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and wherever required to do so– held, that the fact that whether petitioner is innocent or not cannot be decided at the stage of granting bail but will be decided after the conclusion of the trial- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- allegations against the petitioner are serious- investigation has not been completed and the petitioner will influence the prosecution witnesses- hence, petition dismissed. Title: Shyam Walia S/o late Sh. Karam Chand Vs. State of H.P. Page-356

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Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 18 and 29 of N.D.P.S. Act- as per police version, 500 grams of opium was recovered from the petitioner- held, that

while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and the petitioner is not required for custodial interrogation- the contraband found from the possession of the petitioner is not commercial quantity- trial will be concluded in due course of time- hence, petitioner released on bail subject to conditions. Title: Goverdhan Dass son of Shri Maya Ram Vs. State of H.P. Page-166

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 269, 270, 277, 336, 326, 420, 120-B of the Indian Penal Code read with sections 43 and 44 of Water (Prevention & Control of Pollution) Act- petitioner was working as Junior Engineer- he was assigned his duties of Ashwani Khad water lifting scheme- petitioner was to check the treatment plant but had neglected to do so- he had failed to comply with the direction of the High Court- he had a knowledge that untreated sewage water was being mixed with the drinking water – his negligence led to the outbreak of jaundice in various parts of Shimla - no recovery is to be effected from the petitioner – it was collective responsibility of all the officers to maintain the treatment plants and to ensure supply of potable water to the citizens- FIR was not registered against the officials of MC, Shimla- officials of H.P. State Pollution Control Board had also not performed their duties/responsibilities- petition allowed and the petitioner ordered to be released on bail subject to condition- direction issued to the State not to post the officials against whom FIR have been registered in the same capacity- further, direction issued to the State to ensure that all the treatment plants are run by the officers/officials of the I&PH Department to ensure quality/safety of drinking water- samples be lifted every 48 hours to maintain its quality- State also directed to set up the State of Art facilities to analyze water samples within 12 hours. Title: Roop Lal Gautam Vs. State of H.P. Page-171

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Constitution of India, 1950- Article 226- Appeals preferred against the judgment passed by the Learned Single Judge in different writ petitions- learned Counsel for the parties stated at bar that judgment may be set aside, the appeals may be accepted and the cases may be remanded- judgment set aside and cases remanded to the Tribunal for deciding the matter afresh. Title: H.P. Housing and Urban Development Authority Vs. Kanta Bhardwaj and another Page- 18

Constitution of India, 1950- Article 226- Appellant was engaged as a beldar- he claimed that he was working as a supervisor- he further claimed that the person appointed after him had been appointed as supervisor, whereas, benefit was denied to him- writ petition was ordered to be dismissed by the Writ Court- original record shows that petitioner had only worked as beldar and not as a supervisor- in some muster rolls attendance has been marked by appellant but these are only stray entries and cannot be relied upon - the findings recorded by the writ Court are pure findings of facts and cannot be interfered in the appeal- appeal dismissed. Title: Balkrishan Vs. State of H.P. and others (D.B.) Page-249

Constitution of India, 1950- Article 226- Court took notice of a news item published in daily newspaper highlighting the illegal use of 'Oxytocin' in fruits, vegetables and on milching animals- 117 samples of food articles were lifted in the last three years out of which 65 samples were analyzed- Government Common Testing Laboratory (CTL) does not have the facility for detection of Oxytocin in food samples- on one occasion 254 injections of Oxytocin were seized- the respondents have not disputed the misuse of Oxytocin and recommendations were made in the meeting of Drugs Consultative Committee (DCC) to ensure that the drug is not diverted to illegal use- hence, direction issued to bring about an efficient Drug Regulatory System at the Centre and the State for handling of the entire problem- Union of India directed to establish an Academy for training all drug regulatory officers- direction issued to make available testing facilities of Oxytocin at Kandaghat Laboratory - the licences of all the existing manufactures of drugs be examined to ensure that the same have been issued strictly in accordance with the Drugs and Cosmetics Act and Rules- Drug Controller directed to place the details of the licences along with monthly statement of production on its website - a Special Task Force be constituted to ensure that no prohibited and regulated drug is readily available - the wholesalers and retailers directed to maintain the records- the Government will ensure the deployment of sufficient police personnel to ensure that no prohibited or contraband drugs enter into the State - the feasibility of restricting the manufacture of Oxytocin in public sector companies be explored - the competent authorities directed to ensure sampling of milk and vegetables and to carryout prosecutions where products tests positive for Oxytocin- the police authorities directed to book all the offenders who are found using Oxytocin and public be informed about the misuse and abuse of drugs. Title: Court on its own motion Vs. State of H.P. and others (D.B.) (CWPIL No. 16 of 2014) Page-258

Constitution of India, 1950- Article 226- Deaths caused due to the jaundice outbreak in Shimla and Solan- Affidavit has been filed by Secretary (I&PH) stating the steps taken by the State Government for the implementation of the direction issued by High Court- direction issued to file a fresh status report about the steps taken for creation of the statutory body- steps taken in terms of preliminary report submitted by Committee as regards STPs, Shimla and STPs in the entire State of Himachal Pradesh – SIT directed to conclude the investigation, as early as possible- SIT also directed to examine the role of the Officers who were manning the posts from 2007- Chief Secretary and Secretary (I&PH) directed to file a fresh affidavit indicating whether any action has been taken against any other

Officers/Officials besides the Officers/Officials who were manning the post at present- Additional Chief Secretary (I & PH), Secretary (I&PH), Engineer-in-Chief(s) and Superintending Engineer(s), who were manning the posts from 18th September, 2014 till the jaundice outbreak are prima facie held to violate the Court directions- they are directed to show cause as to why they should not be dealt with in accordance with the Contempt of Courts Act- Superintendent of Police and District Magistrate directed to make the people aware about the jaundice outbreak by beat of drum- SIT further directed to investigate jaundice outbreak at Solan and to submit report- all the respondents and the other persons/ authorities directed to file affidavits/status reports within three weeks. Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) (CWPIL 1 of 2016) Page-114

Constitution of India, 1950- Article 226- In view of Rule 54 and Government of India's Decision 20-A of the CCS (Pension) Rules the judgment is legal and valid and does not need any interference- LPA dismissed. Title: Uma Devi Vs. State of HP and others (D.B.) Page-595

Constitution of India, 1950- Article 226- It was stated on behalf of the University that result of petitioner for 3rd and 4th Semester could not be declared due to gap of more than two years in accordance with the ordinance - held, that Court cannot direct the respondents to make orders which are not in accordance with Ordinance occupying the field- the petitioner has filed a representation before the Vice Chancellor- Vice Chancellor directed to examine the representation filed by the petitioner and take a decision within six weeks from the date of the order. Title: Dharmila Thakur Vs. HP University and another (D.B.) Page-221

Constitution of India, 1950- Article 226- Original application does not disclose that any role was played by the petitioner while fixing his pay**-** no such averment was made in appeal - original application allowed and respondents restrained from effecting recovery from the petitioner. Title: H.P. State Electricity Board Ltd. And another Vs. Baini Prashad Sharma (D.B.) Page-350

Constitution of India, 1950- Article 226- Original application was filed before the Tribunal pleading that applicants were General Duty Officers (GDOs) and were granted admission in PG Courses in the specialties of Anaesthesia, Obstetrics, Gynaecology, Radio-Diagnosis and Orthopaedics against the quota reserved for them- they were aggrieved by the imposition of third proviso to para 5.2.2 of the Notification which provided for a mandatory peripheral service of two years for Postgraduate GDO candidates opting for Senior Residency in their own specialty - it was contended that two-fold benefits were extended in-service GDOs having Postgraduate Degrees in specialties of Surgery and Medicine by relaxing two years peripheral service qua them and in addition to awarding of three years teaching experience in their own specialty, it would be denied to the applicants- the Tribunal did not quash para 5.2.2. of the policy but allowed the Original Application- held, that unless conditions laid down in policy are not quashed, the same would have de-facto operation and would have to be given effect- once the policy is in place, the same would operate and has to be followed in its letter and spirit- judgment passed by Tribunal set aside and the matter remanded to the Tribunal to decide the same afresh in accordance with law. Title: State of Himachal Pradesh and others Vs. Dr.Hitesh Gupta and others (D.B.) Page-427

Constitution of India, 1950- Article 226- Petitioner claimed a writ to confer the work charge status after completion of ten years of daily waged service with all consequential

benefits- services of the petitioner were terminated constraining him to approach the Industrial Tribunal-cum-Labour Court - award was passed and the termination order was quashed – award has attained finality- hence, petition allowed and respondents directed to grant work charge status to the petitioner, after completion of 10 years of service. Title: Mela Ram Vs. HPSEB Limited & others (D.B.) Page-590

Constitution of India, 1950- Article 226- Petitioner filed a writ petition regarding the alleged illegal constitution of Himachal Pradesh Waqf Board and arbitrary nomination made by the State to the electoral college and no material was placed on record to show that petition was filed in public interest- petitions were earlier filed regarding the constitution of Waqf Board which were dismissed- averments made in the present petition are verbatim the same as were made in the earlier petition- this clearly shoes that the petitioner has been set up at the by some other person- public interest litigation can be filed at the instance of bonafide litigant and cannot be used to disguise personal or individual grievance - the Court should be careful while entertaining public interest litigation- State Government had not constituted an electoral college for want of availability of eligible members – a satisfaction was duly recorded in the order - no genuine public interest was involved- petition dismissed. Title: Ali Mohammed Vs. State of H.P. and others (D.B.) Page-290

Constitution of India, 1950- Article 226- Petitioner filed a Writ commanding the respondents not to charge the taxes applicable for the use of National Highway-21A, which is incomplete and not roadworthy, to refund the excess taxes charged and complete the construction of National Highway-21A within a stipulated period – held, that it is not known in which capacity the writ petition was filed –permission was required to be sought under Order 1 Rule 8 of CPC for filing the writ petition in representative capacity which was not taken- writ is also not in the nature of Public Interest Litigation as it was not fulfilling the requirement of the Rules framed by the Court- notification empowering levying, charging and paying the Special Road Tax has not been questioned- tax was paid from 1.4.2005- no objection was raised till 6.8.2013- filing the present writ petition shows that Writ Petition has been filed for avoiding the payment of taxes- Writ Petition dismissed. Title: Kultar Singh and others Vs. State of Himachal Pradesh and others (D.B.) Page-469

Constitution of India, 1950- Article 226- Petitioner had questioned Annual Confidential Report recorded by the respondents which was quashed by the Writ Court- petitioner claimed that annexure P-3 should also have also been quashed- held, that petitioner is at liberty to file representation before the Competent Authority to seek appropriate remedy. Title: Rajinder Kumar Kaushal Vs. State of H.P. and others (D.B.) Page-310

Constitution of India, 1950- Article 226- Petitioner has sought writ of mandamus commanding the respondent to shift the office of Gram Panchayat Kuthera to village Kuthera from Makriri, or in the alternative to create a separate Panchayat for village Kuthera- held, that creation of panchayat or shifting office thereof is entirely in the domain of the Executive and not of any other agency- Court cannot interfere unless decision is prima facie illegal or suffers from arbitrariness- petition dismissed with liberty granted to the petitioner to approach the Competent Authority by way of representation. Title: Gramin Janta Kalyan Samiti, Kuthera Vs. State of H.P. and others (D.B.) Page-574

Constitution of India, 1950- Article 226- Petitioner has sought writ of mandamus directing the respondents no. 1 to 4 to ensure that no truck registered with respondent no. 4 be

permitted to operate in any other area or from any other club or society- other reliefs prayed by the petitioner are covered by the judgment passed in CWP No. 1257 of 2009 titled Rajesh Kumar Khanna vs. State of H.P. & Ors. decided on 11.3.2014- hence, writ petition disposed of in terms of judgment passed by the High Court- petitioner granted liberty to approach the competent authority by way of representation and competent authority directed to take a decision within a period of 6 weeks from the date of filing of the representation. Title: Kamlesh Kumar and others Vs. State of H.P. and others (D.B.) Page-577

Constitution of India, 1950- Article 226- Petitioner made a complaint against the respondent No. 2, a Petition writer, stating that he had misconducted himself – a request for cancellation of license was also made- inquiry was entrusted to Civil Judge (Senior Division)-cum-CJM, Mandi who concluded that misconduct was established -inquiry report was submitted to 1st respondent who called the response of petition writer- petition writer filed objection and the 1st respondent ordered to file the complaint- writ petition was filed against the order of the 1st respondent- held, that the order passed by 1st respondent does not assign any reason to disagree with the report submitted by Learned Civil Judge (Senior Division)-cum-CJM, Mandi- an opportunity is to be afforded to the 2nd respondent to cross-examine the persons associated by learned Civil Judge (Sr. Division)-cum-CJM, in case so desired by respondent No. 2- order set aside with the direction to respondent No.1 to proceed in the matter from the stage of affording an opportunity to cross-examine the persons associated by Learned Civil Judge (Senior Division)-cum-CJM, Mandi. Title: Chanchal Ram Vs. District and Sessions Judge, Mandi & another Page-1

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational Trust, which has established a Senior Secondary Public School and is also running a B.Ed. College- it applied to respondent No. 2 for introducing Diploma in Elementary Education- application was rejected- Writ Petition was filed- during the Writ Petition, an inspection was carried out- Writ Petition was disposed of with a direction to respondent No. 2 to take appropriate action in the light of the Inspection Report- again prayer was rejected- petitioner has preferred an appeal before the Appellate Authority which was accepted - Appellate Authority ordered the inspection which was conducted in the first week of March, 2013- a show cause notice was issued which was considered and the permission granted to run the course was kept in abeyance- it was further decided to withdraw the affiliation in respect of B.Ed. Course- again writ petition was filed which was disposed of with a direction to Appellate Authority to decide the appeal within 6 weeks- appeal was allowed and the matter was remanded to respondent no. 2 – the recognition in respect of the B.Ed. course was restored- a letter of intent was issued for running the course in question- however, case was again taken up and certain objections were raised- ultimately, the recognition was refused- again a Writ Petition was filed- direction was again issued- case was again rejected- held that permission was declined to the petitioner by respondent No. 2 on one pretext or the other- petitioner had to approach Appellate Authority as well as the Court by filing writ petition- Appellate Authority had also recorded that petitioner had finally completed the formalities under intimation to the NRC- Annexure P-33 quashed qua the petitioner and the respondent directed to pass fresh orders, within a period of three months, in the light of the orders passed by the Court from time to time, read with the decision made by the Member Secretary, National Council for Teachers Education. Title: Shimla Educational Society Trust and another Vs. National Council for Teachers Education and Ors. (D.B.) Page-500

Constitution of India, 1950- Article 226- Petitioner retired as Finance Officer- his pension was fixed as per letter dated 30.9.2002- UGC framed a scheme on 30.12.2008, revised the

pay scales of the post of Registrar, Deputy Registrar, Assistant Register, Controller of Examination, Finance Officer, Deputy Finance Officer and Assistant Finance Officer- State Government revised the pay scale of Controller of Examination, Addl. Controller of Examination, Planning and Development Officer, Secretary to VC, Deputy Registrar, Assistant Registrar, Public Relations Officer and Administrative Manager- however, pay scale or pension of Finance Officer was not revised- petitioner filed a writ petition- writ Court held that Finance Officer was one the Administrative Officers of the University- since, pay scale of all other officers had been revised, therefore, exclusion of the category of the writ petitioner amounted to discrimination- writ petition was allowed- appeal was filed by the University pleading that prerogative to grant a particular scale vests with the employer- held that Writ Court could not have fixed the pay scales especially when State Government was already seized of the matter- held, that the question relating to Constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service pertaining to the field of policy and are within the exclusive discretion and jurisdiction of the State- Court cannot direct the Government to have a particular method of recruitment or eligibility criteria- Court had wrongly ignored the fact that State Government was seized of the matter- Court could have direct the authorities to consider the case but could not have direct a writ of mandamus commanding the authorities to release a particular pay scale. Title: H.P. University Vs. Swadesh Singh Thakur & anr (D.B.) Page-418

Constitution of India, 1950- Article 226- Petitioner submitted an application which was rejected on the ground that certificate of age proof was not submitted- a representation was filed which was rejected – held, that it was specifically provided in the advertisement that defective applications would not be entertained and were to be rejected out-rightly without providing opportunity for correction- non-submission of the certificate is a disputed question of fact which cannot be determined in the writ petition- matriculation certificate is mandatorily required - the conditions prescribed in the advertisement have to be strictly complied with – application was rightly rejected- petition dismissed. Title: Nidhi Sharma Vs. Himachal Pradesh Public Service Commission (D.B.) Page-483

Constitution of India, 1950- Article 226- Petitioner was a Deputy Ranger- his name appeared at serial No.8 of the LPC sent to the government- he filed a writ petition in which the Writ Court ordered that he be regularized as forest guard- separate appeals were preferred against this order- documents on the file show that petitioner was performing his duty as Deputy Ranger – hence, petitioner be appointed as Deputy Ranger -petitioner held entitled to all service benefits as Deputy Ranger from the date of appointment till his retirement, including retiral benefits. Title: Daulat Ram Vs. State of HP and others (D.B.) Page-264

Constitution of India, 1950- Article 226- Petitioners appeared in H.P. Judicial service Judicial Service Preliminary Written Examination- respondents invited objections qua the answer key- petitioners filed objections to the same- respondents displayed the revised answer key - grievance of the petitioners is that revised answer key is wrong and some of the questions are beyond the syllabus- held, that it was not permissible for the Court to intervene and examine the question papers, even if the questions pertained to the law- Court does not have power to review the decision taken by the expert regarding the revised answer key- Court cannot undertake the task of the statutory authorities and substitute its own opinion for that of the experts- writ petition dismissed. Title: Rustam Garg & ors. Vs. Himachal Pradesh Public Service Commission (D.B.) Page-591

Constitution of India, 1950- Article 226- Petitioners were appointed as Timber Watchers in the Himachal Pradesh State Forest Corporation- Industries Department absorbed them against the posts of Mining Guards **–** subsequently an order of their repatriation was issued- respondent No. 3 pleaded that petitioners were appointed on secondment basis for a period of one year and no option was given for appointment on regular basis- a letter was written by the Corporation to the Director of Industries with a request to repatriate the Timber Watchers- repatriation order was issued- the appointment letter of the petitioners clearly shows that appointment order was on secondment basis for only one year and this condition was accepted by the petitioner- they cannot claim that they are entitled for regularization- petitioners cannot claim regularization contrary to their appointment order- writ Court had rightly dismissed the writ petition- appeal dismissed. Title: Manohar Lal Vs. State of H.P. and others (D.B.) Page-223

Constitution of India, 1950- Article 226- Respondent/university issued an advertisement for selection and appointment for the post of Assistant Professor (Silviculture)- writ petitioner and other persons had appeared in the selection process - one 'S' was appointed as such- the petitioner filed a writ petition questioning the appointment of 'S'- 'S' died during the pendency of the writ petition- Writ Court did not determine whether the selection and appointment of 'S' were proper or not- hence, judgment set aside and the writ petition ordered to be transferred to H.P. State Administrative Tribunal. Title: Manoj Joshi Vs. Dr. Y.S. Parmar University (D.B.) Page-309

Constitution of India, 1950- Article 226- Respondents issued an advertisement for letting out space in Lower Paddal at Mandi for setting of temporary 'Mela' Shops/ Hangers/Pandals during the international 'Shivratri' fair- condition No. 2 provided that only those bidders are eligible who have already executed at least one similar work in State/National level fair- petitioners filed a Public Interest Litigation pleading that this condition was designed to accommodate some favourite of the respondents and to ensure that the petitioners and similarly situated small traders are ousted from participating in the tender- public would be deprived of the goods which are being manufactured and sold by local artisans and traders- respondents raised a preliminary objection regarding the maintainability – held, that the writ petition styled as a Public Interest Litigation but was filed to foster personal disputes or vendetta cannot be regarded as a Public Interest Litigation- Court has to see that the ugly private malice/vested interest is not lurking in the veil of Public Interest Litigation – the writ petition has been filed to espouse the private commercial interests of the traders- further, Courts have hardly any role to play in the process of tender except for striking down such action of the executive as is proved to be arbitrary or unreasonable- there is increase of only 10% which cannot be said to be arbitrary or unreasonable- name of the person who was to be benefited by tender condition has not been specified- merely because, petitioners do not fulfill the criterion does not mean that criterion has been designed to oust the petitioner- tenders have not been opened and the writ petition is pre-mature- petition dismissed. Title: Lala Ram and others Vs. State of H.P. and others (D.B.) Page-27

Constitution of India, 1950- Article 226- Writ Court had issued direction to the respondents-appellants to allow the petitioners time bound benefit of promotional scales/devised promotional scale on completion of 9/16 years of service with all consequential benefits- held, that an employee has a right of consideration for promotion only and not a right of promotion- Court could have directed the respondent to consider the case of the petitioners for grant of time bound benefit of promotional scales/devised

promotional scale. Title: Himachal Pradesh State Electricity Board Limited Vs. Krishan Chand Malhotra and others (D.B.) Page-622

Constitution of India, 1950- Article 226- Writ petition filed by the petitioner was allowed- held, that the judgment was passed in accordance with the judgment of High Court in **Vivek Kaushal and others versus H.P. Public Service Commission,** CWP No. 9169 of 2013 decided on 10.7.2014 and **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another (2010) 6 SCC 759-** hence, judgment passed by the writ Court has to be set aside - it was admitted in para No. 5 of the reply on preliminary submission that two marks are to be awarded to the petitioner- hence, writ petition allowed in terms of para No. 5 of the preliminary submission. Title: HP Board of School Education, Dharamshala Vs. Rajnesh and another (D.B.) Page-222

Constitution of India, 1950- Article 226- Writ petitioner approached the Court to seek direction against the respondent to regularize his services with 1996 with all consequential benefits and release the arrears of payment- prior to this, writ petitioner has already approached the Administrative Tribunal vide OA No. 143 of 1991 decided on 3.12.1996- OA was disposed of with the observations that the writ petitioner had already completed 10 years of the services on December 31, 1995 as Pump Operator and as per the statement of learned Additional Advocate General his services for regularization will be considered from 1996- relying upon the order of the Administrative Tribunal the writ petition was dismissed by the Court- held, that the Writ petitioner could not have claimed any relief which was not prayed in that lis as the relief claimed was hit by Order 2 Rule 2 CPC read with Section 11 CPC- Writ Petition was rightly dismissed- appeal also dismissed. Title: Ghan Shayam Vs. State of Himachal Pradesh and another (D.B.) Page-10

Constitution of India, 1950- Articles 226 & 227- Petitioner was appointed as driver on contract basis- he was transferred and was appointed as a driver- petitioner is entitled to be regularized after five years in terms of policy- respondents directed to regularize the petitioner w.e.f. the date of transfer to the second department. Title: State of HP and others Vs. Rakesh Rana (D.B.) Page-330

Constitution of India, 1950- Articles 226 and 227- Father of the petitioner was appointed Postal Assistant in the year 1980, who died on 3.1.1998 while in service- petitioner attained the age of majority in the year 2002- application for compassionate appointment was filed, which was rejected on 5.2.2008- petitioner filed a petition for quashing the order dated 5.2.2008- original application was dismissed by the Tribunal on the ground that application was barred by limitation- held, that a person has to make an application before the tribunal within one year from the date of passing of final order – time can be extended by six months on sufficient cause- the purpose of compassionate appointment is to provide assistance to the family, which has been deprived of the earning hands- the family of the deceased was surviving for 14 years- application for compassionate appointment was made in the year 2002- claim was rejected in the year 2008- original application was made in the year 2012 - the very purpose of granting compassionate appointment had lost its efficacy – in these circumstances, application was rightly rejected by the Tribunal- petition dismissed. Title: Surender Kumar Vs. Union of India and others (D.B.) Page-284

Contempt of Courts Act, 1971- Section 12- Writ petitioner filed a writ pleading that they were appointed as lecturers under Para Teachers Policy- policy was framed by the

Government to regularize the services of those para teachers who had completed uninterrupted service of 10 years- 439 para teachers were regularized- names of the writ petitioners were not mentioned in the list - a subsequent notification was issued stating that the Lecturers in the subjects of Psychology, Electronics and Home Science would be offered appointment as TGTs and not PGTs as the cadre was declared as dying cadre- however, another notification was issued and the teachers in the Home Science were offered the post of PGT- the services of the petitioners were regularized as TGTs and not PGTs- an application for interim relief was also filed- interim order was passed by the writ Court and the petitioners were permitted to work as PGTs- a subsequent order was passed stating that it would be open to the respondents to redress the grievances of the petitioners by granting them the pay scale of post graduate teachers- another order was passed that the order had not been complied with, therefore, the contempt proceedings be initiated- respondents informed the Court that they had complied with the direction- Contempt petition was disposed of- petitioners filed a petition pleading that the order should be recalled as the respondents had not implemented the order and had not paid the salary as PGTs- respondents filed a reply in which they admitted that order had been implemented- when the petitions came up for consideration, it was conceded that the matter was covered in the SLP pending before the Hon'ble Supreme Court in which order of status quo was granted- held, that respondents should have approached the Court to explain the difficulty instead of saying that the order had been implemented- respondents had obtained legal advice from the Law Department in which it was stated that petitioners are entitled to the salary of PGT- petitioners will succeed in their claim only if the decision of the Government to regularize the services of the Lecturers School Cadre (Para Teachers) is upheld by the Hon'ble Supreme Court- status quo order was passed earlier to the order of the High Court- hence, proceedings dropped and the respondents warned to be careful in future. Title: Court on its own motion Vs. P.C.Dhiman & others (D.B.) Page-251

'D'

Drugs and Cosmetics Act, 1940- Section 18(a) (ii) read with Section 16(b) and Section 17-E(f) and 27-A – Proceedings were initiated against the petitioner under Drugs and Cosmetics Act- it was contended that report of the chemical analyst is not proper as, the permissible percentum of the ingredients of the sample was not mentioned in the report - held, that report of the Chemical Analysts showed that the matter insoluble in alcohol was much beyond the prescribed limit- this conclusion was sufficient even if exact quantity was not stated- further held that mis-reflection/mis-quoting of the provision of law is not sufficient to quash the proceedings- petition dismissed. Title: M/s Ban Labs Ltd. and another Vs. State of Himachal Pradesh Page-269

'H'

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord filed a petition for eviction of the tenant pleading that he required the premises for his married son and for his three daughters- respondent denied the averments made in the petition- Rent Controller ordered the eviction of the tenant- appeal was dismissed - it was contended in the revision that earlier rent petition was dismissed and this fact was not taken into consideration by the Rent Controller or the Appellate Authority- essential ingredients for seeking eviction were not pleaded – another tenant vacated the premises and one person died during the pendency of the petition due to which ground floor fell vacant- held, that subsequent events can be taken into consideration for determining the bona fide of the landlord- hence, case remanded to Rent Controller to determine whether bonafide requirement still persist in view

of subsequent development or not- tenant permitted to produce the evidence to establish the subsequent developments. Title: Pradeep Kumar Bhandari Vs. Manohar Lal Page-228

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlords filed a petition against the tenant for eviction which was allowed- appeal was preferred which was dismissed- civil revision was preferred which was disposed of with the direction that tenant would retain possession of the premises till the sanction of the map of building plan - it was further directed that tenant would continue to pay the use and occupation charges- landlords contended before Rent Controller that rider for production of building plan has been removed and prayed for issuance of warrant of possession- warrant of possession was issued on which tenant filed objections- Rent Controller held that landlords are not required to produce sanctioned building plan before executing court -Rent Controller dismissed the objections and ordered the eviction of the tenant- Civil Revision was preferred in which it was directed that tenant will continue to be in possession till the sanction of the building plan- Rent Controller was directed to determine the use and occupation charges which were assessed as Rs.10,000/- per month- revision petition has been filed against the order passed by Rent Controller- held, that many petitions were disposed of by single order - amount of use and occupation charges @ Rs.10,000/- per month was not set aside by the Hon'ble Supreme Court- order would be binding on all courts- landlords cannot demand different use and occupation charges from different tenants residing in the same building- revision petition dismissed. Title: R.R. Sharma, S/o Sh. Gurbardhan Sharma Vs. Ram Kumari Wd/o late Sh. Karam Chand & others Page-597

'I'

Indian Penal Code, 1860- Section 302 and 201- Deceased was found lying in Nallah near liquor vend with injuries on his person - brother of the deceased made a statement that a telephonic call was received after which the deceased had left the house- he suspected that the person who made the call had murdered the deceased- it was found on investigation that accused was consuming alcohol and he had called the deceased and some other persons- on inquiry, accused disclosed specifically that he had dropped the deceased at Ganoh Bus Stand- accused was convicted by the Court – held in appeal that chemical analysis report revealed that the blood alcohol level in the blood of the deceased was 172.50 mg% - there was no enmity between the deceased and the accused- the call detail report was not proved in accordance with the Section 65(b) of Indian Evidence Act- no witness had deposed that accused and deceased were left alone in the house- motive to kill the deceased was not established- recoveries of scooter and pair of shoes of the accused were also not established satisfactorily- chain of circumstances is incomplete – theory of last seen was also not proved- thus, in these circumstances, Learned Trial Court had erred in convicting the accused- accused acquitted. Title: Harbans Lal Vs. State of H.P. (D.B.) Page-175

Indian Penal Code, 1860- Section 302 and 309- Complainant was told by 'R' that something unusual had happened to her husband- she went to the house of 'N'- the accused was found unconscious and vomiting- 'A' was taking her towards the road- 'S' was told by 'A' that accused had taken fungicide and had administered it to her child G who was unconscious- vehicle was driven by 'A' with the high speed- vehicle went off the road and fell into a deep gorge –'A' died and other occupants received injuries- injured were taken to hospital, where the statement of the complainant was recorded- accused was convicted and sentenced by the trial Court- held in appeal that Police had not examined 'R' who had informed the complainant - he was a material witness- PW-1 did not support the complainant regarding his presence at the house – the recoveries of mat and bottle of

fungicide are also doubtful- no person had seen the accused administering the poison to the child- motive for commission of crime was also not proved- Medical Officer had not given the proximate time of taking poison and time of death- mother-in-law of the accused and her husband were not examined- chain of circumstances is incomplete - the prosecution has not successfully proved his case against the accused beyond reasonable doubt-appeal accepted and accused acquitted. Title: Unpa Vs. State of H.P. (D.B.) Page-204

Indian Penal Code, 1860- Section 302- Deceased had gone from his house to visit a fair but had not returned - his dead body was found lying behind the liquor shop- accused was acquitted by the trial Court- independent witnesses have not supported the prosecution case- deceased was heavily drunk when he came to his shop- quantity of ethyl alcohol in blood of deceased was 271.00 mg %- possibility of his fall in the state of intoxication cannot be ruled out- held, that in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Bhag Singh (D.B.) Page-52

Indian Penal Code, 1860- Section 336 and 304 A- Director General Border Roads had undertaken construction work of bridge - accused was the contractor- the bridge collapsed during the process of the construction- 9 labourers were buried alive under the debris- it was found in investigation that bridge had collapsed due to failure of the shuttering – accused was tried and acquitted by the trial Court- held, that labourers had brought the cracking noises to the notice of the officers of D.G.B.R., however, the work was not stopped- no efforts were made for getting the drawings approved from the competent authority- prosecution was required to prove that accused had acted negligently which resulted the death of labourers- drawing were required to be approved by Director General Border Roads for which the officers were responsible- case was not proved against the accused- trial Court had rightly acquitted the accused. (Para-25 to 28) Title: State of Himachal Pradesh Vs. Jagdish Chander Gupta & ors. Page-452

Indian Penal Code, 1860- Section 363, 366 and 376- PW-1 and PW-17 were alone in their house- their grand-father had gone to Vikasnagar - when he returned, he found that his grand daughters were missing- they were recovered from the house of accused- PW-17 was raped by the accused- accused was tried and acquitted by the trial Court- PW-17 had not made the complaint to any person- her version that she slept with the accused inside the room and other family members were sleeping outside the house, is also not believable, when the accused was married and is having children- Medical Officer did not find any evidence of recent intercourse- both PW-1 and PW-17 knew that accused was married and there was no occasion to hold out a promise to marry PW-17- held, that in these circumstances, prosecution version is not believable and the accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Vishnu Pal @ Papla and another (D.B.) Page-200

Indian Penal Code, 1860- Section 376- Prosecutrix had gone to jungle where she was raped by the accused- accused also threatened to kill her in case of disclosure of incident to any person- whenever prosecutrix used to go to jungle, accused used to rape her with the assurance of marrying her- accused refused to marry her on which matter was reported to the police- FIR was registered- accused was tried and acquitted by the trial Court- held, in appeal that testimony of the mother does not inspire confidence and according to her prosecutrix disclosed the incident only when she was 4 months pregnant- mother of the prosecutrix could have noticed pregnancy- earlier mother of the prosecutrix had demanded Rs. 10,000/- from the accused for compromise- prosecutrix had refused to depose against

the accused and reported the matter to the police only at the instance of her mother- statement of prosecutrix could not be recorded as she died during the trial - no DNA test of the foetus was conducted to determine the paternity- in these circumstances, prosecution had not proved its case beyond reasonable doubt against the accused- accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Suresh Kumar (D.B.) Page-457

Indian Penal Code, 1860- Section 395, 396, 460, 457 and 120-B- One 'R' was found murdered in his house- cause of death was found to be asphyxia- articles were found scattered in the room- an anonymous telephonic call was received by the police from STD Booth, Baddi that caller could throw light on the murder in question- police called owner of the booth and asked him to detain the caller- police visited Baddi and interrogated the caller who disclosed that offence was committed by accused- police interrogated accused 'G'- the weapons of offence, vehicle used in the commission of offence and the stolen articles, belonging to the deceased, were recovered from different places at the instance of the accused- investigation revealed that accused 'V' had facilitated the sale of stolen ornaments to accused M –melted gold and silver were recovered- DNA found in stubs of Cigarette and Bidi which matched with the DNA of accused - accused were convicted by the trial Court- held in appeal that no satisfactory evidence was led by the prosecution regarding conspiracy prior to the commission of offence- the disclosure statements and the recoveries effected pursuant to those statements were not satisfactorily proved- material witnesses were not examined and recovered articles were not connected to the death of the deceased- it was not elicited in the cross-examination that blunt side of Khukri could have led to the fracture of hyoid cartilage and hyoid bone leading to asphyxia- towel and rope which could have caused asphyxia causing death were not produced by the prosecution- owner of the booth had not established the identity of the caller- it was not mentioned in the site plan that Cigarette and Bidi were lying on the site of the occurrence- no entry was made in the malkhana register regarding the collection of these items – trial Court had not properly appreciated the evidence- appeal accepted- accused acquitted. Title: Ram Lal @ Bittu Vs. State of H.P. (D.B.) Page-91

Indian penal Code, 1860- Section 409, 420, 467, 468, 471, 120-B - **Prevention of Corruption Act, 1988-** Section 13(2)- A sum of Rs. 2,40,000/- was sanctioned by D.C., Kullu for erecting retaining wall/breast wall and fencing work of ground of School- it was shown that work in the sum of Rs.1,35,116/- was carried out- but on assessment the work was found to be worth Rs. 58,836/-- false bills were prepared- the work was entrusted by BDO to JE on his own without inviting tender- accused were acquitted by the trial Court- PW-1 did not have any personal knowledge about the work or the expenditure done- he had not made any inquiry regarding the work, the details and expenditure incurred- assessment report was prepared without associating the accused- no satisfactory evidence was led to establish that any amount was entrusted to JE or that he had misappropriated the same- statement of handwriting expert does not prove that accused had prepared false quotation- payments were made to the parties by means of cheque and case of misappropriation cannot be accepted- PW-26 was trapped in this case for taking money from the accused- he was tried and acquitted- the possibility of accused having been falsely implicated cannot be ruled out- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Sita Ram Yadav & another (D.B.) Page-238

Indian Penal Code, 1860- Section 498-A and 302- Deceased was married to the accused- accused started harassing the deceased- she disclosed this fact to her mother and her

mother advised the deceased and her husband to live peacefully- deceased informed her mother two years prior to the incident that she had taken poison- she asked her mother to take child and when her mother along with other relatives came to her house, she disclosed that her husband was harassing her- her mother again advised the deceased and the accused to live peacefully- accused telephonically informed the mother of the deceased that he suspected the character of his wife and asked her to visit his house- accused informed the mother of the deceased that deceased had taken poison- her mother visited the spot and found that deceased was dead- cause of death was stated to be phosphide poison- PW-2 admitted in his cross-examination that deceased had never visited their house after her marriage- he also admitted that relations were snapped as accused belonged to a different caste- PW-4 also admitted that deceased had never returned after the marriage and social relations were snapped with the deceased- PW-1 stated that accused used to beat the deceased but no report was lodged - since, it is admitted that social relations with the deceased were snapped, therefore, it cannot be believed that witnesses had visited the house of the accused- the version of the prosecution was that phosphide poison was mixed in food and was given to the deceased cannot be accepted as phosphide poison has pungent smell- deceased was serving in police department and would have reported the matter, in case of harassment- prosecution has failed to prove any harassment or that the poison was administered to the deceased- held, that in these circumstances, trial Court had rightly acquitted the accused. Title: State of H.P. Vs. Samir Sood (D.B) Page-44

Indian Penal Code, 1860- Section 506- **Protection of Children from Sexual Offences Act, 2012**- Section 6- Prosecutrix aged 8 years was residing with her Aunt- accused had been subjecting her to sexual intercourse and last such assault took place on 24.05.2013- prosecutrix narrated the incident to her teacher who informed the Head Mistress- FIR was registered against the accused- accused was tried and convicted by the trial Court- Date of Birth of prosecutrix is recorded as 02.07.2004 in school record- her medical age was found to be between 9-10 years- testimony of the prosecutrix was duly corroborated by medical evidence- Prosecutrix has withstood the test of scrutiny- she has no reason to depose falsely against the accused - her testimony is free from blemish, improvements and contradictions and it inspires confidence- her testimony was also corroborated by the Teacher to whom the incident was narrated- the ocular version and documentary evidence clearly establish complicity of the convict in the crime- there are no major contradictions - held, that in these circumstances, trial Court had rightly convicted the accused- appeal dismissed. Title: Ram Singh Vs. State of H.P. (D.B.) Page-485

Indian Succession Act, 1925- Section 63- Will was executed by the deceased- executant was 90 years of age, all of the natural heirs were excluded- the beneficiary is not a direct descendant, but is a collateral, being son of a distant brother of the testator- the identifier and the attesting witness are close relatives of the beneficiary- defendant claimed the ownership of the land which was resisted by the plaintiff by filing a civil suit- civil suit was decreed and the Will was set aside- appeal was also dismissed- held, that onus of proving the Will is upon the beneficiary- testimony of beneficiary is not truthful and believable- his version that testator was ill only one month prior to his death stands contradicted from the Will wherein it was stated that the testator was not maintaining good health for the last few years- it was not proved that testator was in a sound disposing state of mind- witness was residing in another village and it was established that plaintiff had taken care of the deceased till his death- there was no proof of the beneficiary having shared food or shelter or having rendered services to the testator- there are material contradictions in the testimonies of beneficiary, identifier and attesting witness- hence, in these circumstances, it cannot be

said that findings returned by the Court are illegal, perverse and erroneous – appeal dismissed. Title: Kali Dass Vs. Minki Devi & others Page-532

Industrial Disputes Act, 1947 - Section 25- Petitioner claimed himself to be an employee of the respondent who was appointed in the July, 2001 as Machine Operator- he continued to discharge his duties to the satisfaction of his superiors - he proceeded on leave and when returned to join his duty, his services were terminated in violation of the Section 25-F of the Act- respondent denied the relationship of employer and employee - it was claimed that petitioner was employed through contractor as per provision of Contract Labour (Regulation and Abolition) Act, 1970 and H.P. Contract Labour (Regulations and Abolition) Rules, 1974- petitioner had not deliberately impleaded the contractor as party – Industrial Tribunal held that petitioner was never on the roll of the company and was employee of the Contractor- petition was filed against the award announced by the Tribunal- held, that overwhelming evidence produced by the respondent show that petitioner was employed by the Contractor and not by the company- wages were being paid by the Contractor and even if the Contractor was not a registered contractor, the penal action can be taken against the contractor but that will not give right to the workman to claim the employment under the principal employer- Award passed by the Industrial Tribunal can be interfered by the High Court only if the same is illegal or irrational and suffers from procedural impropriety- petition dismissed. Title: Manoj Kumar Vs. M/s Sintex Industries Pvt. Limited Page-471

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Land Acquisition Act, 1894- Section 18- Land was acquired for construction of Ramshilla – Bhekhali Road- compensation was awarded by the Collector- reference was made and the compensation was enhanced- aggrieved from the award, an appeal was preferred- sale deeds produced by the claimants show that value of the land is Rs.3,80,000/- per bigha or Rs.19,000/- per biswa- acquired land was put to public purpose- road was constructed upon it and there is no error in uniform determination of the market value of the acquired land- determination of the market value of the acquired land has to be on the basis of objective material- it cannot be left to the mere whims and fancies of the acquirer- sale deeds were executed prior to the initiation of the acquisition proceedings and the Court had rightly relied upon them- appeal dismissed. Title: State of Himachal Pradesh through Principal Secretary (PWD) & others Vs. Dave Ram & others Page-602

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Sanjauli-Dhalli bye pass road- Land Acquisition Collector assessed the compensation- aggrieved from the award of the collector a reference was sought- compensation was enhanced and was paid regardless of the nature and category of the land along with statutory benefits- aggrieved from the award , an appeal was preferred- reference Court has relied upon the award made with reference to a notification for the construction of Sanjauli-Dhalli bye pass road- reference Court had deducted 50% amount towards development charges- Reference Court had also enhanced the amount for structure but PW-3 stated that he had not visited the spot while preparing the report- since, land was acquired for the construction of the road, therefore, no development was to be made and classification of land is immaterial- Court had erred in deducting 50% amount towards development charges- appeal allowed and the award modified - market value of the land assessed @ 9,05,107/- per bigha along with statutory benefits- claimant held not entitled to increase in value of structure of the acquired building. Title: Dr. Saif Ali Khan Vs. State of H.P. and another Page-514

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of the Sanjauli-Dhalli bye pass road-compensation was awarded- aggrieved from the award, a reference was made- Reference Court enhanced the compensation – aggrieved from the award, appeal was preferred- claimants have relied upon the sale deeds- State relied upon one year average value of Village Lambidhar which is situated at a distance from the acquired land- no sale deed was proved by the State- sale deed filed by the claimant was executed within one year of notification - 50% deduction was made towards development charges- land was not required to be developed for construction of the road- development is required when the land is acquired for the construction of housing colony and allied matters- since, land was acquired for the construction of the road, the classification of land was irrelevant- appeal allowed and award modified to the extent that claimants are entitled to Rs. 9,05,107/- per bigha along with statutory benefits. Title: Geeta Devi and others Vs. State of H.P. and another Page-523

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of the Sanjauli-Dhalli bye pass road-compensation was awarded by land acquisition collector-aggrieved from the award a reference was made- Reference petition was allowed by the District Judge– aggrieved from the award, appeal was preferred- Reference Court has relied upon the award announced regarding the acquisition of the road for the construction of Sanjauli-Dhalli bye pass road – Reference Court had deducted 50% of the amount for development charges- land was not required to be developed for construction of the road-development is required when the land is acquired for the construction of housing colony and allied matters- since, land was acquired for the construction of the road, the classification of land was irrelevant- appeal allowed and award modified to the extent that claimants are entitled to Rs.9,05,107/- per bigha along with statutory benefits. Title: Shankari Vs. State of H.P. and another Page-551

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Motor Vehicles Act, 1988- Section 149- Claimant was inside his cattle shed- a road was being constructed on the upper side of the cattle shed - a big boulder came from the upper side, as a result of which the right leg of the claimant got injured- the boulder came down because the JCB was being used rashly and negligently for the construction of the Road- it was contended that JCB does not fall within the definition of the motor vehicle – held, that JCB is a powerful motor vehicle with a long arm for digging and moving earth – vehicle was insured and, therefore, insurer was rightly held liable to pay compensation. Title: United India Insurance Company Ltd. Vs. Kamal Sharma and others Page-405

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that passenger carrying capacity of the vehicle was 4+1- Registration Certificate also shows that sitting capacity of the vehicle was 4+1- deceased was travelling in the vehicle at the time of accident- thus, insurer cannot escape from the liability to pay compensation to the claimants- Insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal allowed and insurer saddled with liability. Title: Jagmohan Singh and another Vs. The Oriental Insurance Company Ltd. and others Page-129

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver was not having valid and effective driving licence at the time of accident- however, no evidence was led to prove this fact- claimants had pleaded that deceased was loading and unloading the fuel wood in the offending vehicle- this was not denied by the respondent- hence, risk was duly covered-

appeal dismissed. Title: National Insurance Company Ltd. Vs. Kushla Devi & others Page-131

Motor Vehicles Act, 1988- Section 149- Insurer contended that it was averred in the claim petition that vehicle bearing registration No. HP 12- 1572 was involved in the accident- however, claimants specifically pleaded and proved that vehicle was Mahindra Jeep bearing registration No. HR 68- 1572 which shows that offending vehicle was falsely implicated- held, that claimants had clarified that number of offending vehicle was recorded as HP 12-1572 by mistake, the fact that vehicle bearing registration No. HP 68 1572 was involved in the accident, has been proved by leading oral and documentary evidence- an FIR was registered against the driver of the vehicle bearing registration No.HR 68 1572 – challan was also presented against the driver of the vehicle bearing registration No. HR 68 1572- hence, plea of the insurer that false case was filed against the driver of the vehicle bearing registration No. HR 68 1572 is without any force. Title: Oriental Insurance Co. Vs. Bholi and others Page-389

Motor Vehicles Act, 1988- Section 149- Insurer contended that the accident was outcome of contributory negligence- however no evidence was led to prove that the accident was outcome of contributory negligence- factum of insurance was not disputed- it was not established that driver did not have a valid driving licence- copy of driving licence also discloses that driver was competent to drive the vehicle- monthly income of the house wife cannot be less than Rs. 4,000/- - she has lost source of dependency to the tune of Rs. 2000/- per month- age of the injured was 50 years – Tribunal applied multiplier of '9', whereas, multiplier of '11' is applicable – thus, claimant had lost source of dependency to the extent of Rs. 2000x12x9= Rs. 2,16,000/- along with interest. Title: ICICI Lombard General Insurance Co. Ltd. Vs. Rattna Karir and others Page-367

Motor Vehicles Act, 1988- Section 149- Insurer contended that the deceased and injured were gratuitous passengers, owner had committed willful breach and has to be saddled with liability- insurance policy shows that passengers carrying capacity of the vehicle is 1+2 which means that the vehicle was authorized to carry one driver and two passengers- deceased and injured were travelling in the vehicle along with their goods and cannot be called to be gratuitous passengers- appeal dismissed. Title: National Insurance Co. Ltd. Vs. Savitri Devi and another Page-383

Motor Vehicles Act, 1988- Section 149- Insurer contended that the risk of 2nd driver was not covered and the award is contrary to the facts of the case- the claimant had pleaded in the claim petition that he was travelling in the vehicle as a 2nd driver but when he appeared before the Tribunal, he stated that he was travelling in the vehicle as conductor- his statement has remained unrebutted – driver also admitted that the claimant was working as conductor, hence, plea of the insurer that claimant was second driver was not proved- amount of compensation was awarded in accordance of the facts- appeal dismissed. Title: National Insurance Co. Ltd. Vs. Dhaman Dutt Sharma and others Page-381

Motor Vehicles Act, 1988- Section 149- Insurer contended that Tribunal had fallen in error in saddling it with liability- risk of the deceased was not covered in terms of insurance policy- offending vehicle was tractor whose seating capacity was one- Insurance policy also covered the risk of driver- risk of labourer or any other persons was not covered- it was specifically held by Tribunal that deceased was travelling in the vehicle at the time of

accident as employee of the owner/insured- thus, vehicle was being driven in contravention of the terms and conditions of the insurance policy and the owner had committed willful breach- hence, insurer directed to satisfy the award with the right of recovery. Title: Oriental Insurance Company Ltd. Vs. Veena Devi and others Page-139

Motor Vehicles Act, 1988- Section 149- Insurer had not led any evidence to prove that there was breach of the terms and conditions of the insurance policy- Driver deposed before the Tribunal that he had a valid and effective driving licence at the time of accident- copy of driving licence also shows that driver had a valid and effective driving licence at the relevant point of time- hence, plea that driver did not have a valid driving licence cannot be accepted- further, claimant had averred in the claim petition that he had hired the vehicle and was travelling with the tomato crates in the vehicle –hence the plea that claimant was a gratuitous passenger cannot be accepted. Title: National Insurance Company Ltd. Vs. Krishanu Ram Page-385

Motor Vehicles Act, 1988- Section 166- Claimant had pleaded that his income was Rs.15,000/- per month - by guess work, Tribunal had assessed his income as Rs.8,000/- per month - by exercising the guess work, it can be safely held that monthly income of the deceased would not have been less than Rs.8,000/-- he had suffered 25% disability which affected his earning capacity to the extent of 50%- thus, loss of source of income can be taken as 50%- the age of the injured was 62 years- Tribunal had applied multiplier of 8- held, that multiplier of '5' is applicable and the claimant is entitled to the compensation of Rs.4,000 x 12 x 5= 2,40,000/- under the head of loss of earning- Tribunal had awarded interest @ 12% per annum, whereas, amount of interest has to be awarded @ 7.5% per annum. Title: National Insurance Company Ltd. Vs. Krishanu Ram Page-385

Motor Vehicles Act, 1988- Section 166- Claimant has proved that driver was driving the vehicle rashly and negligently – an FIR was registered against him- respondents did not lead any evidence, thus, it was duly proved that driver had driven the vehicle rashly and negligently at the relevant point of time and had caused accident- Tribunal had wrongly held that claimant had failed to prove this fact- a strict proof is not required in motor accident case- prima facie proof is sufficient- claimant remained admitted in the hospital and had suffered 5% disability- hence, amount of Rs.50,000/- was awarded under the medical expenses' and Rs.1,00,000/-, under the head of 'loss of amenities of life and pain and sufferings'. Title: Balbir Kumar Vs. Ajay Kumar & another Page-361

Motor Vehicles Act, 1988- Section 166- Claimant led evidence to prove that driver was driving the vehicle in a rash and negligent manner- an FIR was registered against the driver of the offending vehicle- challan was presented against him before the Court- respondents had not led any evidence and evidence led by the claimant remained unrebutted- Tribunal had erred in holding that the claimant had failed to prove the rashness and negligence of the driver- Tribunal had wrongly held that claimant had not proved the rashness and negligence of the driver- Driver was holding valid driving licence- deceased was 22 years at the time of accident- he was bachelor and was earning Rs. 2500/- per month as Conductor and Rs. 100/- per day, when he used to be on tour – his monthly income can be taken as Rs. 3,000/- by guess work- 50% amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 1500/- per month- multiplier of '15' is applicable and the claimant is entitled to Rs. 1500/- x 12 x 15 = 2,70,000/- under the head 'loss of dependency' along with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. Title: Lal Singh Vs. Davinder Singh & others Page-374

Motor Vehicles Act, 1988- Section 166- Deceased was aged 26 years old at the time of accident- he was student of MCAM- his career and budding age have been taken away by the accident- he would have been earning not less than Rs. 10,000/- per month after the completion of this studies- he would have spent one half on his parents being bachelor- thus, the parents have lost source of dependency to the tune of Rs. 5000/- per month- his age was 26 years, multiplier of '15' was applicable- thus, compensation of Rs. 4 lacs awarded by the Tribunal cannot be said to be excessive in any way- appeal dismissed. Title: National Insurance Co. Ltd. Vs. Suresh Chand Sharma and others Page-130

Motor Vehicles Act, 1988- Section 166- Deceased was an employee and his salary was Rs.12,909/- per month at the time of accident- claimants are more than five in number- Tribunal had wrongly deducted 1/3rd towards personal expenses- hence, claimants have lost of source of dependency to the extent of Rs.10,000/- per month- deceased was aged 52 years at the time of accident- Tribunal has fallen in error in applying multiplier of '7', whereas, multiplier of '9' is applicable- thus, claimants are entitled to Rs.10,000x 12 x 9= Rs.10,80,000/- claimants are entitled to Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.11,20,000/- along with interest from the date of filing of the claim petition till its realization. Title: Urmila Devi & another Vs. Managing Director, HRTC & others Page-146

Motor Vehicles Act, 1988- Section 166- Deceased was Assistant Manager with M/s Global Agri System Private Limited- his monthly income was Rs.12,000/- per month- after deduction loss of dependency is Rs.8,000/- per month- Tribunal had applied multiplier of '16', whereas, multiplier of '15' was applicable- thus, claimants have lost source of dependency to the extent of Rs.14,40,000/- (Rs.8000/-x12x15)- they are entitled to Rs.25,000/- under the head 'conventional charges' and Rs.10,000/- each under the heads 'loss of consortium', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 14,95,000/-, with interest. Title: Oriental Insurance Co. Vs. Usha Kumari and others Page-136

Motor Vehicles Act, 1988- Section 166- Insurer contended that claim petition was not maintainable as another claim petition had been filed before Motor Accident Claims Tribunal, Ambala, which was dismissed in default on 2.6.1994 – perusal of record shows that claimant had filed a claim petition before MACT, Ambala which was dismissed in default- copy of order was proved before the Tribunal- State of Himachal Pradesh has framed the Rules providing that the provisions of Order 9 of the CPC are applicable to the proceedings before MACT- Order 9 Rule 9 CPC bars the plaintiff from instituting a fresh suit on the same cause of action where a suit is wholly or partly dismissed under Rule 8- hence, when a claim petition is dismissed in default, the claimant can not file a fresh claim petition- MACT had rightly dismissed the petition- appeal dismissed. Title: Triveni Prasad Vs. Kanwal Jeet and others Page-143

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.13,583/- as per the salary certificate- hence, monthly income of the deceased cannot be less than Rs.13,600/-- claimants have pleaded and proved that age of the deceased was 50 years at the time of accident –report of the post mortem and statement of PW-5 also show that age of the deceased was 50 years- Tribunal has fallen in error in holding that age of the deceased was 52 years- 1/5th of the amount was to be deducted towards personal expenses of the deceased, thus, claimants have lost source of income to the extent of Rs.11,000/- per

month- Tribunal had applied multiplier of '8', whereas, multiplier of '11' was to be applied- thus, claimants have lost source of income/dependency to the extent of Rs.14,52,000/- (11,000 x 12 x 11)- claimants are entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 14,92,000/- along with interest. Title: Viyasan Devi and others Vs. Ashok Kumar and others Page-147

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 5,524- after deducting 1/3rd income towards personal expenses, Tribunal had rightly held that claimant had lost of source of dependency to the extent of Rs. 3,682/-, or say, Rs. 3700/- per month- age of the deceased was 39 years- multiplier of '15' is applicable – Tribunal fell in error in applying multiplier of '16'- claimants are entitled to Rs. 3700 x 15 x 12 = Rs. 6,66,000/- under the head 'loss of source of dependency'- claimants are also held entitled to Rs. 10,000/- each under the heads 'funeral expenses', 'loss of consortium', 'loss of love and affection' and 'loss of estate'- thus, total amount of Rs. 7,11,000/-, under the different heads. Title: Oriental Insurance Co. Vs. Bholi and others Page-389

Motor Vehicles Act, 1988- Section 166- Owner and driver questioned the award on the ground that claimants had failed to prove the rash and negligent driving by driver- a criminal case was filed against the driver before the competent Court which is still pending- it is prima facie proved that driver has driven the offending vehicle rashly and negligently at the time of accident- appeal dismissed. Title: Sumit Sareen & another Vs. Rano Devi Page-141

Motor Vehicles Act, 1988- Section 166- Respondent No.1 boarded the bus which met with an accident on account of rash and negligent driving of the driver—he sustained multiple injuries and was taken to hospital- he filed a claim petition which was allowed- compensation of Rs.26,17,576/- was assessed by the trial Court- however, compensation was restricted to Rs.25 lacs as claimant had only claimed Rs.25 lacs as compensation- claimant had not examined any witness to prove the bills produced on record- mere admission of a document does not amount to proof – the Tribunal could not have relied upon the un-exhibited documents to award the compensation - no evidence was led to prove the future medical expenses- claimant is a government servant and would be entitled to reimbursement from the government- claimant had not produced the bills of travelling by taxi and no person in whose vehicle the claimant had travelled was examined by the claimant- earned/commuted leave was sanctioned by the government- therefore, claimant had not suffered any loss during the period he was on leave - the increment was granted to the claimant immediately after he joined and thus he had not suffered future loss of income- Medical Officer categorically stated that disability will not be improved by the physiotherapy- therefore, amount for physiotherapy could not be awarded to the claimant- further, it was doubtful that claimant had taken treatment from PW-4- claimant had claimed attendant charges @ Rs.5,000/- p.m.- it is difficult to believe that claimant who was drawing salary of Rs.12,500/- would be paying Rs.5,000/- p.m to PW-9- claimant had become partially paralytic for life- hence the sum of Rs. 3 lacs awarded under pain and suffering was reasonable- he had suffered 50% disability and the amount of Rs. 3 lacs towards future discomforts, inconvenience, hardship and frustration was reasonable- thus, amount reduced to Rs.9,61,309/- along with interest @ 9% per annum Title: The New India Assurance Company Ltd. Vs. Jagdish Lakhanpal and others Page-558

Motor Vehicles Act, 1988- Section 166- Salary certificate shows that last pay drawn by the deceased was Rs.17,977/-- 1/3rd amount is to be deducted towards personal expenses- thus, claimants had lost source of dependency to the tune of Rs. 11984/-, or say Rs. 12,000/- per month- multiplier of '17' was applied, whereas, multiplier of '16' is applicable- thus, claimants are entitled to Rs. 12,000/-x12 x 16 = Rs. 23,04,000/- under the head 'loss of dependency'- amount of Rs.10,000/- each is awarded under the heads of 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses'- thus, total amount of Rs. 23,44,000/- is awarded along with interest. Title: Rita Mohil & others Vs. Imran Khan & another Page-397

Motor Vehicles Act, 1988- Section 166- Witnesses consistently deposed that vehicle was being driven by the driver rashly and negligently in which E and I had lost their lives- an FIR was registered against the driver – final report was also filed against him- thus, claimants had discharged the onus prima facie by proving that driver was driving the vehicle rashly and negligently at the time of accident- claim petition cannot be dismissed on the ground of mis-joinder and non-joinder of necessary parties - natural mother is entitled to get compensation regarding the death of her married daughter- deceased would have been earning not less than Rs. 3,000/- per month at the relevant point of time and it can be said that the claimant had suffered loss of source of dependency to the tune of Rs. 1500/- per month- age of the deceased was 25 years at the time of accident- multiplier of '15'is applicable – claimant is entitled to Rs. 1500 x 12 x 15= 2,70,000/- with interest. Title: Tripta Devi Vs. General Manager, HRTC and others Page-401

Motor Vehicles Act, 1988- Section 168- Mandate of Section 168 is to determine the amount of compensation which appears to be just- it is the duty of the Tribunal or the Appellate Court to assess the just compensation and they can award more compensation than claimed - Tribunal had awarded less amount under the head and loss of amenities and pain and suffering- compensation enhanced to Rs. 60,000/- under the head 'pain and suffering' and loss of amenities of life. Title: Managing Director HRTC Vs. Khem Chand and another Page-377

Motor Vehicles Act, 1988- Section 169- Owner had taken a specific plea in the reply to the claim petition that the claimant had filed MACT Case before the Motor Accident Claims Tribunal, Panchkula which was dismissed- the Tribunal had not disclosed this plea in the award- a certified copy of the award passed by MACT, Panchkula was produced- held, that the second claim petition filed by the claimants before the Tribunal on the same cause of action was hit by the principle of res judicata- appeal allowed and award set aside. Title: Sohan Lal Vs. Om Prakash Sharma & others Page-140

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 7.5% per annum from the date of filing of the claim petition – amount of interest @ 7.5% per annum was to be awarded for all heads except for future income from the date of the claim petition and for future income interest was to be awarded from the date of the award and not from the date of the claim petition. Title: United India Insurance Company Ltd. Vs. Surinder Singh & others Page-410

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N.D.P.S. Act, 1985- Section 15- Secret information was received that accused had kept poppy husk in his possession for sale to the public - search of the house of the accused was

conducted during which 2.200 kg. of poppy husk was found in one bag and 5.3 kg of poppy husk was found in another bag- search of the store was also conducted during which 10 bags were recovered which contained 200 kg. of poppy husk- total 207.5 kg. of poppy husk was recovered from the possession of the accused- accused was tried and convicted by the trial Court- independent witnesses did not support the prosecution version- PW-15 has admitted in his cross-examination that no document or article was found suggesting that accused was residing in that house- no agreement pertaining to tenancy of store was brought on record- no rent receipt was produced- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts a doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. Title: Rishi Pal Vs. State of Himachal Pradesh and another (D.B.) Page-443

N.D.P.S. Act, 1985- Section 20- A bus was stopped for checking, accused was occupying seat No. 35- he was carrying black coloured bag on his lap which was found to be containing 450 grams of charas- accused was convicted by the trial Court- in appeal, held that independent witnesses have not supported prosecution case- no passenger of the bus was examined- PW-2 stated that bag was kept on his lap while PW-10 stated that accused was carrying the bag on his shoulder which is major contradiction- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. Title: Deepak Vs. State of HP Page-191

N.D.P.S. Act, 1985- Section 20- Accused became perplexed and tried to run away on seeing the police- he was given an option to be searched on which he expressed his option to be searched before a Gazetted Officer- accused was brought to the office of Addl. S.P.- his search was conducted during which one polythene packet was recovered from the underwear of the accused – the packet was containing 330 grams of charas- he was convicted by the trial Court- the person who brought the case property to the Court was not examined – entry regarding the name of the person who carried out the case property to the Court is necessary as per Punjab Police Rules- case property is required to be kept safe custody from the date of seizure till its production- in absence of entry in the daily diary, a doubt is cast whether same case property is produced in the Court which was recovered from the accused- no proper procedure was followed while producing the case property in the Court or returning the same- held, that in these circumstances, prosecution case was not proved- accused acquitted. Title: Sanju Vs. State of Himachal Pradesh Page-38

N.D.P.S. Act, 1985- Section 20- Accused was holding a carry bag in his right hand- he became perplexed and tried to run away on seeing the police- his search was conducted during which 1.5 kg. of charas was recovered- it was admitted by PW-1 in his cross-examination that the place was a busy road and vehicles pass through the place frequently -

independent witnesses were easily available but prosecution has not joined any independent witness- held, that in these circumstances prosecution has failed to prove its case beyond reasonable doubt and the accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Darshan Kumar (D.B.) Page-245

N.D.P.S. Act, 1985- Section 20- Accused was holding a micron bag on his lap in a bus- when bag was opened it was found to be containing another micron bag and white coloured blanket- on opening micron bag 1.754 Kgs of charas was recovered- accused was convicted and sentenced by the trial Court- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. Title: Rajinder Kumar alias Raja Vs. State of Himachal Pradesh (D.B.) Page-31

N.D.P.S. Act, 1985- Section 20- Accused was seen carrying a bag in his hand- the search of the bag was conducted during which 1.800 kgs charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that there is contradiction in the prosecution case- police officers stated that charas was found in the form of sticks, whereas, in FSL charas was found in the form of poly wrapped sticks and balls in two transparent zip poly packets- police witnesses have not stated that charas was in the form of poly wrapped sticks and balls in two transparent zip poly packets- thus, identity of the case property also becomes doubtful – houses are located on either side of the road and buildings are also situated nearby- I.O. had not made any efforts to associate any independent witness - seal was handed over to PW-6 who stated that he had lost the same but no rapat was got recorded by him regarding the loss of seal- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was rightly acquitted by the trial court– appeal dismissed. Title: State of Himachal Pradesh Vs. Hukam Singh (D.B.) Page-325

N.D.P.S. Act, 1985- Section 20- Accused was seen sitting in front of shop- he got frightened and started running towards bus stand- police got suspicious and apprehended the accused- search of the bag was conducted during which 350 grams of charas was recovered- accused was convicted and sentenced by the trial Court- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. Title: Kartik Singh Vs. State of Himachal Pradesh Page-20

N.D.P.S. Act, 1985- Section 20 and 29- A vehicle being driven by 'G' was stopped – 'A' was sitting in front of the vehicle- a rucksack was found near the feet of 'A' which was containing 1.150 kg. of charas- other accused were sitting in the vehicle – they were tried and acquitted by the trial Court- in appeal held, that PW-1 had deposed that documents were prepared at the spot in the official vehicle by the I.O.- PW-8 stated that seizure memo was prepared outside the vehicle which was a major contradiction – PW-2 admitted that no specimen seal was deposited with him- there is no entry in the malkhana register regarding the deposit of the sample seals- no entry was made about the taking out of the case property from the malkhana- it was necessary to make entry in the malkhana register when the case property was taken out from the malkhana and again when it was received back- in these circumstances, prosecution case was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused. Title: State of Himachal Pradesh Vs. Anil Kumar and others (D.B.) Page-234

N.D.P.S. Act, 1985- Section 20 and 29- Accused were seen carrying bags on their backs by the police party- they became nervous and returned on seeing the police- they were apprehended and their search was conducted during which one plastic envelope from each of the accused containing 5 kg. of charas was recovered- it was found on investigation that 'K' was owner of the charas- accused were acquitted by the trial Court- held, in appeal against the acquittal that personal search of the accused were also conducted, therefore, it was necessary to obtain separate consent of the accused for the personal search- however, a joint consent was obtained which has vitiated the trial- Columns No. 9 to 11 of NCB Form are blank - no independent witness was associated during the search- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- call details have not been proved in accordance with Section 65 of Indian Evidence Act- in these circumstances, accused were rightly acquitted by the trial court– appeal dismissed. Title: State of Himachal Pradesh Vs. Sohan Lal & ors. Page-430

N.D.P.S. Act, 1985- Section 20 and 50- Police was checking vehicle- a nano car was signaled to stop- driver was asked to show the documents but he got frightened, police got suspicious- an option was given to the accused that he could give his personal search to Magistrate or Gazetted Officer- accused gave consent to be searched by the police officials- 988 grams charas was recovered from the car- accused was tried and convicted by the trial Court- held in appeal that accused is to be apprised of his legal right to be searched before a Gazetted Officer or a Magistrate- in this case consent was sought for being searched before the police officer, Gazetted Officer or Magistrate- thus, memo is not in accordance with Section 50 of the Act- it was not necessary to carry out the personal search of the accused when bag was recovered from the car but personal search of the accused was conducted and compliance of Section 50 of N.D.P.S. Act was required to be made- independent witnesses have not supported the prosecution case- there are contradictions in the testimonies of the police officials- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case

property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was acquitted. Title: Jagdish Kumar @ Nitu Vs. State of Himachal Pradesh Page-581

N.D.P.S. Act, 1985- Section 21- Motorcycle was intercepted by the police – accused was sitting as pillion rider- he was carrying a maroon coloured carry bag- same was checked and 390 capsules of Parvon-Spas were found in it – accused was tried and convicted by the trial Court- accused was apprehended near village Trimath- population of the village was about 200-300 people- there was residential house of 'R'- vehicles also ply at the spot – independent witness was not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances, prosecution case was not proved- accused acquitted. Title: Sadiq Mohd. Vs. State of H.P. Page-311

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Precedent- Every High Court must give due deference to the law laid down by other High Courts- Punjab & Haryana, High Court had passed the judgment on the issue raised before the High Court- hence, appeals are disposed of in view of judgment of the Punjab & Haryana, High Court. Title: The Accounts Officer (Cash) Vs. Income Tax Officer (TDS) (D.B.) Page-337

Prevention of Corruption Act, 1988- Sections 7 and 13(2)- A complaint was made by the complainant that accused had demanded Rs.15,000/- for assisting the release of complainant on bail- Rs. 10,000/- were paid and Rs. 5,000/-were to be paid subsequently- a trap was laid and accused was caught with money- accused was tried and convicted by the trial Court- held, in appeal that complainant had admitted in cross examination that money was demanded within the hearing range in the High Court complex- accused had opposed the bail application of the complainant- there are material contradictions in the testimonies of the witnesses- in these circumstances, prosecution had failed to prove its case beyond reasonable doubt against the accused- accused acquitted. Title: Baldev Singh Vs. State of H.P. Page-460

Protection of Children from Sexual Offences Act, 2012- Section 6- Prosecutrix was raped and threatened by the accused- subsequently, she went to the police Station where FIR was recorded- her medical examination was conducted, which confirmed the rape- her radiological age was found to be 13 ½ years to 15 years – accused was sentenced and convicted by the trial Court – testimony of the prosecutrix was credible and confidence inspiring - she supported the prosecution version- there is no improvement or embellishment over her previous statement- her statement was corroborated by the testimonies of PW-2 and PW-4- she was proved to be less than 15 years of age- her testimony regarding the rape was confirmed by medical evidence- underwear of the victim indicated presence of DNA of more than one person- DNA profiling was compatible with DNA

of accused- held, that in these circumstances, trial Court had rightly convicted the accused- appeal dismissed. Title: Harnam Singh Vs. State of Himachal Pradesh (D.B.) Page-87

Protection of Women from Domestic Violence Act, 2005- Section 12- Court awarded maintenance of Rs. 2,000/- per month to respondent No. 1 and Rs. 1,000/- per month to respondent No. 2- earlier a petition under Section 125 of Cr.P.C was filed seeking maintenance which was decided subsequent to the order awarding maintenance- application was allowed and maintenance @ Rs.500/- per month was awarded to respondent No. 2 and maintenance @ Rs.1,000/- per month was awarded to respondent No. 1- a revision was preferred before Learned Sessions Judge, Kullu which was dismissed- it was contended that award of maintenance in the earlier petition barred subsequent petition under Section 125 of Cr.P.C- held, that right of maintenance was granted under distinct statutes - any adjudication by the Court in the earlier petition will divest the jurisdiction of subsequent Court- hence, order passed by the Court awarding maintenance under Section 125 of Cr.P.C set aside. Title: Vinod Kumar Vs. Shakuntala and another Page- 286

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Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Sections 13(2) and 17- Petitioner had taken a loan and had defaulted in the repayment- negotiation took place between the bank and the petitioner, whereby the unit was restored to the petitioner subject to the terms and conditions- petitioner again defaulted – his assets were taken over by the respondent- held, that petitioner has an alternative and efficacious remedy under Section 17 of the SARFAESI Act- a complete mechanism has been provided under the Act which has overriding effect over other laws- hence, writ petition is not maintainable and the petitioner is at liberty to avail the remedy under SARFAESI Act. Title: M/s Cecil Instant Power Company Vs. Punjab National Bank and others (D.B.) Page-537

Specific Relief Act, 1963- Section 5- Father of the plaintiff died on 29.9.1994- he was owner in possession of the suit land- he had never executed sale deed in favour of the defendant- defendant forcibly occupied the suit land on the basis of forged sale deed- plaintiff prayed for decree for cancellation of the sale deed being fraudulent and for delivery of the possession – defendant pleaded that he had become owner by way of sale deed- suit was dismissed by the trial Court – an appeal was preferred which was allowed- 'D' was 95 years of age at the time of execution of the sale deed – Sub Registrar had visited the house of the Executant for registration as per endorsement, which carried with it a presumption of correctness- this belies the case of the defendant that sale deed was scribed and registered in the office of Sub Registrar, Bhoranj- witnesses had also deposed falsely that the document was scribed and registered at Bhoranj- sale deed was surrounded by suspicious circumstances- Appellate Court had rightly appreciated the evidence – appeal dismissed. Title: Ram Sukh Vs. Mast Ram Page-151

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession of the suit land pleading that predecessors-in-interest of the respondents No. 2 to 4 were owners in possession of the suit land as co-sharers- they had sold their share to the plaintiff and one 'L' through registered sale deed- 'L' died and was succeeded by the plaintiff- mutation was not sanctioned due to mistake of Patwari- name of 'N' was appearing in the revenue record- defendants purchased the share of 'N'- plaintiff filed a civil suit against the defendants and the others qua the share of 'N'- suit was decreed by Sub Judge, Amb- defendants were proclaiming that they had purchased the share of 'J' and 'S' in the suit land- defendants

claimed that they were bonafide purchaser for consideration- suit was dismissed by the trial Court- an appeal was preferred which was allowed- sale deed was not proved before the trial Court but was proved in appeal- entire land was shown in the ownership and possession of Gram Panchayat- suit was filed by the proprietary body against the Gram Sabha challenging the vestment of suit land in Gram Panchayat - suit was decreed by the trial Court and the findings were affirmed by the Appellate Court- proprietary body came in possession of the suit land- revenue entries were required to be corrected on the basis of sale deed- cause of action arose when the suit land was sold by the defendants No. 4 & 5 in favour of defendants No.1 to 3- suit was filed well within the limitation- appeal dismissed. Title: Tara Devi & ors. Vs. Kaushalya Devi & ors. Page-110

Specific Relief Act, 1963- Section 5- Suit land was owned by one 'S' who sold it to 'P' predecessor-in-interest of plaintiffs- plaintiffs filed a civil suit against the defendant claiming the possession of the suit land pleading that suit land had been forcibly occupied by the defendant- defendant pleaded that he was put in possession by 'P' pursuant to an agreement- suit was decreed by the trial Court- in appeal, the appellate court reversed the decree passed by the trial court - the agreement was duly proved- a power of attorney was also executed in favour of the defendant by means of which the defendant was authorized to manage/sell/mortgage the suit land- no steps were taken for cancelling the agreement/power of attorney- defendant was put in possession by means of agreement to sale and he cannot be dispossessed- Appellate Court had rightly reversed the decree passed by the trial Court- appeal dismissed. Title: Bachitar Singh and others Vs. Sandhya Devi and others Page-155

Specific Relief Act, 1963- Section 34- Father of the defendant was in possession of the suit land as a non-occupancy tenant- he had sold the suit land to the plaintiff for consideration of Rs.3,000/-- possession was also delivered to the plaintiff- defendant No.1 wanted to pre-empt the sale of the land but the matter was compromised - defendant No. 1 entered into an agreement wherein defendant No.1 admitted the sale in favour of the plaintiff to be correct and confirmed it- it was agreed that land would be transferred on the attestation of mutation and the conferment of proprietary rights – defendant No. 1 sold the suit land to the defendants No. 2 and 3 after the conferment of proprietary rights - defendant No. 1 tried to obtain the forcible possession- plaintiff had become owner by way of adverse possession- suit was partly decreed by the trial Court- appeal was preferred, which was allowed and the plaintiff was declared to be owner in possession of suit land by way of adverse possession- in second appeal held, that the sale made in favour of plaintiff was not registered – agreement only gives a right to the plaintiff to file a suit for specific performance and not to file a suit for declaration- defendant No. 1 was not owner at the time of agreement- he became owner only after attestation of the mutation- father of the defendant No. 1 has been recorded to be in possession as non-occupancy tenant in the revenue record – plaintiff had failed to prove his possession over the suit land- a plea of adverse possession can be taken as shield not a sword- sale deed was executed after the attestation of mutation - regular second appeal accepted and the judgments passed by Civil Judge and the Appellate Court set aside. Title: Raman Chand alias Relu and others Vs. Hukam Chand Page-276

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration and permanent prohibitory injunction- he pleaded that defendant had sold the suit land to the plaintiff in the year 1974 for a consideration of Rs. 2,000/- orally- possession was delivered to the plaintiff- plaintiff raised construction of the house in the year 1978- defendant avoided the execution of the sale deed with a malafide intention- plaintiff applied for correction of

revenue entries but his application was rejected on the ground that plaintiff is a resident of Punjab and land could not have been entered in his favour without permission from State Government- plaintiff filed a suit seeking declaration regarding his ownership- defendant denied the case of the plaintiff and stated that possession of two biswas of land was given to the plaintiff- suit was dismissed by the trial Court- appeals were also dismissed- held, that no tangible evidence was placed on record by the plaintiff that he was an agriculturist- plaintiff belonged to Schedule Caste but in a different state namely Punjab- cause of action had arisen in favour of the land in the year 1974 on the date of the sale but the suit was filed in the year 1994- suit was hopelessly barred by limitation- no oral sale could have been made in the year 1974- suit for declaration cannot be filed on the basis of adverse possession- parties knew that agreement was void from the very beginning- hence, defendant is not entitled for any relief- the Courts had rightly dismissed the suit and the counter-claim- appeal dismissed. Title: Bhag Mal Vs. Ram Krishan Page-339

Specific Relief Act, 1996- Section 34- Plaintiffs filed a civil suit claiming themselves to be exclusive owners in possession of the suit land – they further pleaded that they had become owners by way of adverse possession- defendants started interfering with the suit land taking advantage of wrong revenue entries– hence, relief of injunction was also sought- trial Court decreed the suit- an appeal was preferred- Appellate Court accepted the appeal and dismissed the suit- held, that suit cannot be filed on the basis of adverse possession- adverse possession can be made a ground to defend the suit- further, on merits adverse possession was not established- Appellate Court had rightly reversed the decree of the trial Court- appeal dismissed. Title: Mastu Devi & others Vs. Chet Ram & others Page-119

Specific Relief Act,1963- Section 38- M.C. Shimla had issued Teh Bazari receipts in favour of the plaintiff- plaintiff claimed that land does not belong to Union of India- he filed a suit for restraining the defendant from evicting the plaintiff from the suit land- suit was decreed by the trial Court on the premise that defendant had failed to establish his ownership- this decree was reversed in appeal – khasra number over which tea stall was being run by the plaintiff was not given- witness of the defendant deposed about the ownership- held, that in these circumstances, the Appellate Court had rightly reversed the judgment of the trial Court. Title: Gokul Ram Vs. Union of India Page-84

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land was granted as Nautor to him- he is owner in possession of the suit land – defendants without any right, title or interest started digging the foundation over the suit land for construction of a house despite requests- defendants pleaded that they are in possession openly and continuously for a period of more than 30 years and that they have become owner by way of adverse possession- suit was decreed by the trial Court- decree was reversed in appeal and the case was remanded with the direction to decide the same after affording an opportunity to establish the identity of the suit land- Local Commissioner was appointed who submitted the report- suit was again decreed- decree was affirmed in appeal – in regular second appeal held that patta granting nautor land speaks about conducting of necessary inquiries through the Field Agencies –suit land was granted as Nautor to the plaintiff after enquiry which shows that suit land was lying vacant on the spot and was recommended to be allotted to the plaintiff- Kanungo also proves that possession was delivered to the plaintiff- Tatima does not mention Khasra number correctly and cannot be relied upon- report of Local Commissioner was accepted by the parties and there was no question of affording an opportunity of cross-examination- held, that in these circumstances, it cannot be said that

evidence was not appreciated in right perspective – appeal dismissed. Title: Ved Parkash Vs. Uttam Chand and another Page-55

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- land of the defendant is situated at the lower level and all the rainy water of residential house of the plaintiff and other vacant land has been passing through the site since the time immemorial – plaintiff has acquired right of easement by prescription- defendants constructed a new house over the portion with intention to divert the natural flow of water- they have dug a drain adjacent to the boundary wall of the plaintiff, due to which boundary wall was damaged- defendants denied the claim- suit was dismissed by the trial Court- appeal was preferred which was also dismissed- held, in appeal that rainy water from the house of the plaintiff started flowing towards the land of the defendant 26 - 27 years ago and not prior to that- plaintiff had not acquired easementary right by way of prescription or by necessity – Court had properly appreciated evidence- appeal dismissed. Title: Shrawan Singh Vs. Ramel Singh (dead through LRs & ors.) Page-280

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from interfering with the suit land- subsequently, an application for amendment to incorporate the plea that defendants had encroached upon the suit land during the pendency of the suit was filed, which was allowed by the trial Court- aggrieved from the order, defendants preferred a revision petition pleading that plaintiff was aware of the encroachment prior to the institution of the suit and the application was filed at a belated stage- it was also contended that report of demarcation was not attached to the application- held, that construction had started subsequent to filing of the suit- therefore, this plea cannot be accepted- merely because, report of demarcation was not attached to the application is not sufficient to dismiss the same- revision dismissed. Title: Arjun Jain and others Vs. Ajay Kumar and others Page-14

Specific Relief Act, 1963- Section 38- Plaintiffs filed a suit seeking permanent prohibitory injunction for restraining the defendants from interfering with the suit land or raising construction over the same pleading that they are co-owners in joint possession of the suit land and defendants are strangers- defendants opposed the suit pleading that they are in possession on payment of rent since the time of their forefather – their names were wrongly deleted by Consolidation authorities without their knowledge – a revision petition was filed under Consolidation of Holding Act which was allowed - trial Court decreed the suit- an appeal was preferred which was allowed—in second appeal held, that Consolidation Officer had restored the revenue entries which existed prior to their deletion- plaintiffs had never challenged the order passed by the competent authorities during consolidation proceedings- it was duly proved that defendants were paying Chakota to the plaintiffs - the Appellate Court had rightly appreciated the evidence - the trial Court had committed an error while reading revenue entries- appeal dismissed. Title: Sarjeevan Singh and another Vs. Ram Nath and another Page-107

'T'

Torts - Plaintiff filed a suit for recovery of damages against the defendant pleading that he was the owner of the bus which was stopped by the defendant- defendant snatched the route permit and ran away with the same- plaintiff requested the defendant to return the permit but the permit was not returned -bus could not be plied for want of permit- defendant stated that he had asked the plaintiff to show the route permit on which the plaintiff had handed over the permit to the defendant- defendant warned the plaintiff not to

ply the bus on the route other than the allotted one- he wanted to return the permit but plaintiff refused to accept the same- suit was dismissed by the trial Court- an appeal was preferred which was allowed- defendant did not state as to when he returned the permit to the plaintiff- he also admitted that route permit could not be renewed and he undertook the responsibility to renew it and to pay the damages- plaintiff had led satisfactory evidence to show that income from the bus was Rs.1650/- per day- Appellate Court had rightly appreciated the evidence- appeal dismissed. Title: Neeraj Sharma Vs. Brij Mohan Gautam Page-133

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'F'

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Their Workmen, Bihar Collery Kamgar Union Vs. Bharat Coking Coal Limited and another, 2014 LLR 842

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'U'

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Union of India & others versus Shri Lal Dass, I L R 2015 (VI) HP 189 D.B.

Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1

Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564

Unique Butyle Tube Industries (P) Ltd. Vs. U.P. Financial Corporation and others (2003) 2 SCC 455

United Bank of India vs. Satyawati Tondon and others (2010) 8 SCC 110

United Commercial Bank vs. Mani Ram and others, AIR 2003 HP 63

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Vijay Kumar and another versus B.K. Thapper and another, AIR 1976 Jammu and Kashmir 30

Vijay Kumar Gupta versus State of H.P. and others, I L R 2015 (I) HP 351 D.B.

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

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

Chanchal Ram .....Petitioner

Versus

District and Sessions Judge, Mandi & another .....Respondents.

CWP No.2799 of 2008.
Decided on: 24th February, 2016

Constitution of India, 1950- Article 226- Petitioner made a complaint against the respondent No. 2, a Petition writer, stating that he had misconducted himself – a request for cancellation of license was also made- inquiry was entrusted to Civil Judge (Senior Division)-cum-CJM, Mandi who concluded that misconduct was established -inquiry report was submitted to 1st respondent who called the response of petition writer- petition writer filed objection and the 1st respondent ordered to file the complaint- writ petition was filed against the order of the 1st respondent- held, that the order passed by 1st respondent does not assign any reason to disagree with the report submitted by Learned Civil Judge (Senior Division)-cum-CJM, Mandi- an opportunity is to be afforded to the 2nd respondent to cross-examine the persons associated by learned Civil Judge (Sr. Division)-cum-CJM, in case so desired by respondent No. 2- order set aside with the direction to respondent No.1 to proceed in the matter from the stage of affording an opportunity to cross-examine the persons associated by Learned Civil Judge (Senior Division)-cum-CJM, Mandi.

(Para-7 and 8)

For the petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. Ramakant Sharma, Senior Advocate with Mr. Basant Thakur, Advocate for respondent No.1.

Mr. G.R. Palsra, Advocate with Ms. Leena Guleria, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. (Oral)

The grouse brought to this Court is that the 1st respondent has closed the complaint filed by the petitioner against the 2nd respondent vide impugned order, Annexure P-3, without application of mind and in complete departure to the material available on record, particularly the report Annexure P-2, submitted by learned Civil Judge (Senior Division)-cum-Chief Judicial Magistrate, Mandi.

2. The 2nd respondent is a Petition Writer having been granted the licence to do the typing work in District Court Complex, Mandi. The copy of licence is Annexure R-2A. The petitioner made a complaint Annexure P-1 against the 2nd respondent, stating therein the instances when he misconducted himself as a typist, with request to cancel the licence of the said respondent. Rule 17 of the Himachal Pradesh Subordinate Courts Typists (Grant of Licence, Registration and Control) Rules, 2001, provides for cancellation of licence, granted to a typist on the ground of misconduct. This Rule reads as follows:

> "**17. Cancellation of Licence for misconduct—** The licence of a typist shall be liable to be cancelled, if he/she is found guilty of

misconduct or engages in any other employment, trade, business or profession etc;

Provided that before taking any action under this rule, the District Jude may hold such inquiry as he may deem fit after giving reasonable opportunity to show cause to the typist."

3. Therefore, on receipt of complaint Annexure P-1, the 1st respondent entrusted the matter to learned Civil Judge (Senior Division)-cum-Chief Judicial Magistrate, Mandi, for holding an inquiry into the allegations against the 2nd respondent. Consequently, the inquiry was conducted. Eight persons, including Pardhan of Gram Panchayat, Kot Gehri, were associated during the course of inquiry and their statements recorded. Learned Civil Judge (Senior Division)-cum-CJM, Mandi, after holding the inquiry has concluded that the instances of misconduct referred to in the complaint against the 2nd respondent are established and that the provisions contained under Rule -17 are attracted in the matter. The inquiry report Annexure P-2 was submitted to the 1st respondent for further necessary action. The 1st respondent seems to have called for the response of the 2nd respondent on the inquiry report, who in turn, filed objections Annexure R-2B. The 1st respondent has ordered to file the complaint with one line order that since litigation between the petitioner and the 2nd respondent herein is pending in various courts, therefore, they are inimical to each other.

4. The impugned order has been challenged on the ground of being unjust, unfair and arbitrary as well as non-speaking. The grouse is that the matter should have not been closed by a single line order. It is averred that had there been any occasion to the 1st respondent to have disagreed with the inquiry report, he should have recorded the reasons therefor.

5. It is in this backdrop, the writ petition has been filed with the following prayers:

(i) That a writ in the nature of certiorari may kindly be issued and the impugned order dated 7.6.08 (Annexure P-3) passed by learned Sessions Judge, Mandi may be quashed and set aside.

(ii) That further writ in the nature of mandamus may be issued directing the respondent No.1 to take an appropriate decision against respondent No.2 in accordance with law."

6. In reply to the writ petition, the stand of 1st respondent is that since the petitioner and 2nd respondent are inimical to each other on account of litigation, therefore, the complaint was rightly ordered to be closed after affording an opportunity of being heard to the petitioner. Similar is the version of 2nd respondent, which is supported by the documents, viz. Annexure R2-A, the copy of licence; Annexure R2-B, objections he preferred to the inquiry report; Annexure R2-C, the report of Gram Panchayat Nichla Lot, Tehsil Sadar, District Mandi; Annexure R2-D, a certificate issued by the Secretary, District Bar Association, Mandi; Annexure R2/E, the report of Additional District Magistrate in the matter of obstructing path by the petitioner herein and Annexure R2-F, a copy of order passed by Sub Divisional Magistrate, Sadar, Sub Division, Mandi, H.P. , in a complaint under Section 145 Cr. P.C., which was filed by the petitioner against the 2nd respondent. Another copy of order Annexure R2-G whereby Judicial Magistrate, 1st Class, Mandi, has exempted the petitioner from appearance in the Court, has also been pressed into service.

7. As noticed supra, the impugned order Annexure P-3 has been sought to be quashed and a direction sought to the 1st respondent to take appropriate action against the 2nd respondent in accordance with law.

8. Having gone through the record of this case and the submissions made on both sides, it would not be improper to conclude that the order Annexure P-3 is terse having been passed without assigning any reason to disagree with the report submitted by learned Civil Judge (Sr. Division)-cum-CJM, Mandi. Even objections to the report filed by the 2nd respondent have not been discussed. Of course, the proper course available to the 1st respondent was to have afforded an opportunity of being heard to the 2nd respondent on the submission of Inquiry Report Annexure P-2. Though objections to the report were called from the said respondent and even the objections were filed also before the 1st respondent, however, he should have been given an opportunity to cross-examine the persons associated by learned Civil Judge (Sr. Division)-cum-CJM, during the course of inquiry and the complaint disposed of thereafter by a reasoned order.

9. The impugned order, therefore, is neither legally nor factually sustainable. The same as such is ordered to be quashed and set aside. Consequently, there shall be a direction to the 1st respondent to proceed in the matter afresh from the stage of affording the 2nd respondent, if he so desires, an opportunity to cross-examine the persons associated by learned Civil Judge (Sr. Division)-cum-CJM, Mandi, during the course of inquiry. It is thereafter, the complaint be disposed of in accordance with law, after hearing the petitioner and the 2nd respondent, by a speaking order. The petition is accordingly disposed of. Pending application(s), if any, shall also stand disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Arb. Case No. 66 of 2011 alongwith
Arb. Case No. 54 of 2011.
Date of Decision : February 26, 2016

1. Arb. Case No. 66 of 2011

The State of Himachal Pradesh through Secretary (PW) & another ..Objectors/respondents

Versus

M/s R. K. Construction Co. ...Non-objector/petitioner

2. Arb. Case No. 54 of 2011

M/s R. K. Construction Company ...Petitioner

Versus

The State of Himachal Pradesh through Secretary (PW) & another ...Respondents.

Arbitration and Conciliation Act, 1996- Section 34-Contractor and State preferred objections against the award pronounced by arbitrator- held, that the award can be set aside only when it is shown to be in conflict with public policy of India or when it is ex-facie and patently in violation of the statutory provisions- claim set up by the State was considered and adjudicated by the Arbitrator- the gross value of the work undertaken by the Contractor, the payments disbursed to him and the final bill were considered and the excess amount was ordered to be refunded in favour of the State- Contractor had given an

undertaking which had the effect of novation of the original contract- hence, case does not fall within any one of the exceptions provided under Section 34 of the Act-application dismissed. (Para-4 to 19)

Cases referred:

Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705
Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644
McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181
Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. (2006) 11 SCC 245
DDA vs. R. S. Sharma and Co. (2008) 13 SCC 80
Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49
Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312
Kuldeep Singh vs. Commr. of Police, (1999) 2 SCC 10
P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594

For the petitioner : Mr. R. S. Verma, Addl. Advocate General with Mr. Puneet Rajta, Dy. A.G. for the Objector in Arb. Case No. 66 of 2011 and for the respondents in Arb. Case No. 54 of 2011.

For the respondent : Mr. J. S. Bhogal, Sr. Advocate, with Mr. Nand Lal Sharma, Advocate, for the respondent/non-objector in Arb. Case No. 66 of 2011 and for the petitioner in Arb. Case No. 54 of 2011.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

Award dated 23.6.2011 passed by the Arbitrator-cum-Superintending Engineer, Arbitration Circle, H.P. PWD, Solan in Case No. SE-ARB-81/04, arising out of works contract for "New MLA Hostel at Vidhan Sabha, Block PI & PQ, Agreement No. 64 of 1995-96" is the subject matter of challenge in these applications preferred under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act").

2. The Contractor has preferred objections by way of Arbitration Case No. 54 of 2011, titled as *M/s R. K. Construction Company vs. State of Himachal Pradesh through Secretary (PW) to the Government of Himachal Pradesh & another* and the State assails the award through Arbitration Case No. 66 of 2011, titled as *State of Himachal Pradesh through Secretary (PW) to the Government of Himachal Pradesh & another vs. M/s R. K. Construction Co.*

3. In a tabulated form, the claim set up by the parties and the amount awarded by the Arbitrator are reproduced as under:-

Award in favour of the claimant (contractor):

Sr. No.	Description of claim	Amount claimed	Amount awarded	Remarks.
1.	Payment of final bill.	Rs. 1,00,000/- (amended to Rs. 1,28,390.65)	Nil	

2.	Payment of market rates.	Rs. 14,93,884.73 (amended to Rs. 15,51,512.30)	Nil	
3.	Payment of carriage of grit.	Rs. 52,073.70	Nil	
4.	Damages for prolongation of contract.	Rs. 1,55,000/-	Rs. 1,30,000/-	
5.	Payment of interest.	@24% from 1.5.98 till date.	Simple interest @ 7.5% per annum on an amount of Rs. 1,10,023/- for a period of ten years i.e. upto the date of award.	

Award in favour of the respondent (State):

Sr. No.	Description of counter-claim	Amount claimed	Amount awarded	Remarks.
1.	Payment due against minus final bill.	Rs. 2,38,734/-	Rs. 19,977/-	

4. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part – I of the Act, wherein Section 34 finds place. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the public policy of India and merits are to be to be looked into only under certain specified circumstances, being against the public policy of India, which connotes public good and public interest. Award which is *ex facie* and patently in violation of the statutory provisions cannot be said to be in public interest.

5. In *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* (2003) 5 SCC 705 the Court reiterated the principle laid down in *Renusagar Power Co. Ltd. vs. General Electric Co.,* 1994 Supp (1) SCC 644 holding that the award can be set aside if it is contrary to: (a) fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. However, such illegality must go to the root of the matter. If it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.

6. The principles continued to be reiterated by the apex Court in *McDermott International Inc. vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181 and *Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd.* (2006) 11 SCC 245.

7. Eventually in *DDA vs. R. S. Sharma and Co.* (2008) 13 SCC 80 the Court culled out the following principles:

> "21. From the above decisions, the following principles emerge:
>
> (a) An award, which is
>
> (i) contrary to substantive provisions of law; or
>
> (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
>
> (iii) against the terms of the respective contract; or
>
> (iv) patently illegal; or
>
> (v) prejudicial to the rights of the parties;
>
> is open to interference by the court under Section 34(2) of the Act.
>
> (b) The award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality.
>
> (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
>
> (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49 has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The court observed that:-

> "29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.
>
> 30. The *audi alteram partem* principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:
>
> > "18. *Equal treatment of parties.* – The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
> >
> > * * *
> >
> > 34. *Application for setting aside arbitral award.* – (1) * * *
> >
> > (2) An arbitral award may be set aside by the court only if –
> >
> > (a) the party making the application furnishes proof that –
> >
> > * * *

> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"
>
> 31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:
>
> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (iii) ignores vital evidence in arriving at its decision,
>
> such decision would necessarily be perverse."

9. Further, in the very same decision, while relying upon *Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons,* 1992 Supp (2) SCC 312; *Kuldeep Singh vs. Commr. of Police,* (1999) 2 SCC 10; and *P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd.,* (2012) 1 SCC 594, the Court clarified the meaning of the expression 'perverse' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-

> **"**42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:
>
> 42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:
>
> "28. *Rules applicable to substance of dispute*. – (1) Where the place of arbitration is situated in India –
>
> (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"
>
> 42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.
>
> 42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:
>
> "28. *Rules applicable to substance of dispute*. – (1) - (2) * * *
>
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."
>
> This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of

the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181, this Court held as under:

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See: *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593 and *D.D. Sharma v. Union of India*, (2004) 5 SCC 325].
>
> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC 573, the Court held:

> "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: *Gobardhan Das v. Lachhmi Ram*, AIR 1954 (SC) 689, *Thawardas Pherumal v. Union of India*, AIR 1955 (SC) 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 (SC) 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 (SC) 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 (SC) 214 and *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679.]"

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held:

> "43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view

taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case*, (2010) 11 SCC 296, SCC p. 313)

> '43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.*, (2009) 5 SCC 142 the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.' " **"**

10. While deciding the present application, the aforesaid propositions of law are required to be considered and applied.

11. During the course of hearing, learned counsel for the State could not highlight as to in what manner the award passed by the Arbitrator can be said to be perverse, erroneous, illegal or opposed to public policy.

12. Having perused the award in question, one is convinced and satisfied that the claim set up by the State stands duly considered and on the strength of the material placed on record, equitably adjudicated. In fact counter claim stands partly allowed in favour of the State. After taking into account the gross value of the work undertaken by the Contractor; the payments disbursed to him; and the final bill prepared, the amount paid in excess was awarded to be refunded in favour of the State. There is no discrepancy with regard to the figures mentioned on page 10 of the Award. There is neither any arithmetical error nor any misstatement of fact.

13. Insofar as objections raised by the Contractor are concerned, Sh. J. S. Bhogal, learned Senior Counsel, while relying upon the decision rendered by this Court in Arbitration Appeals No. 5 & 6 of 2006, titled as *State of H.P. & another vs. Mohan Singh Shandil*, decided on 26.5.2009, holding the Chief Engineer not to be the competent authority under the contract, and determination of rates for the works undertaken as extra items to be illegal, submits that the award is against the contractual terms.

14. The said decision, in my considered view, is clearly distinguishable as would emerge from the narration of facts herein under. The Court was not dealing with a case where the parties, during the execution of the contract had mutually consented to be governed by fresh terms. The contractual provisions were thus interpreted in a different factual matrix.

15. It is not in dispute that in relation to the works i.e. construction of Blocks PI and PQ of the New MLA Hostel at Vidhan Sabha, petitioner was awarded the contract in question. In terms of agreement dated 29.9.1995, the awarded work was to be completed within a period of nine months. The contracted amount was Rs.53,73,481/-. Since the work could not be completed within the stipulated period of time, extension in terms of clause 5, was accorded and eventually the work came to be completed only on 31.10.1997. It is also not in dispute that in relation to extra item of extra work, awarded during the period of contract, the rates were to be governed in terms of clause 12 and 12-A of the agreement. Be that as it may, fact of the matter being that on 21.2.1998 and before preparation of the final bill and disbursement of the final amount to the contractor, the parties sat to modify the contract in the shape of the Contractor giving an undertaking in the following terms:-

> "We hereby undertake that if there will be any change in the rates of EXTRA/Substitute Items in plus or minus in the Circle, we will accept the same."

16. The parties thus agreed themselves to be bound by fresh terms, partially novating the original contract. Insofar as the work for extra items, so carried out by the Contractor is concerned, rates stood determined by the Chief Engineer in his capacity as incharge of the Circle Office. In this view of the matter, claims No. 1 and 2 rightly stand adjudicated and rejected.

17. Insofar as claim No. 3 is concerned, the Arbitrator, based on the material on record rightly held that the Contractor could have procured the raw material from an alternate source i.e. Panchkula since there was no prohibition with respect thereto.

18. Insofar as damages for prolongation of the contract is concerned, the claim stands partly awarded in favour of the Contractor. Reduction of the sum of Rs.25,000/- from the original claim cannot be said to be illegal or perverse.

19. The case does not fall within any one of the exceptions provided under Section 34 of the Act. Hence for all the aforesaid reasons, both the applications preferred under Section 34 of the Act are dismissed. Pending applications, if any, also stand disposed of accordingly.

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

Ghan Shayam ...Appellant.

Versus

State of Himachal Pradesh and another ...Respondents.

LPA No.158 of 2011
Decided on: 29.02.2016

Constitution of India, 1950- Article 226- Writ petitioner approached the Court to seek direction against the respondent to regularize his services with 1996 with all consequential benefits and release the arrears of payment- prior to this, writ petitioner has already approached the Administrative Tribunal vide OA No. 143 of 1991 decided on 3.12.1996- OA was disposed of with the observations that the writ petitioner had already completed 10 years of the services on December 31, 1995 as Pump Operator and as per the statement of learned Additional Advocate General his services for regularization will be considered from 1996- relying upon the order of the Administrative Tribunal the writ petition was dismissed by the Court- held, that the Writ petitioner could not have claimed any relief which was not prayed in that lis as the relief claimed was hit by Order 2 Rule 2 CPC read with Section 11 CPC- Writ Petition was rightly dismissed- appeal also dismissed.

For the appellant: Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and order, dated 5th May, 2010, made by the Writ Court in CWP (T) No. 5163 of 2008, titled as Shri Ghan Shyam versus State of Himachal Pradesh and another, whereby the writ petition filed by the appellant-writ petitioner came to be dismissed (for short "the impugned judgment").

2. It is apt to reproduce the reliefs sought by the appellant-writ petitioner in OA No. 1287 of 1998, which was transferred to this Court and came to be diarized as CWP (T) No. 5163 of 2008, herein:

> *"(i) That the respondents may very kindly be directed to regularise the services of the applicant w.e.f. due date i.e. the year 1996 with all consequential benefits.*
>
> *(ii) That the respondents may further be directed to release the running pay scale to the applicant from 5.9.89 to 31.12.1995 and the arrears of payment be released with interest.*
>
> *(iii) That the respondents may further be directed to produce the entire record pertaining to the case of the applicant for the kind perusal of this Hon'ble Tribunal.*
>
> *(iv) Any other order/relief to which this Hon'ble Court deems just and proper in the facts and circumstances of the case may also be passed in favour of the applicant and against the respondents."*

3. It would be profitable to record herein that the appellant-writ petitioner had already approached the H.P. State Administrative Tribunal (for short "the Tribunal") by the medium of OA No. 143 of 1991, which was decided by the learned Tribunal on 3rd December, 1996, and the following order came to be passed:

> *"The original record produced by the learned Additional Advocate General which shows that the applicant has completed 10 years service on December 31, 1995 as Pump Operator. From 1996 his case will be considered for regularisation. He further submits that none of the applicant's junior has been regularised.*

In these circumstances no other and further order needs be passed. The application is finally disposed of in above referred to terms."

4. The grievance of the appellant-writ petitioner as on 3rd December, 1996, stands clinched by the said order, dated 3rd December, 1996.

5. The appellant-writ petitioner cannot claim any relief, which he has not prayed in that lis or which had accrued to him or was available and, if prayed, was not granted, in view of the mandate of the provisions contained in the Code of Civil Procedure (for short "CPC"), particularly, Order 2 Rule 2 CPC read with Section 11 CPC.

6. The question is – whether the appellant-writ petitioner has sought for any relief which has accrued to him in terms of the order, dated 3rd December, 1996? No such relief has been sought for.

7. Having said so, the Writ Court has rightly made the impugned judgment, needs no interference.

8. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications.

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

Rajinder Rustagi .....Petitioner
Versus
Johri Mal Rustagi and others .....Respondents

CMPMO No. 343/2015
Decided on: 29.2.2016

Code of Civil Procedure, 1908- Order 1 Rule 10- Section 151- Respondent No.1 filed a suit for declaration claiming ownership of the suit land- petitioner filed an application for impleading him as party in the civil suit- defendant contested the application pleading that petitioner was a stranger to the suit land – he had no right, title or interest over the same- application was dismissed by the trial Court- held that Court had rightly concluded that if petitioner is not joined as a necessary or proper party, consequence will ensue - petitioner will not be bound by the decree and will be free to question its legality/propriety in appropriate proceedings- petition dismissed. (Para-2 to 6)

Cases referred:
Firm of Mahadeva Rice and Oil Mills & ors v. Chennimalai Goundar, AIR 1968 Madras 287
Amit Kumar Shaw v. Farida Khatoon, (2005) 11 SCC 403

For the Petitioner : Mr. D.K. Verma and Mr. K.K. Verma, Advocates.
For the Respondents : Mr. Ajay Sharma, Advocate, for respondent No. 1.
Ms. Meera, vice Counsel for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This petition is instituted against Order dated 15.7.2015 rendered by learned Civil Judge (Junior Division)-I, Dharamshala, District Kangra, Himachal Pradesh in application CIC No. 87 in CS No. 30/2010

2. “Key facts" necessary for the adjudication of the present petition are that respondent No. 1 has filed a suit for declaration before Civil Judge (Junior Division)-I, Dharamshala, District Kangra, claiming ownership of the land comprising in Khasra Nos. 920, 921, 922, 929, 930, and 941 Kita 6 of Khata No. 462, Khatauni No. 1184. Petitioner filed an application under Order 1 Rule 10 read with Section 151 CPC for impleading him as party in the civil suit No. 30/2010. Application was contested by the defendant Shri Johri Mal. According to the averments made in the reply, applicant was stranger to the suit land and he had no right, title or interest over the suit land and thus, he was not a necessary party. Application was dismissed by the learned Civil Judge (Junior Division)-I on 15.7.2015. Hence, this petition.

3. Civil suit was instituted in the year 2010. According to the averments made in the application under Order 1 Rule 10 CPC, he came to know about pendency of the suit only on 28.2.2015. Predecessor-in-interest of the applicant Shri Daulat Ram had purchased the land in open auction on 22.8.1958 in lot Nos. VI and VIII. Possession was delivered to Daulat Ram. He raised construction. He expired on 19.4.1975. It is also averred in the application that there is a common path in Khata No. 462. Learned Civil Judge (Junior Division) has rightly come to the conclusion that if plaintiff is not joined as a necessary or proper party to a suit, consequence will ensue and he will suffer. Application preferred by the petitioner has been opposed for impleadment under Order 1 Rule 10 CPC, thus, he would not be bound by the decree and would be free to question its legality/propriety in appropriate proceedings.

4. A party seeking impleadment to a suit is required to demonstrate that he has a direct and substantive interest in the subject matter and his interest would be affected directly by the decree that may be passed in the suit or that his presence is must for answering issues arising in the suit. Thus, there is neither any illegality nor any perversity in the orders passed by the Civil Judge (Junior Division).

5. The learned Single Judge of Madras High Court in **Firm of Mahadeva Rice and Oil Mills and others v. Chennimalai Goundar** reported in AIR 1968 Madras 287, has laid down following tests to be followed while adding parties:

> “(5) ….. I am of the opinion that the following tests may be formulated usefully as a guidance in the case of adding of parties under O. 1, R. 10, Civil P.C.: (1) if, for the adjudication of the “real controversy” between the parties on record, the presence of a third party is necessary, then he can be impleaded. (2) it is imperative to note that by such impleading of the proposed party, all controversies arising in the suit and all issues arising thereunder may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided in the pending suit itself; (3) The proposed party has a defined, subsisting, direct and substantive interest in the litigation, which interest is either legal or equitable and which right is cognisable in law; (4) Meticulous care should be taken to avoid the adding of a party if it is intended merely as a ruse to ventilate certain other grievances of one or the other of the parties on record which is neither necessary or expedient to be considered by the Court in the pending litigation; and (5) It should always be remembered that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by Courts by adding a new party whose interest has no nexus to the subject-matter of the suit.…”

6. Their Lordships of the Hon'ble Supreme Court in **Amit Kumar Shaw v. Farida Khatoon** reported in (2005) 11 SCC 403 have held that a person may be added as a party to the suit in following two cases i.e. (1) when he ought to have been added as a plaintiff or defendant, and is not joined so, or (2) when, without his presence, question in suit can not be completely decided. There is neither any illegality nor any perversity in the order passed by the learned Civil Judge (Junior Division)-I, Dharamshala.

7. Accordingly, there is no merit in the present petition and the same is dismissed, so also the pending applications, if any.

****

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

Arjun Jain and others ....Petitioners.

Versus

Ajay Kumar and others ....Respondents.

CMPMO No.110 of 2015
Date of decision: 01.3.2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a civil suit for seeking permanent prohibitory injunction for restraining the defendants from interfering with the suit land- subsequently, an application for amendment to incorporate the plea that defendants had encroached upon the suit land during the pendency of the suit was filed, which was allowed by the trial Court- aggrieved from the order, defendants preferred a revision petition pleading that plaintiff was aware of the encroachment prior to the institution of the suit and the application was filed at a belated stage- it was also contended that report of demarcation was not attached to the application- held, that construction had started subsequent to filing of the suit- therefore, this plea cannot be accepted- merely because, report of demarcation was not attached to the application is not sufficient to dismiss the same- revision dismissed.

For the Petitioners: Mr. Ashok K. Tyagi, Advocate.
For the Respondents: Mr. Anil God, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. ***(Oral)***

The respondents herein are plaintiffs in Civil Suit No. 72/1 of 2013 instituted at their instance before the learned Civil Judge (Jr. Division), Nahan. The suit aforesaid instituted before the aforesaid Court, initially as apparent on a reading of a copy of plaint as stands appended with the petition ventilated therein the relief of permanent prohibitory injunction. The relief of permanent prohibitory injunction initially ventilated therein stands anchored upon threatenings of invasion or threatenings meted by the defendants/petitioners herein to the respondents herein/plaintiffs qua encroachment over/upon the suit land whereupon the latter claim to be exclusive possession thereof as owners. A close reading of the plaint upsurges the prime fact of the petitioners herein/defendants in the civil suit intending to encroach or invade upon a portion of the suit land. The portion earmarked in the site plan appended to the plaint came to be purportedly subsequent to the institution of the suit subjected to construction at the instance of the

petitioners herein. The respondents herein/ plaintiffs in the civil suit hence were led to institute an application under Order 6 Rule 17 C.P.C. before the learned trial Court with a prayer therein for permission or leave being granted by it to them for incorporating in the plaint para 4(a) besides prayed for leave from it for incorporation therein of the reliefs prayed for in the apposite application. The relevant paragraphs of the apposite application leave whereof from the learned trial Court for their incorporation in the plaint stood canvassed stand extracted hereinafter:

> *"4-A Despite the facts, narrated in the preceding paras above and despite subsistence of injunctory orders which were passed by this Ld. Court qua the suit land on dated 22/03/2014, the Defendants/Respondents have illegally and forcibly done construction over the suit land on the part as shown by the red ink in the site plan/layout plan attached with the Original Plaint. The same is required to be demolished and vacant possession thereof is required to be delivered to the Applicants/Plaintiffs".*
>
> *(b-i) Despite the prayer in para above and inspite of injunctory orders passed by this learned Court which is still subsisting and in the light of construction raised by the Defendants/Respondents, now the order of mandatory injuction may kindly be passed directing the Defendants/Respondents to demolish their construction which they have raised illegally over the suit land comprised in Khasra No. 487/342/282, during the pendency of the suit and pendency of the injunctory orders qua the suit land, the construction to be demolished is depicted in red in the already appended site plan dated 28/10/2013 and after demolition, possession of the suit land may kindly be delivered to the Applicants/Plaintiffs."*

The application aforesaid seeking the incorporation in the plaint of the hereinabove extracted amendments stood allowed by the learned trial Court. The defendants-petitioners herein stand aggrieved by the aforesaid order. The short submission addressed by the learned counsel for the petitioner in impugning the apposite order stands anchored upon the factum of the plaintiffs/respondents herein being, at the outset or at the stage prior to the institution of the suit, aware of the factum of encroachment by the defendants on over/upon the suit property depicted in the site plan/layout plan appended to the plaint. Hence, their omission to thereat incorporate the reliefs as embodied in the application under Order 6 Rule 17 now baulks them at this belated stage to seek leave of the learned trial Court for their incorporation in the plaint. However, the aforesaid submission neither has force rather is rudderless especially in view of the evident fact emerging from a close reading of the pleadings initially constituted in the plaint qua the petitioners/defendants merely threatening to invade the settled possession of the plaintiff over/upon the suit land denoted in the site plan/layout plan assertion whereof qua their possession thereof rests upon their exclusive title thereon. The construction at the instance of the petitioners herein/defendants over/upon suit land had not commenced at that stage. Commencement of construction over/upon the suit land at the instance of the petitioners herein occurred subsequent to the institution of the plaint, hence when the act of raising of construction on the land falling to the purported exclusive possession and title of the plaintiffs/ respondents herein occurred subsequent to the institution of the plaint, it obviously bars the learned counsel for the petitioners to canvass qua the fact aforesaid falling within the knowledge of the plaintiffs at the stage contemporaneous to the institution of the plaint, for as such theirs standing enjoined to at that stage incorporate the said fact in the plaint. Moreover, the learned counsel for the petitioners herein cannot also contend qua any omission thereof precluding the plaintiffs to now seek their incorporation in the plaint nor is it open for the learned counsel for the petitioners to contend with any force before this

Court qua the factum of the plaintiffs/respondents herein standing thwarted to incorporate the subsequently occurred facts in the plaint for claiming concomitant reliefs in consonance therewith being prayed to be awarded /afforded in their favour. Moreover, any non-appending with the plaint of the apposite report of demarcation, if any, of the suit property is of no consequence as the site plan/layout plan depicting the site/place where the defendants/petitioners herein are threatening to encroach upon, stood appended with the plaint which site is the one whereon construction subsequently stands commenced by the defendants especially when proof thereof can stand elicited from the plaintiffs/respondents herein during the progress of or during the trial of the suit besides when the plaintiffs respondents herein may concert to adduce clinching proof qua an apposite issue cast thereupon, by theirs moving an appropriate application before the learned trial Court for the appointment of a Local Commissioner for demarcating the contiguous boundaries of the parties at contest. Consequently, the impugned order is affirmed and maintained and the instant petition stands dismissed. All pending applications also stand dismissed.

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

Ganesh Paul ...Petitioner
Versus
Kanta Devi and others ...Respondents

CMPMO No. 201/2011
Reserved on: 29.2.2016
Decided on: March 1, 2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff filed a suit for declaration that he and proforma defendants are joint owners in possession- subsequently, plaintiff filed an application for amendment which was dismissed by the trial Court- application was filed after framing the issues- plaintiff had not shown as to why amendment could not be sought at the earlier stage of trial- the Court has to arrive at a conclusion that despite due diligence, plaintiff could not have raised the matter before the commencement of the trial- there is no illegality or perversity in the order passed by the trial Court. (Para-2 to 6)

Case referred:
State of Madhya Pradesh v. Union of India and another, (2011) 12 SCC 268

For the Petitioner : Mr. Shyam Chauhan, Advocate.
For the Respondents : None for the respondents.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This petition is instituted against Order dated 2.4.2011 passed by learned Civil Judge (Senior Division), Una, District Una, HP, in Civil Misc. Application No. 56-VI-2011.

2. “Key facts" necessary for the adjudication of the present petition are that petitioner-plaintiff field a suit for declaration to the effect that he and proforma defendants are joint owner-in-possession of the land measuring 5-36-36 hectares. Suit was contested by the respondent-defendant by filing written statement. Plaintiff filed an application under Order 6 Rule 17 CPC seeking amendment to the plaint. Application was contested by the defendants. Learned Civil Judge (Senior Division) dismissed the application on 2.4.2011. Hence, this petition.

3. According to the defendants, application was filed at a very belated stage. Issues were framed by the learned trial Court on 22.2.2010.

4. Petitioner-plaintiff has not shown why amendment could not be sought at the early stage of trial. No grounds have been made out for seeking amendment. Court has to arrive at a conclusion that despite due diligence, plaintiff could not have raised the matter before the commencement of trial. Application, in this case, besides being belated is also an afterthought. There is neither any illegality nor perversity in the order passed by learned trial Court.

5. Their Lordships of the Hon'ble Supreme Court in **State of Madhya Pradesh v. Union of India and another** reported in (2011) 12 SCC 268 have held that where an application is filed after the commencement of the trial, it must be shown that despite due diligence, said amendment could not have been sought earlier. Their lordships have held as under:

> 7. The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> 8. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

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

LPA No. 63 of 2015 a/w LPAs No. 64, 111, 119 120 of 2015, 123 and 124 of 2015.
Date of decision: 1st March, 2016.

LPA No. 63 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Kanta Bhardwaj and another	*...Respondents.*
LPA No. 64 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Anita Thakur and others	*...Respondents.*
LPA No. 111 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Vijay Kumar Sharma	*...Respondent.*
LPA No. 119 of 2015.	
H.P. Housing and Urban Development Authority& Anr.	*.....Appellants*
Versus	
Het Ram	*...Respondent.*
LPA No. 120 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Rajesh Kumar and others	*...Respondents.*
LPA No. 123 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Om Parkash and others	*...Respondents.*
LPA No. 124 of 2015.	
H.P. Housing and Urban Development Authority	*.....Appellant*
Versus	
Nisha Sharma and another	*...Respondents.*

Constitution of India, 1950- Article 226- Appeals preferred against the judgment passed by the Learned Single Judge in different writ petitions- learned Counsel for the parties stated at bar that judgment may be set aside, the appeals may be accepted and the cases may be remanded- judgment set aside and cases remanded to the Tribunal for deciding the matter afresh. (Para-2 to 6)

For the appellant(s): Mr. C.N. Singh, Advocate.

For the respondent(s): Mr. Sunil Mohan Goel, Advocate, for respondent No. 1 in LPAs No.63 and 64 of 2015.
Mr. Shrawan Dogra, Advocate General with M/s Anup Rattan and Romesh Verma, Addl. AGs and Mr. J.K. Verma, Deputy Advocate

General, for respondent No. 2 in LPAs No. 63 and 64 of 2015 and for respondents No. 4 and 5 in LPA No. 119 and 120 of 2015, 123 and 124 of 2015.

Mr. Dilip Sharma, Sr. Advocate with Ms. Nishi Goel, Advocate, for the respondent in LPA No. 111 of 2015.

Mr. A.K. Gupta, Advocate for the respondent in LPA No. 119 of 2015 and for respondents No. 1 to 3 in LPA No. 120 of 2015.

The following judgment of the Court was delivered:

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

LPA No. 63 of 2015 is directed against the judgment and order dated 6.4.2015 passed by the learned Single Judge in CWP No. 7771 of 2010, LPA No. 64 of 2015 is directed against the judgment and order dated 6.4.2015 passed by the learned Single Judge in CWP No. 7772 of 2010, LPA No. 111 of 2015 is directed against the judgment and order dated 13.5.2015 passed by the learned Single Judge in CWP No. 7291 of 2011, LPA No. 119 of 2015 is directed against the judgment and order dated 13.5.2015 passed by the learned Single Judge in CWP No. 588 of 2011, LPA No. 120 of 2015 is directed against the judgment and order dated 13.5.2015 passed by the learned Single Judge in CWP No. 6945 of 2010, LPA No. 123 of 2015 is directed against the judgment and order dated 13.5.2015 passed by the learned Single Judge in CWP No. 7162 of 2010 and LPA No. 124 of 2015 is directed against the judgment and order dated 13.5.2015 passed by the learned Single Judge in CWP No. 6 of 2011, whereby writ petitions filed by the petitioners came to be allowed, for short the impugned judgments, on the grounds taken in the memo of appeals.

2. All these appeals involve the common questions of law and facts, hence taken up together for disposal.

3. It appears that the judgments are based on the judgment made by the learned Single Judge in different writ petitions. At this stage, the learned counsel for the parties stated at the Bar that the impugned judgments may be set aside and the appeals may be accepted and the cases may be remanded. Their statements are taken on record.

4. Accordingly, the appeals are accepted and the impugned judgments are set aside and the cases are remanded to the Tribunal, for deciding afresh.

5. Parties are directed to cause appearance before the Tribunal on **1st April, 2016.**

6. All the LPAs are disposed of alongwith all pending applications, if any.

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

Hari Nand ...Appellant

Versus

HP Road Transport Corp and another ....Respondents.

LPA No. 177 of 2011.

Date of decision: 1st March, 2016.

For the appellant: Ms. Komal Kumari, Advocate.
For the respondents: Mr. Adarsh Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This LPA is directed against the judgment and order dated 15.3.2011, passed by the learned Single Judge in CWP (T) No. 9226 of 2008, whereby the writ petition came to be dismissed, for short the impugned judgments, on the grounds taken in the memo of appeal.

2. It appears that the petitioner was appointed as Conductor and involved in criminal case and was shown door. On acquittal, he was appointed afresh and accepted the fresh appointment without any demur. He had filed writ petition taking into account his service which he had already rendered before he was appointed afresh, which was rejected by the learned Single Judge, as stated supra.

3. The learned Single Judge has rightly made the discussion in para 3 of the impugned judgment, which is well reasoned, needs no interference.

4. Accordingly, the impugned judgment is upheld and the appeal is dismissed alongwith all pending applications, if any.

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

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

Cr. Appeal No. 365/2015
Reserved on: 29.2.2016
Decided on: March 1, 2016

N.D.P.S. Act, 1985- Section 20- Accused was seen sitting in front of shop- he got frightened and started running towards bus stand- police got suspicious and apprehended the accused- search of the bag was conducted during which 350 grams of charas was recovered- accused was convicted and sentenced by the trial Court- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. (Para-17 to 22)

For the appellant : Mr. Balwant Singh Thakur, Advocate.
For the respondent : Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 27.3.2015 rendered by learned Special Judge (I), Una (HP) in Sessions Trial No. 04/2014, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo four years rigorous imprisonment with a fine of Rs.30,000/-, and, in default of payment of fine, to further undergo simple imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that on 28.10.2013 late in the night around at 11.30 pm, a police party left the police station Sadar Una for new and old bus stands, Takka Road and Khad Par, Una for patrolling. At around 12.30 pm, while police party was proceeding towards bus stand from petrol pump near the bus stand, Una, accused was seen sitting in front of closed Kapila confectionery shop, who on seeing the police got frightened and started running towards bus stand. He was nabbed by the police around 25-30 steps ahead in front of the shop of Radha Krishan (PW-8). PW-13 SI Durjesh Kumar called two independent witnesses Radha Krishan (PW-8) and Rohit Sharma (PW-9) and in their presence asked his name and whereabouts. Accused was holding a black coloured bag, on which words 'D-Diesel' were inscribed. On opening the black coloured bag, a polythene bag was found containing stick shaped hard black substance. It was found to be Charas. It weighed 350 grams. Contraband was put in the polythene bag in the same manner. Bag was wrapped in a cloth parcel and sealed with six impressions of seal 'A'. It was taken into possession vide seizure memo Ext. PW-8/B. IO filled in columns No. 1 to 8 of the NCB form, Ext. PW-1/C and embossed impression of seal 'A'. IO prepared Rukka Ext. PW-13/A and sent the same through HHC Satwinder Singh to Police Station Una, on the basis of which FIR Ext. PW-1/B was recorded by PW-1 Sh. K.L. Beri. IO prepared site map Ext. PW-13/B. IO produced the case property, NCB form in triplicate and accused before Inspector/ SHO K.L. Beri for resealing process of sealed parcel containing Charas. PW-1 K.L. Beri checked the parcel and resealed it with four seal impressions of 'T' and filled in columns No. 9 to 11 of NCB form, Ext. PW-1/C and further embossed seal impression 'T' on it. PW-1 K.L. Beri deposited the case property with MHC Ravi Kant (PW-11). On 30.3.2013, PW-11 HHC Ravi Kant sent the case property alongwith copy of FIR and docket to FSL Junga through PW-10 HHC Satwinder Singh vide RC No. 175/13 (Ext. PW-8/B). Investigation was completed. Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 13 witnesses in order to prove its case against the accused. Accused was also examined under Section 313 CrPC. Defence of accused was of denial simpliciter and that he was innocent and falsely implicated in the case. Accused was convicted and sentenced as noticed herein above. Hence, this appeal.

4. Mr. Balwant Singh Thakur, Advocate, has vehemently argued that the prosecution has failed to prove case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General has supported the judgment of conviction.

6. PW-1 K.L. Beri testified that on 28.10.2013 at 2.10 am, HHC Satwinder Singh brought rukka Ext. PW-1/A to the Police Station on the basis of which he got recorded FIR Ext. PW-1/B on the official computer. On the same day at about 4.30 am, ASI

Durjesh Kumar has produced one sealed parcel sealed with six seals of impression 'A' allegedly containing 350 grams of charas alongwith NCB form in triplicate, sample seals of impression 'A', case file and accused. He resealed the parcel with six seals of impression 'T' and filled up column No. 9 to 11 of NCB form Ext. PW-1/C. He embossed impression of seal 'T' on NCB form. He handed over sealed parcel alongwith other documents and sample of seals to MHC Ravi Kant. He issued certificate Ext. PW-1/E. In his cross-examination, he has admitted that in NDPS cases, every FIR is treated as a special report. It is mandatory to send a copy of it to the nearest Ilaka Magistrate. He has admitted that there was no such entry in Column No. 15 of FIR Ext. PW-1/B.

7. PW-4 Constable Rajesh Kumar testified that on 28.10.2013, he was present at Police Station Sadar, Una. Around midnight at 2.30 am, MHC handed over to him two copies of FIR No. 331/13. One FIR was delivered by him to SP Una and second one was delivered to CJM, Una at their respective residences on the same night.

8. PW-5 LHC Mool Raj deposed that on 25.11.2013, SHO Police Station Sadar Una had deputed him to FSL Junga to collect FSL report pertaining to case FIR No. 331/13. He collected FSL report in sealed envelope alongwith case property and returned to Police Station Sadar Una on 27.11.2013 and handed over sealed cover containing FSL report and another sealed parcel to MHC Police Station Sadar, Una.

9. PW-8 Radha Krishan deposed that he was running a small confectionery shop on the entrance gate of bus stand, Una. During the year 2013, somewhere during summer the police party came to his shop and told him that Bhang in the shape of black coloured hard substance had been recovered from the accused. Accused was brought to his shop by the police later on. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that it was last year in the month of October when police party came to his shop. He denied that during midnight at 12.30 am, he had seen the police chasing the accused. He denied that accused was nabbed by the police in his presence. He admitted that in his presence and that of Rohit, police questioned the accused to disclose the name as Kartik son of Joginder Singh resident of VPO Bhanala, Tehsil Shahpur, District Kangra. He denied that thereafter police opened the black coloured carry bag being carried by accused with words 'D-Diesel' inscribed, in his presence and that of Rohit, upon which one polythene bag came out which contained black coloured hard substance in the shape of slides. He volunteered that polythene bag containing black coloured hard substance in the shape of slides/Bhang was brought to him prior to the time when accused was brought. He admitted that police in his presence on smelling found black coloured hard substance slides to be charas. He admitted that Charas was weighed and found to be 350 grams. He admitted that police in his presence and that of Rohit had put charas back in same manner in the polythene bag. However, he denied that polythene bag was put in black coloured carry bag having words 'D-Diesel' inscribed thereupon and sealed with six seal impressions of 'A' and put in white cloth parcel. Volunteered that polyphone bag containing charas was sealed in white cloth parcel Ext. P-1, which was same on which he has signed in red circle. He also admitted that another witness Rohit had appended signatures thereupon. He had seen black coloured bag with words 'D-Diesel' inscribed thereupon but this bag was not there when charas contained in polythene bag was about to be sealed. Black coloured bag was not brought in his presence. He found parcel Ext. P-1 already stitched and sealed when his signatures were obtained. He was not aware as to when this bag was put in sealed parcel. He admitted that on seal impression Ext. PW-8/A he had appended his signatures. He denied that seal 'A' after use was handed over to him. He admitted that seizure memo Ext PW-8/B was prepared in his presence vide which parcel Ext. P-1 was taken into possession by the police. He admitted that he has put signatures on the seizure memo alongwith Rohit.

He appended his signatures on the documents without going through them. He could not give any explanation why he signed the documents without going through the same. In his cross-examination by the learned defence counsel on behalf of the accused, he denied that all the shops around bus stand remained open. However, he admitted that buses kept plying throughout the night. He volunteered that only 3-4 shops generally remain open during night hours.

10. PW-9 Rohit Sharma deposed that he was having a confectionery shop at the entrance gate of the bus stand. Last year on 28th October, around 12.30 midnight police brought charas and told that the same had been recovered from one person and after 1 and ½ hours, accused was produced before him. Police told that charas shown to him had been recovered from him. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that he has seen the police chasing the accused at around 12.30 am. He denied that accused was nabbed by the police in his presence. He admitted that in his presence and that of Radha Krishan, police questioned accused to disclose his name. He denied that thereafter police opened black coloured bag with 'D-Diesel' inscribed thereupon in his presence and that of Radha Krishan being carried by the accused upon which one polythene bag came out which contained black coloured hard substance in the shape of slides. Volunteered that police weighed the black coloured substance i.e. Charas in his presence in the shop of Radha Krishan. He admitted that police in his presence on smelling found black coloured substance to be charas. He also admitted that charas weighed 350 grams and in his presence, had put that charas back in the same manner in the polythene bag and then into black coloured bag which was sealed thereafter in a white cloth parcel. Volunteered that bag was sealed in Police Station. He identified his signatures on Ext. P-1. He admitted that on sample impression Ext. PW-8/A, he had appended his signatures alongwith that of Radha Krishan and accused. He denied that seal impression 'A' after use was handed over to Radha Krishan. He admitted that seizure memo Ext. PW-8/B was prepared in his presence, vide which Ext. P-1 and other documents were taken into possession. He appended his signatures on the seizure memo in red circle 'A' alongwith that of Radha Krishan. He appended his signatures on documents without going through their contents. In his cross-examination by the learned defence counsel, he deposed that signatures on memo and cloth piece were obtained from him in the Police Station on the next day where he was called again.

11. PW-10 HHC Satwinder Singh deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. IO handed over to him one Rukka Ext. PW-1/A to be taken to the Police Station. He handed over the Rukka to MHC Police Station, Sadar, Una, on the basis of which, FIR Ext. PW-1/B was recorded.

12. PW-11 Ravi Kant deposed that on 28.10.2013, Inspector/ SHO Sh. K.L. Beri deposited with him at 5.10 am six impressions each of seal 'A' and 'T' alongwith NCB form in triplicate, sample impressions of seals 'A' and 'T' and accordingly, he made entry in the malkhana register No. 19 at Serial No. 1394/13. On 30.10.2013, as per RC No. 175/13, he handed over case property and documents to HHC Satwinder Singh to deliver the same to FSL Junga for chemical examination. On 27.11.2013, HHC Mool Raj brought FSL report and case property and deposited the same with him.

13. PW-12 HC Vijay Kumar also deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. Case property was produced before the Court during the course of examination-in-chief of PW-12 HC Vijay Kumar.

14. PW-13 SI Durjesh Kumar testified that he alongwith patrolling party was proceeding towards bus stand from petrol pump. In front of Kapila Confectionery shop which was closed at that time, one boy was found sitting in front of shop. On seeing the police party, the boy got frightened and started running towards bus stand and was nabbed by the police at abut 25-30 steps ahead in front o shop of Radha Krishan. He called two independent witnesses namely Radha Krishan and Rohit Sharma and in their presence inquired name and whereabouts of the accused. Accused was carrying a black coloured bag with words 'D-Diesel' inscribed thereupon. On opening the bag, he found a polythene bag which was containing stick shaped hard substance. It was found to be charas. It weighed 350 grms. He filled in columns No. 1 to 8 of NCB form, Ext. PW-1/C. He prepared Rukka Ext. PW-1/A. It was sent to the police station Sadar, Una through HHC Satwinder Singh. Spot map Ext. PW-13/B was prepared by him. In his cross-examination, he has admitted that no official /independent witnesses were searched or offered for search prior to making search of bag of accused. Before the search of the bag of accused, he was not informed of his right in terms of section 50 of the Act.

15. PW-8 Radha Krishan and PW-9 Rohit Sharma have not supported the case of the Prosecution in its entirety. They were declared hostile and were cross-examined. However, fact of the matter is that they have identified their signatures on Ext. PW-1 and Ext. PW-8/A. However, PW-9, Rohit Sharma, in his cross-examination, has deposed that the signatures on memo and cloth piece were obtained from him in the Police Station on the next day where he was again called.

16. PW-11 HHC Ravi Kant testified that on 28.10.2013, Inspector K.L. Beri deposited at 5.10 am one sealed parcel containing six seal impressions 'A' and 'T' alongwith NCB form in triplicate. Accordingly, he made entries in Malkhana Register No. 19 at Serial No. 1394/13. Case property was sent through HC Satwinder Singh to FSL Junga for chemical examination. PW-10 Satwinder Singh deposed that MHC Ravi Kant on 30.10.2013 handed over one sealed parcel sealed with six impressions of 'A' and 'T' vide RC No. 175/13. Accordingly, he deposited the same with FSL Junga. Case property was produced while recording statement of PW-12 HC Vijay Kumar.

17. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

18. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

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

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

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

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

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

27.18. Safe custody of property.-

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

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

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

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its

closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

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

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

23. In view of the discussion and analysis made hereinabove, the present appeal is allowed. Judgment dated 27.3.2015 rendered by learned Special Judge (I), Una (HP) in Sessions Trial No. 04/2014 is set aside. Accused is acquitted of the offence under Section 20 of the Act. He be released forthwith, if not required by the Police in any other case. Fine amount, if any deposited by him, be refunded to him. Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned, forthwith.

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

Lala Ram and others .....Petitioners.

Versus

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

CWP No.328 of 2016.
Judgment reserved on: 29.02.2016.
Date of decision: March 01,2016.

Constitution of India, 1950- Article 226- Respondents issued an advertisement for letting out space in Lower Paddal at Mandi for setting of temporary 'Mela' Shops/ Hangers/Pandals during the international 'Shivratri' fair- condition No. 2 provided that only those bidders are eligible who have already executed at least one similar work in State/National level fair- petitioners filed a Public Interest Litigation pleading that this condition was designed to accommodate some favourite of the respondents and to ensure that the petitioners and similarly situated small traders are ousted from participating in the tender- public would be deprived of the goods which are being manufactured and sold by local artisans and traders- respondents raised a preliminary objection regarding the maintainability – held, that the writ petition styled as a Public Interest Litigation but was filed to foster personal disputes or vendetta cannot be regarded as a Public Interest Litigation- Court has to see that the ugly private malice/vested interest is not lurking in the veil of Public Interest Litigation – the writ petition has been filed to espouse the private commercial interests of the traders- further, Courts have hardly any role to play in the process of tender except for striking down such action of the executive as is proved to be arbitrary or unreasonable- there is increase of only 10% which cannot be said to be arbitrary or unreasonable- name of the person who was to be benefited by tender condition has not been specified- merely because, petitioners do not fulfill the criterion does not mean that criterion has been designed to oust the petitioner- tenders have not been opened and the writ petition is pre-mature- petition dismissed.

(Para-5 to 16)

Cases referred:

Devinder Chauhan Jaita vs State of Himachal Pradesh and others, I L R 2014 (VI) HP 755

Vijay Kumar Gupta versus State of Himachal Pradesh and others, ILR 2015 (I) HP 351 (D.B.)

Anurag Sharma and another vs State of Himachal Pradesh and others, I L R 2015 (IV) HP 351 D.B.

For the Petitioners : Mr. Ashwani Pathak, Senior Advocate with Mr.Sandeep K.Sharma, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioners are aggrieved by certain terms of the tender notice issued by the "Shivratri Fair Committee, Mandi" for letting out space in Lower Paddal at Mandi for setting up of temporary 'Mela' Shops/ Hangers/Pandals during the international 'Shivratri'

fair, 2016, with effect from 08.03.2016 to 14.03.2016, more particularly, the conditions No.2 and 3 of the tender which read thus:-

> *"2. Only those bidders are eligible who have already executed at least one similar work in State/National level fair. The bidder will have to enclose an affidavit/self declaration in this regard alongwith the quotation.*
>
> *3. Successful bidder shall be permitted to rent out shops in structure No.1 to 5 to desirous traders and he shall be permitted to collect rent for the same. Further successful bidder shall issue ID cards to traders which shall be displayed on the person who is sitting in the shop. In case of failure of compliance security of bidder shall be forfeited."*

2. The petitioners claim to have filed this petition as Public Interest Litigation as also to safeguard the individual interest by alleging that the aforesaid conditions of the tender have been intentionally designed and tailor-made to accommodate some favourite of the respondents and at the same time to ensure that the petitioners and similarly situated small traders are ousted from participating in the tender which amounts to infringement of their right of free trade and business and thus the same is violative of the provisions of the Constitution. It is further claimed that the petition has also been filed in public interest as it is ultimately the public at large which would be deprived of the goods which are being manufactured and sold by the local artisans and traders and on such pleas the petitioners have sought quashing of the tender notice issued on 04.02.2016.

3. The respondents have filed reply, wherein it is stated that the decision to invite tender for fabrication of water-proof/fire- proof stalls was taken in order to ensure better facilities to the shopkeepers, so that their business does not suffer due to inclement weather. It is also averred that in the previous year the ground was let out at approximately Rs.1,33,00,000/- which now has been enhanced to approximately Rs.1,45,00,000/- and in this manner the total hike is hardly about 10% and the same, therefore, cannot in any manner be said to be exorbitant.

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

4. Shri Shrawan Dogra, learned Advocate General, has at the outset, raised preliminary objection regarding the maintainability of the writ petition as a "Public Interest Litigation". According to him, this petition has been filed for redressal of individual(s) disputes and cannot, therefore, be maintained as Public Interest Litigation.

5. It is more than settled that merely because a petition is styled as a Public Interest Litigation but infact is nothing more than a camouflage to foster personal disputes or vendetta, the same cannot be regarded as a Public Interest Litigation. There has to be a real and genuine public interest involved in a litigation and there must be concrete and credible basis for maintaining a cause before the Court and not merely an adventure of knight errant borne out of wishful thinking. Only a person acting bonafide and having sufficient interest in the proceedings of PIL will alone have a locus-standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights, but not a person(s) for personal gain or private profit or any other oblique consideration.

6. Public Interest Litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest

seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens.

7. The attractive brand name of Public Interest Litigation cannot be allowed to be used for suspicious products of mischief. This has so been held by the Hon'ble Supreme Court in its various pronouncements and the same have been repeatedly reiterated and followed by this Court in a batch of writ petitions, *CWP No.7249/2010 titled 'Devinder Chauhan Jaita versus State of Himachal Pradesh and others', being lead case, decided on 03.12.2014, another batch of writ petitions, CWP No.9480/2014 titled 'Vijay Kumar Gupta versus State of Himachal Pradesh and others', being the lead case, decided on 09.01.2015, CWP No.2775/2015 titled 'Anurag Sharma and another versus State of Himachal Pradesh and others', decided on 07.07.2015.*

8. Adverting to the contents of this writ petition, it would be seen that there is no public interest involved in the present writ. This would be evident from the fact that out of the six petitioners, two are from State of Punjab, one from District Kullu and only three of them are otherwise residents of District Mandi and have joined hands only to espouse their commercial interests and the same has nothing to do with the interest of the General Public. Therefore, the instant petition cannot be treated as a Public Interest Litigation and can only be considered as a Private Interest Litigation.

9. Mr. Ashwani Pathak, Senior Advocate has then made number of submissions which we will deal in seriatim. It is vehemently argued that the conditions in the tender are arbitrary and have been tailor-made to dissociate the local businessmen from participating in the bid and have been designed in a manner so as to confer undue benefit to a person who had already organized such an event at Chamba.

10. We are not impressed by such argument. It is more than settled that fixation of a value of a tender is entirely within the purview of executive and the Courts hardly have any role to play in the process except for striking down such action of the executive as is proved to be arbitrary or unreasonable and said principles laid down by the Hon'ble Supreme Court have been reiterated in a recent judgment of this Bench in CWP No. 3921 of 2015 titled as Shyam Lal vs. HIMUDA and Anr., decided on 02.12.2015, wherein it was held as under:

> 7. It is more than settled that the government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, malafide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of tender prescribed only because it feels that some other terms in the tender would have been fairer, wiser or logical (refer **Michigan Rubber (India) Ltd Vs. State of Karnataka & ors (2012) 8 SCC 216, CWP No. 4897 of 2014, titled Mahalakshmi Oxyplants Pvt Ltd Vs.State of HP & anr, CWP No. 4112 of 2014, titled Minil Laboratories Ltd Vs. State of HP & anr, CWP No.1756 of 2014 titled M/s Andritz Hydro Pvt Ltd Vs Himachal Pradesh Power Corporation Ltd, CWP No. 765 of 2014 titled Namit Gupta Vs. State of HP & ors and CWP No. 1007 of 2015 titled Sandeep Bhardwaj Vs.State of HP & ors, reported in AIR 2015 HP 117).**
>
> 8. What would be the scope of judicial review in such like matters, has been succinctly laid down by the Hon'ble Supreme Court in Michigan Rubber (supra) in the following terms:
>
> "23 From the above decisions, the following principles emerge:

> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.
>
> 24 Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
>
> (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

11. It has come on record that the ground was let out in the previous year i.e. in the year 2015 at approximately Rs.1,33,00,000/-, whereas the reserve price for present year is approximately Rs.1,45,00,000/-, which means an approximate hike of about 10%. Once it is so, then the fixation of the value of the tender at the current price cannot be said to be either arbitrary or unreasonable.

12. Coming to the next contention of Mr. Pathak that the tender has been tailor-made in order to confer undue benefit on an individual, suffice it to say that this submission deserves to be outrightly rejected for the reason that the petitioners have failed to even name the individual for whose benefit the tender is alleged to have been so designed.

Moreover, the said person has not even been arrayed as a party and as per the settled law no order adverse to a party can be passed behind his back.

13. That apart, even the pleadings to this effect are totally vague and wholly deficient. Merely, because the petitioners do not fulfill the tender conditions, the same does not mean that the tender document has been designed to confer illegal benefit upon some individual. In addition to aforesaid, this contention also merits rejection for the simple reason that in response to the tender, as many as three person(s) have submitted their bid (as was intimated in the open Court) which clearly belies the contention of the petitioners that an undue benefit is sought to be conferred on any particular individual.

14. It is next contended by Mr. Pathak that the respondents by giving a free hand to the successful bidder to allot shops has virtually assured the ouster of craftsmen/rural artisan and small hawkers and petty businessmen. Even this submission of the petitioners is too farfetched and cannot be accepted. It has come on record in the reply of the respondents that the procedure being adopted for allotting Paddal Ground is the same as was adopted by the Mela Committee at Chamba. The petitioners have not been able to point out any shortcomings in this process. Merely, because the respondents this time have chosen to experiment and deviate from the existing practice the same cannot be viewed with suspicion. After all, the past practice cannot for all times be accepted blindly and permitted to remain static. The respondents too must change as circumstances evolve and any action to bring about change cannot always, therefore, be viewed with suspicion unless the same is arbitrary, unreasonable, illegal or anything of the like.

15. Apart from the above, the contention of the petitioners is not at all grounded and is otherwise based on surmises and conjectures. As a matter of fact, the writ petition itself is pre-mature when the petitioners seek to challenge condition No.3 of the tender whereby successful bidder has been permitted of his own to rent out the shops. Admittedly, the tenders have not been opened. It is only thereafter that the Court would be in a position to know about the successful bidder and the actual terms and conditions prescribed by the said bidder for letting out the shops and, therefore, even on this score, the petition at this stage is not maintainable.

16. For all the aforesaid reasons, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their costs. Interim order passed by this Court on 15.2.2016 is vacated. Pending applications, if any, stand disposed of.

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

Rajinder Kumar alias Raja .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 441 of 2015.
Reserved on: February 26, 2016.
Decided on: March 01, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was holding a micron bag on his lap in a bus- when bag was opened it was found to be containing another micron bag and white coloured

blanket- on opening micron bag 1.754 Kgs of charas was recovered- accused was convicted and sentenced by the trial Court- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. (Para- 11 to 22)

For the appellant: Mr. R.S.Chandel, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 1.10.2015, rendered by the learned Special Judge (III), Solan, H.P., in Sessions trial No. 1-ASJ-II/7 of 2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs. 1,00,000/- and in default of payment of fine to further undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 25.2.2014, HC Ambi Lal (PW-10), HHC Ajay Kumar, HHC Ram Krishan and Const. Amit Kumar (PW-9) proceeded towards Chambaghat, Salogra and Kandaghat, in connection with patrolling duty. At about 1:00 PM, HC Ambi Lal alongwith other police officials were present at Chambaghat near traffic check post. HRTC bus enroute Shimla to Delhi bearing No. HP-14-B-0282 came from Shimla side. It was intercepted. HC Ambi Lal started checking the luggage of the passengers from the front side. When he reached near seat No. 35, a person was holding a micron bag on his lap. On opening the bag, inside it there was a blanket white in colour and inside it a transparent packet containing a micron bag inscribed therein “Lal & Sons” was found. On opening this micron bag, black coloured substance round and cylindrical in shape was recovered. In the presence of Rajat Dhaulta who was sitting on seat No. 37 and Conductor Rajinder Kumar, the black coloured substance was found to be charas. The person sitting on seat No. 35 disclosed his name as Rajinder Kumar alias Raja son of Jodha Ram. Cannabis was weighed. It was found to be 1.754 Kgs. It was again put in the micron bag and sealed in pulinda with three seal impressions of seal “M”. Sample of the seal was taken on separate piece of cloth. NCB form in triplicate were filled in at the spot. Seal after use was handed over to conductor Rajinder Kumar. Rukka Ext. PW-10/C was prepared by HC Ambi Lal and sent to the PS Sadar Solan through HHC Ram Krishan. On the basis of rukka FIR Ext. PW-4/A was recorded. Seizure memo was prepared on the spot. PW-10 HC Ambi Lal handed over the parcel containing charas alongwith the sample seal, NCB forms for re-sealing. Inspector Anil Kumar PW—6 re-sealed the case property with three seal impressions of seal “U” and separate sample of the seal Ext. PW-6/A was taken. He filled in the columns No. 9 to 11 of the NCB forms. PW-6 Insp. Anil Kumar after re-sealing the case property handed over the case property alongwith the sample seal, NCB form to MHC PW-5 HHC Kanshi Ram to deposit the same in malkhana. The case property was sent for

chemical analysis and receipt of the FSL report Ext. PX was procured. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 10 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. R.S.Chandel, Advocate for the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur, learned Asstt. Advocate General for the State has supported the judgment of the learned trial Court dated 1.10.2015.

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

6. PW-3 Rajinder Kumar deposed that he was posted as Conductor in HRTC Depot, Solan. On 25.2.2014, he was deputed as a Conductor in bus bearing regn. No. HP14-B-0282. Bal Krishan was driver and the bus was enroute from Shimla to Delhi. The bus left Shimla at 11:18 AM. About 30-32 passengers were travelling in the bus. Accused was also travelling in the bus and was sitting on seat No. 35. At about 1:00 PM, when the bus arrived at Chambaghat, the bus was intercepted by the police and thereafter they started search of the bus. However, he was standing outside and when he came inside the bus, he saw a reddish white coloured bag held by the accused. The police opened the bag in his presence and found a blanket therein in which polythene packet was found. On opening the polythene packet, stick and ball shaped substance was found which was told to be charas. It weighed 1.754 kgs. The sealing proceedings were completed on the spot. It was sealed with seal impression "M". The seizure memo was prepared. He signed the same. The case property was produced during his examination in the Court. In his cross-examination, he deposed that some passengers had boarded the bus at bye pass Shimla, Shoghi and Kandaghat. Usually, passengers are told not to keep their luggage in the aisle of the bus. Some of the passengers had kept their luggage in the carrier and some had kept it with them. The police party comprising of 4-5 persons out of which, one was in civil dress stopped the bus at Chambaghat. He denied the suggestion that bag Ext. P-2 had been lying on the luggage carrier of the bus. Volunteered that when he came inside the bus, he had seen bag Ext. P-2 with the accused. He admitted that there was Dhaba of Nepali near the place of recovery. He denied that Ext. P-7 ticket did not belong to the accused.

7. PW-5HHC Kanshi Ram deposed that he was posted as MHC Malkhana, PS Solan, Sadar from the year 2013. On 25.2.2014, Insp. SHO Anil Kumar handed over to him a parcel sealed with 3 seals each of seal impressions "M" and "U" alongwith specimen impressions thereof, NCB form in triplicate and a micron bag containing a blanket to him. He made entry in this behalf at Sr. No. 764 in the malkhana register. On 26.2.2014, he handed over all the articles to Const. Karun Tanwar against RC for depositing the same at FSL, Junga. He deposited the same at FSL Junga on the same day and handed over the receipt to him. In his cross-examination, he admitted that in the ordinary course of duty, signature of the person handing over the articles are usually taken. He also admitted that the signatures of the person handing over the articles and thereafter receiving from him were not there on the register.

8. PW-6 Insp. Anil Kumar deposed that HC Ambi Lal handed over to him a sealed parcel sealed with 3 seals of impression "M", specimen impression thereof, NCB form in triplicate and seizure memo. He re-sealed the same with 3 seals of impression "U". He

also filled in the relevant columns 8 to 11 thereof. He got prepared re-sealing certificate vide Ext. PW-5/D. The FSL report is Ext. PX. On receipt of the FSL report, he prepared and filed the challan.

9. PW-7 Const. Karan Chand deposed that on 26.2.2014, MHC Malkhana PS Sadar Solan handed over to him a sealed parcel having 3 seals of each of impressions "M" and "U", NCB forms, copies of seizure memo and FIR against RC. He safely carried and deposited all the articles in FSL Junga against receipt on the RC itself and thereafter handed over the RC on the same day to MHC Malkhana.

10. PW-8 Rajat testified that he was travelling from Shimla to Chandigarh in HRTC Bus on 25.2.2014. He was sitting on seat behind seat No. 1. Accused was also travelling in the same bus. At about 1:00 PM, when the bus reached at Chambaghat, it was stopped by the driver to enable the passengers to get down therefrom. When the bus moved ahead and reached in front of the police cabin, it was signaled to stop by the police personnel. The police personnel entered inside the bus from front as well as rear door. After entering they lifted a bag which was placed in the rack of the bus and asked the passengers as to whom did it belong. None claimed it. Thereafter, the police personnel asked the accused as to whether the bag belonged to him but the accused declined. Thereafter, the police brought a dog inside the bus and handed over the bag to the accused by saying that it belonged to him. Then they asked the passengers to get down from the bus. The police personnel asked the passengers to sign some papers but they declined to do so. He was declared hostile and cross-examined by the learned Public Prosecutor. He testified that he appended his signatures on the papers voluntarily. In his cross-examination, he denied the suggestion that on 25.2.2014, he was sitting on seat No. 37 and ahead of his seat accused was sitting on seat No. 35 holding a micron bag in his lap. He denied that the police checked the bag in his presence and it found containing a blanket in which a transparent plastic bag containing another micron bag was found and on opening it, stick and round shaped black substance identified as charas was recovered from it. He also denied that the accused on being asked disclosed has identity as Rajinder Kumar. He also denied that charas on weighing was found to be 1.754 kgs. and thereafter it was put back into the same micron bag and the transparent bag and thereafter it was put in a white cloth parcel whereof was prepared which was sealed with three impressions of "M". He admitted his signatures on seizure memo Ext. PW-3/B, sample seal Ext. PW-3/A and parcel Ext. P-1. In his cross-examination by the learned defence counsel, he deposed that except bag Ext. P-2, the police had not lifted any other bag.

11. PW-9 Const. Amit Kumar deposed the manner in which the bag was recovered from the accused who was sitting on seat No. 35, search, seizure and sealing proceedings were completed on the spot. Rukka was prepared and handed over to HHC Ram Kishan for taking to Police Station. In his cross-examination, he deposed that there was no secret information with respect to the transportation of the contraband. He also admitted in his cross-examination that adjacent to the place of interception, there was also a traffic booth. At that time, a traffic police personnel was also present therein, but he did not join them as a witness.

12. PW-10 HC Ambi Lal has also deposed the manner in which the bag was recovered from the accused who was sitting on seat No. 35, search, seizure and sealing proceedings were completed on the spot. Seizure memo Ext. PW-3/B, specimen impression Ext. PW-3/A and Parcel Ext. P-1 were signed by the accused the PWs Rajinder, HHC Ram Kishan and Rajat. He produced the case property before the SHO Anil Dhaulta. He resealed the parcel Ext. P-1 with three seals of seal impression "U" and thereafter he prepared re-sealing certificate Ext. PW-5/D. He also admitted in his cross-examination that traffic police

personnel was present in the traffic booth, however, he was not associated in the proceedings. He also admitted that adjacent to the traffic both, there was one Dhaba run by a Nepali. He did not associate any person from the Dhaba. He did not associate any other person from Chambaghat.

13. What emerges from the evidence discussed hereinabove, is that on 25.2.2014, accused was travelling from Shimla to Chandigarh in HRTC bus bearing No. HP-14-B-0282. The bus was enroute from Shimla to Delhi. The bus was intercepted at Chambaghat, Distt. Solan. The bag Ext. P-2 was recovered from the accused who was sitting on seat No. 35 as per the prosecution version.

14. PW-8 Rajat, who was sitting on seat No. 37, according to the prosecution case, has not at all supported the case of the prosecution. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that he was sitting on seat behind seat No. 1. He specifically denied that the accused was sitting on seat No. 35 and holding a micron bag in his lap, though he has admitted his signatures on memos prepared by the police.

15. The case property was produced while recording the statement of PW-3 Rajinder Kumar. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

> **"22.70. Register No. XIX- This register shall be maintained in Form 22.70.**
>
> **With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.**
>
> **The register may be destroyed three years after the date of the last entry."**
>
> **The register is to be maintained in Form 22.70. It reads as under.**
>
> **"FORM NO. 22.70.**
>
> **POLICE STATION_____ ____DISTRICT**
>
> **Register No. XIX.-Store-Room Register (Part-I)**
>
> **Column 1.- Serial No.**
>
> **2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.**
>
> **3. Date of deposit and name of depositor.**
>
> **4. Description of property.**
>
> **5. Reference to report asking for order regarding disposal of property.**
>
> **6. How disposed of and date.**
>
> **7. Signature of recipient (including person by whom dispatched).**
>
> **8. Remarks.**
>
> **(To be prepared on a quarter sheet of native paper)."**

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

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

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

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

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

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

"27.18. Safe custody of property.-

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

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

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

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

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

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

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

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

21. The prosecution has failed to prove case against the accused under Section 20 of the Act.

22. In view of the discussion and analysis made herein above, the appeal is allowed. The judgment dated 1.10.2015 rendered by learned Special Judge-III, Solan, District Solan (HP) in Session trial No. 1-ASJ-II/7 of 2014 is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He is ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any, paid by the accused, be also refunded to him. Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerted, forthwith.

****

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

Sanju .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 315 of 2014.
Reserved on: February 29, 2016.
Decided on: March 01, 2016.

N.D.P.S. Act, 1985- Section 20- Accused became perplexed and tried to run away on seeing the police- he was given an option to be searched on which he expressed his option to be searched before a Gazetted Officer- accused was brought to the office of Addl. S.P.- his search was conducted during which one polythene packet was recovered from the underwear of the accused – the packet was containing 330 grams of charas- he was convicted by the trial Court- the person who brought the case property to the Court was not examined – entry regarding the name of the person who carried out the case property to the Court is necessary as per Punjab Police Rules- case property is required to be kept safe custody from the date of seizure till its production- in absence of entry in the daily diary, a doubt is cast whether same case property is produced in the Court which was recovered from the accused- no proper procedure was followed while producing the case property in the Court or returning the same- held, that in these circumstances, prosecution case was not proved- accused acquitted. (Para- 13 to 20)

For the appellant: Mr. Balwant Singh Thakur, Advocate vide Mr. Bhim Raj Sharma, Advocate.

For the respondent: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 21.6.2014, rendered by the learned Special Judge, Kullu, H.P., in Sessions trial No. 16/2013(263 of 2013), 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 three years and three months and to pay fine of Rs. 25,000/- and in default of payment of fine to further undergo rigorous imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 20.12.2014 at about 6:30 AM, the police party, headed by HC Gian Chand was present at Khalara Nalla, as the police party had gone to the spot in official vehicle. The accused was noticed coming from Bharai side and after seeing he police party, he got perplexed and tried to run away. He was intercepted. The place was secluded and no local witness was available. The accused was asked by the I.O. that he intended to carry out his personal search. HC Girdhari Lal and Const. Sanjay were associated as witnesses by the I.O and in their presence I.O. apprised the accused about his legal right to be searched either before a Magistrate or Gazetted Officer. The accused vide consent memo expressed to be searched before a Gazetted Officer. The I.O. telephonically informed the then Addl. S.P. Kullu, who directed the I.O. to bring the accused to his office at Kullu. The accused was brought by the police to the office of Addl. S.P. at 7.40 AM. Addl. S.P. introduced himself to the accused. Thereafter, the I.O. carried out the personal search of the accused in the presence of witnesses Girdhari Lal and Const. Sanjay and Addl. S.P. Sandeep Dhawal and from the underwear of accused one transparent polythene packet was recovered which contained stick shaped black coloured substance wrapped in wrappers. The substance was found to be charas. It weighed 330 grams. Thereafter, the charas was put in same polythene packet and sealed in one cloth parcel with six seals of letter “K”. The I.O. filled in the NCB forms in triplicate. Sample seal of “K” was separately drawn and the parcel of charas was taken into possession. The I.O prepared the rukka and sent the same to the Police Station Kullu through Const. Sanjay, upon which, FIR was registered. The I.O. prepared the spot map. The case property was produced before S.I. Harish Chander who resealed the same with three seals of letter “H”. He also filled in the relevant columns of NCB forms and thereafter, the case property alongwith sample seals, NCB form and other relevant documents was deposited with MHC Ram Krishan, who incorporated the entry of articles in malkhana register. On 21.12.2012, after filling in column No. 12, MHC Ram Krishan sent the case property through Const. Rajesh Kumar vide RC No. 284 of 2012 to FSL Junga, who deposited the same under receipt. Report of the FSL was procured. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 8 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Balwant Singh Thakur, Advocate appearing vice Mr. Bhim Raj 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. Parmod Thakur, learned Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 21.6.2014.

5. I have heard the learned Advocates and gone through the judgment and records of the case carefully.

6. PW-3 MHC Ram Krishan testified that on 20.12.2012, SI/SHO Harish Chander deposited a parcel sealed with six seals of seal “K”, three seals of seal “H”, stated to

be containing 330 grams of charas alongwith the sample seal, NCB-I form in triplicate and copy of seizure memo. He made entries in Register No. 19 at Sr. No. 182. On 21.12.2012, after filling in column No. 12, he sent the case property through Const. Rajesh Kumar vide RC No. 284 of 2012 to FSL Junga, who deposited the same at FSL Junga, under receipt.

7. PW-4 Addl. S.P. Sandeep Dhawal deposed that HC Gian telephonically informed him on 20.12.2012 that he had apprehended accused at Khalara Nalla. He also informed him that accused wanted to be searched before a Gazetted Officer. He then told HC Gian to bring the accused to his office. At about 7:40 AM, the accused was produced before him in his office. Const. Girdhari and Const. Sanjay were also with HC Gian Chand. He briefly introduced himself to the accused and thereafter perused his consent memo Ext. PW-4/A. He also signed the same. In his presence, I.O. searched the accused. At the time of search of accused, Const. Sanjay and Const. Girdhari were also present. From the underwear of the accused, charas in transparent polythene weighing 330 grams was recovered. The recovered charas was put in the same polythene envelope and sealed in cloth parcel with six seals of seal "K". The I.O. filled in NCB form in his presence.

8. PW-5 SI Harish Chander deposed that on 20.12.2012, after receiving rukka, he put his endorsement vide Ext. PW-5/A and registered FIR Ext. PW-5/B. On the same day, HC Gian Chand produced one sealed parcel containing six seals of seal "K" along with sample seal, NCB-I forms and other relevant documents. He resealed the parcel with three seals of "H". He also filled in relevant columns of NCB-I form. Thereafter, he handed over the entire case property with MHC Ram Krishan.

9. PW-6 Const. Sanjay Kumar deposed that on 20.12.2012, he alongwith HC Girdhari Lal and HC Gian Chand had gone to Khalara Nalla in official vehicle from PS Kullu. At about 6:30 AM, accused came from Bharai side who tried to run away after seeing the police party. He was overpowered by the I.O. with the help of other police official. I.O. got suspicious about his possessing some contraband. The place was secluded as no witness was available. I.O. got himself searched. Then, I.O. apprised the accused about his legal right to be searched either before the Magistrate or Gazetted Officer. The accused consented in writing to be searched before a Gazetted Officer. The I.O. informed the Addl. S.P. telephonically to this effect. Consent memo of the accused vide Ext. PW-4/A was prepared. The accused was brought to the office of Addl. S.P., Kullu. The Addl. S.P. Kullu introduced himself to the accused. The I.O. got himself personally searched vide memo Ext. PW-6/A, which was signed by him, HC Girdhari Lal as well as the accused. Thereafter, I.O. carried out the personal search of the accused in the presence of Addl. S.P. From the underwear of the accused, I.O. recovered one transparent polythene in which black coloured substance was found. It weighed 330 grams. The charas was again put in the same polythene and subsequently sealed in one cloth parcel with six seals of seal "K". The samples of seal "K" were drawn vide Ext. PW-4/B. The I.O. filled in the NCB-I form in triplicate. The seal was handed over to HC Girdhari Lal after use. The parcel of charas was taken into possession vide memo Ext. PW-4/C. The I.O. prepared rukka. Rukka was handed over to him at 9:15 AM. He delivered the same at PS Kullu. The case property was produced at the time of recording of the examination-in-chief of PW-6 Const. Sanjay Kumar.

10. PW-7 HC Gian Chand also deposed the manner in which the charas was recovered, search, seizure and sealing proceedings were completed on the spot. Rukka was prepared vide memo Ext. PW-7/A. He prepared the spot map. He recorded the statements of the witnesses. The accused was taken to the Police Station. He produced the case property before SI/SHO Harish Chander for resealing.

11. PW-8 Const. Rajesh Kumar testified that MHC, PS Kullu Ram Krishan, handed over one sealed parcel containing 6 seals of seal impression "K" and three seals of seal "H" alongwith sample seals, NCB form in triplicate and other relevant record vide RC No. 284/12 to be deposited with FSL, Junga. On 22.12.2012, he deposited the case property at FSL, Junga and on his return he handed over the receipt to the MHC.

12. According to PW-3 MHC Ram Krishan on 20.12.2012, SI/SHO Harish Chander deposited a parcel sealed with six seals of seal "K", three seals of seal "H", stated to be containing 330 grams of charas alongwith the sample seal, NCB-I form in triplicate and copy of seizure memo with him. He made entries in Register No. 19 at Sr. No. 182. On 21.12.2012, after filling in column No. 12, he sent the case property through Const. Rajesh Kumar vide RC No. 284 of 2012 to FSL Junga.

13. The case property was produced while recording the statement of PW-6 Const. Sanjay Kumar. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

> **"22.70. Register No. XIX- This register shall be maintained in Form 22.70.**
>
> **With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.**
>
> **The register may be destroyed three years after the date of the last entry."**
>
> **The register is to be maintained in Form 22.70. It reads as under.**
>
> **"FORM NO. 22.70.**
>
> **POLICE STATION_____ ____DISTRICT**
>
> **Register No. XIX.-Store-Room Register (Part-I)**
>
> **Column 1.- Serial No.**
>
> **2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.**
>
> **3. Date of deposit and name of depositor.**
>
> **4. Description of property.**
>
> **5. Reference to report asking for order regarding disposal of property.**
>
> **6. How disposed of and date.**
>
> **7. Signature of recipient (including person by whom dispatched).**
>
> **8. Remarks.**
>
> **(To be prepared on a quarter sheet of native paper)."**

14. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to

be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

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

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

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

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

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

"27.18. Safe custody of property.-

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

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

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

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

immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

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

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

after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

19. The prosecution has failed to prove case against the accused under Section 20 of the Act.

20. In view of the discussion and analysis made herein above, the appeal is allowed. The judgment dated 21.6.2014 rendered by learned Special Judge, Kullu, (HP) in Session trial No. 16/2013 (263 of 2013) is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He is ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any, paid by the accused, be also refunded to him. Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerted, forthwith.

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

State of H.P. ...Appellant

Versus

Samir Sood. ...Respondent

Cr.A No. : 478 of 2009
Reserved on: 26.2.2016
Decided on: 1.3.2016

Indian Penal Code, 1860- Section 498-A and 302- Deceased was married to the accused- accused started harassing the deceased- she disclosed this fact to her mother and her mother advised the deceased and her husband to live peacefully- deceased informed her mother two years prior to the incident that she had taken poison- she asked her mother to take child and when her mother along with other relatives came to her house, she disclosed that her husband was harassing her- her mother again advised the deceased and the accused to live peacefully- accused telephonically informed the mother of the deceased that he suspected the character of his wife and asked her to visit his house- accused informed the mother of the deceased that deceased had taken poison- her mother visited the spot and found that deceased was dead- cause of death was stated to be phosphide poison- PW-2 admitted in his cross-examination that deceased had never visited their house after her marriage- he also admitted that relations were snapped as accused belonged to a different caste- PW-4 also admitted that deceased had never returned after the marriage and social relations were snapped with the deceased- PW-1 stated that accused used to beat the deceased but no report was lodged - since, it is admitted that social relations with the deceased were snapped, therefore, it cannot be believed that witnesses had visited the house of the accused- the version of the prosecution was that phosphide poison was mixed in food and was given to the deceased cannot be accepted as phosphide poison has pungent smell- deceased was serving in police department and would have reported the matter, in case of harassment- prosecution has failed to prove any harassment or that the poison was administered to the deceased- held, that in these circumstances, trial Court had rightly acquitted the accused. (Para- 21 to 27)

Case referred:
Jaipal vs. State of Haryana, (2003) 1 SCC 169

For the appellant: Mr. Ramesh Thakur, Asstt. Addl. A.G.
For the Respondent: Mr. Rajesh Mandhotra and Ms. Kanta Thakur, Advocates.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 25.4.2009 rendered by the Additional Sessions Judge (I), Kangra at Dharamshala in Sessions Case No.4-B/08 whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under sections 498-A and 302 of the Indian Penal Code, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 23.7.2007 at about 4/4.30 P.M., mother of lady constable Anuradha (deceased) telephonically informed from village Thural that she has come to know that her daughter Anuradha has consumed poison and died. She suspected that her daughter has been killed. This information was recorded in the daily diary in the Police Station, Baijnath. Thereafter, SI Tameshwar alongwith police officials went to the spot. Statement of the mother of deceased Smt. Daya Kumari was recorded under section 154 of the Code of Criminal Procedure vide Ex.PW-1/A. According to the contents of Ex.PW-1/A, deceased Anuradha was married with Samir Sood for the last 8 years. She was working in the Police Department. Accused started harassing Anuradha and she disclosed to her mother. Mother used to advise her daughter and her husband to live peacefully. Mother of the deceased further claimed in her statement that about 2 years back Anuradha informed her on telephone that she had taken poison. She asked her mother to take her child and when the mother alongwith other relatives Ashok Kumar and Ajmer Singh came to the house of deceased Anuradha, she disclosed that her husband Samir Sood used to harass her. She further asked her mother to accompany her, but after advising her daughter and son-in-law to live peacefully, mother came back. She further claimed that on 19.5.2007, husband of her daughter disclosed on telephone that he suspects the character of his wife and thereby called her to his house. She came to the house of her daughter. The husband of her daughter disclosed that his wife Anuradha used to go here and there during night and further levelled allegation of illicit relation with his driver. The husband used to take her entire salary. On 23.10.2007 at about 4.00 P.M., she was informed by her son-in-law Samir Sood that Anuradha has taken poison. Police Station, Baijnath was informed. Mother alongwith her husband and other relatives went to the house of accused where the dead body of Anuradha was lying. Cause of death was due to phosphide poisoning. Statement of one Rajinder Kumar was also recorded under section 164 of the Cr.P.C. The police investigated the case and the challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as 23 witnesses to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. According to the accused, FIR has been registered under pressure of the police. The trial court acquitted the accused. Hence, the present appeal.

4. Mr. Ramesh Thakur, learned Asstt. A.G. has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Rajesh Mandhotra and Ms. Kanta Thakur have supported the judgment rendered by the learned trial court.

6. We have heard the learned counsel for the parties and have gone through the judgment meticulously.

7. PW-1 Daya Kumari deposed that her daughter was serving in the Police Department. She was married with accused Samir Sood 8-9 years back. After 4-5 years of the marriage, accused started harassing her daughter. Her daughter used to tell her on telephone about her harassment by the accused. She used to make her understand to live peacefully with her husband. The accused had love marriage with her daughter and due to this reason they had not gone to their house for 2-3 years after the marriage. Two years before her death, her daughter had telephonically informed her about her having consumed poison and she had requested to take her son. She alongwith her brother-in-law Ashok, Ajmer and Harbans went to the house of accused. When they reached in the house of her daughter she told that accused had been harassing her and also giving beatings to her. She requested the accused and deceased to live peacefully. On 19.5.2007, accused telephonically informed her in the morning that character of her daughter was not good. He requested her to go to his house. Accused had sent his vehicle for her. She visited the house of accused. She found S.H.O. Baijnath Shreshtha Thakur, her Bhabhi and 3-4 servants of accused present there. Accused told her that his wife was having illicit relations with drivers and she should be taken back. She asked him not to level such allegations as such allegations will only defame both the families. Her daughter denied the allegations. There was injury on the head of her daughter. Her daughter told her that accused takes her salary and also sold her vehicle and taken her Rs. 40,000/-, which was withdrawn from her account. She was informed at about 3.30 P.M. on 23.10.2007 about consumption of poison by her daughter. She telephonically informed her husband in the shop. She informed Police Station, Baijnath. She told the police that her daughter has been poisoned to death by the accused. Thereafter, she, her husband and brothers-in-law went to the house of the accused. Her statement was recorded under section 154 Cr.P.C. vide Ex.PW-1/A. She has admitted in her cross-examination that her daughter had not visited her house even after giving birth to her son. She has also admitted that son of her daughter was 7 years old. She has also admitted that her husband had gone to the house of accused for the first time at the time of death of her daughter. She has also admitted that she did not make any report about the injury sustained by her daughter. She has also admitted that the accused was well-to-do contractor.

8. PW-2 Mahinder Singh is the father of deceased. According to him on 19.5.2007, accused had severely beaten his daughter and the stitches were applied. His wife, Ajmer and Ashok had gone to the house of accused. Accused apologized. However, no report was made to the police or to any other authority. His wife had told him that accused had severally beaten their daughter and she had also told her that the allegations were false. In the year 2005 also, accused had given beatings to their daughter. She was turned out from the house. The matter was not reported to the police or before any other authority since they had made the accused realized. He had also apologized not to beat and harass their daughter in future. In his cross-examination, he has admitted that from the time of residing with the accused till her death, their daughter Anuradha had not visited their house. He has never met his daughter when she started residing in the house of accused. He came to know about the illicit relations of accused with SHO Shreshta. He did not make any report against her or against the accused to the higher authorities.

9. PW-3 Brahmi Devi testified that she was maid servant in the house of accused in the year 2007. Anuradha was serving in Police Station, Baijnath. She used to stay back during night in their house. Anuradha used to come for lunch from her duty and again she used to go back for duty and returned to the house in the evening. Accused and

his wife Anuradha used to reside together in the house. On 23.10.2007 Anuradha came for lunch from duty. Her son was also present. Accused had just arrived from his tour. She had prepared the food for them which comprised of rice, Kari and vegetable of potato and Bari. She served them food. Anuradha did not take lunch. She told her that she was feeling something bad in her chest and thereafter she went to sleep. She was declared hostile by the learned Public Prosecutor. She has admitted that she had also taken the same food and nothing had happened to her. She denied the suggestion that the food was served to the son of accused on a cot in the separate adjoining room. She has admitted that accused had taken food. She has denied that Anuradha had vomited after taking lunch though she vomited. She has denied that Anuradha was perfectly alright when she came for lunch. She denied that accused had mixed the poison in the food served to Anuradha and due to consuming poisonous food she died. In her cross-examination by the learned defence counsel, she admitted that vomiting of Anuradha consisted of yellow water and nothing else.

10. PW-4 Ajmer Singh deposed that deceased Anuradha was his niece. She contacted love marriage with the accused. In December, 2005, she had gone with his sister-in-law to the house of accused. His brother Ashok Kumar was also with them. His sister-in-law told them that Anuradha was given beatings by the accused. He noticed injury on her person. When they asked the cause for dispute, she told them that accused was suspecting her illicit relations with someone else. When his sister-in-law prevailed upon the accused, he apologized. Thereafter, during summer accused had given beatings to the accused in the year 2007. He, his brother Ashok and sister-in-law went to Police Station, Baijnath. The accused again apologized. In his cross-examination, he admitted that Anuradha had left her parental house about 13 years back. He also admitted that after leaving the parental house, Anuradha never came back to their house during her life time. He also admitted that after abandoning their house by Anuradha they snapped their social relation with her.

11. PW-5 Rajinder Kumar was working as servant in the house of Samir Sood. He did not know that accused had been harassing and beating Anuradha. The accused never told him that some one had been coming to his house and he had requested him to perform the duty of a guard. He was declared hostile and was cross-examined by the learned Public Prosecutor. His statement was also recorded under section 164 Cr.P.C. vide Ex.PW-20/C. He had given the statement before the Magistrate, Baijnath where the police official who had given beatings to him was also present and as per his instructions whatever he was instructing he was stating the same. He has denied the suggestion that Magistrate had given time to him to reflect. He also denied that the Judicial Magistrate, Baijnath had read over statement after writing to him, which has been stated to be recorded under section 164 Cr.P.C.

12. PW-6 Jeewan Lal deposed that he was working in the shop of Samir Sood. The accused had never told him about coming 3rd person in his house. He was declared hostile and cross-examined by the learned Public Prosecutor.

13. PW-10 Ashok Kumar testified that two years prior to the death of deceased, her mother had told him that accused and deceased Anuradha had a quarrel. He, his Bhabhi (mother of deceased) and his cousin Ajmer Singh had gone to Police Station, Baijnath. Thereafter, they went to the house of accused. The deceased and accused were present in the house. He had not seen the injury on the person of Anuradha. They impressed upon the accused not to give beatings to the deceased. Accused gave assurance not to beat and quarrel with Anuradha. In his cross-examination, he has admitted that information regarding the death of deceased had been telephonically conveyed by accused to

the father of deceased. He has also admitted that they had snapped their relations with the deceased after the marriage with the accused.

14. PW-11 Amit Kumar has deposed that he was serving with the accused Samir Sood. Wife of the accused was serving in the Police Department at Baijnath. He used to take the deceased to the Police Station and bring her back. Deceased Anuradha never told him on telephone about having pain in her throat. He was cross-examined by the learned Public Prosecutor.

15. PW-12 Dr. Tilak Bhagra has conducted the post-mortem examination of the deceased. The report is Ex.PW-12/B. He gave the final opinion vide Ex.PW-12/D. The cause of death was due to consumption of phosphide.

16. PW-13 Dr. Jitender Kaul has deposed that on 31.10.2007, Police had moved an application Ex.PW-13/A for ascertaining probable cause of death of deceased Anuradha. He gave his opinion vide Ex.PW-13/B. According to his opinion, death of deceased was possible by poisoning. On 21.1.2008, Police had moved another application Ex.PW-13/C to know whether the poison could be given without the consent of a person. He gave his opinion Ex.PW-13/D. In his cross-examination, he has admitted that aluminium phosphide poison gives peculiar smell when it comes in contact with water. He has also admitted that food item such as prepared Dal and Kari contain water contents and if aluminium phosphide poison is added and mixed in Dal, Kari and any other liquid, it will give such a pungent smell that could easily be detected. He has also admitted that such type of food in which aluminium phosphide is mixed cannot be consumed by anyone.

17. PW-19 SI Mangat Ram has testified that he was working as SHO, Police Station, Baijnath in the year 2007. He has partly investigated the case. He has admitted that the witnesses of the locality have not been associated in this case as witnesses. He has also admitted that in the statement of Renu Sharma, time of arrival of deceased Anuradha in the hospital and of her death has not been recorded.

18. PW-20 Ajay Mehta has recorded the statement of Rajinder Kumar under section 164 Cr.P.C.

19. PW-21 Dr. Gaurav Srivastav examined the deceased at about 3.55 P.M./4.00 P.M. The patient was unconscious and the blood pressure was not recordable. He administered life saving injection to the patient; however, she could not survive.

20. PW-23 S.I. Tameshwar Thakur has deposed that deceased used to go to her house during lunch hours from Police Station. She used to come to the Police Station, Baijnath at 10.00 A.M. from her house and thereafter she used to go in the evening at 5.00 P.M. On 23.10.2007, Anuradha had gone to take lunch from Police Station, Baijnath to her house. He recorded the statement of mother of deceased under section 154 Cr.P.C. vide Ex.PW-1/A.

21. PW-2 Mahinder Singh has categorically admitted in his cross-examination that from the date deceased started residing with the accused till her death, his daughter has never visited their house. He has also admitted that they had snapped their relations with Anuradha after her marriage with the accused being from different caste. He has also admitted that when he came to know about illicit relation of the accused with S.H.O. Shreshta Thakur, he had not made report against her or accused to the higher authorities. Similarly, PW-4 Ajmer Singh has also deposed that Anuradha had left her parental house about 13 years back. He has also admitted that after leaving parental house, Anuradha had never come back during her life time. They had snapped their social relations with her. PW-

1 Daya Kumari has deposed that accused used to beat her daughter. He was suspecting her character. He had given beatings to Anuradha on 19.5.2007, but no report was lodged either before the police authorities or any other authorities by her. Similarly, PW-2 has also admitted that no report was ever lodged about the beatings given to her daughter by the accused. PW-10 Ashok Kumar has deposed that it was the accused who informed the father of deceased about her death. He has also admitted that they had snapped their social relations with deceased Anuradha after her marriage with accused. PW-2 Mahinder Singh has also admitted that he has never met his daughter after her marriage till her death since the social relations between the deceased and her family were snapped. Thus, the version of PW-1 Daya Kumari, PW-4 Ajmer Singh and PW-10 Ashok Kumar cannot be believed that they had visited the house of deceased when the accused used to maltreat the deceased. The cause of death is phosphide poison. According to the prosecution, accused had administered poison to the deceased by mixing poison in her food. The post-mortem report is Ex.PW-12/C. According to it, cause of death was due to phosphide poisoning. According to Ex.PW-12/C, phosphine gas was detected in of Ex.P/1-1, P/1-2, P/1-3, P/1-4 and P/3. PW-3 Brahmi Devi has categorically deposed that she had prepared the food for the family, which comprised of Rice, Kari and vegetable. She served the food but Anuradha did not take lunch as she told that she was feeling something bad in her chest and thereafter she went to sleep.

22. PW-13 Dr. Jitender Kaul, who also conducted the post-mortem with PW-12 Dr. Tilak Bhagra and Dr. Bindu Sood, has deposed in his cross-examination that aluminium phosphide poison gives peculiar smell when it comes in contact with water. He has admitted that if aluminium phosphide poison is added and mixed in Dal, Kari and any other liquid, it will give such a pungent smell which can be easily detected. He has also admitted that such type of food in which aluminium phosphide is mixed cannot be consumed by anyone.

23. Their Lordships of the Hon'ble Supreme Court in ***Jaipal*** vs. ***State of Haryana***, (2003) 1 SCC 169 have held that phosphine released from zinc phosphide (rat poison) and from aluminium phosphide, is mainly used as fumigant to control insects and rodents in food grains and fields. Aluminium phosphide is available in the form of chalky-white tablets and when the same are taken out of the sealed container, they come in contact with atmospheric moisture and the chemical reason takes place liberating phosphine gas (PH3). Their Lordships have further held that if only the tablet given by the accused to the deceased was celphos it is not likely that the deceased would have consumed it inasmuch as the pungent smell of celphos would have alerted P and S and certainly the deceased would not have consumed the tablet. Their Lordships have held as under:

> [15] Dr. Sharma's opinion, as expressed during his deposition, has authoritative support. Modi in Medical Jurisprudence and Toxicology (Twenty-Second Edition) states (at pp. 197-198) that aluminium phosphide (celphos) is used as a fumigant to control insects and rodents in food grains and fields. In reported cases of poisoning, symptoms which have been found are burning pain in the mouth, throat and stomach, vomiting mixed with blood, dyspnoea, rapid pulse, subnormal temperature, loss of co-ordination, convulsions of a clonic nature and death.In the solid form, it acts as corrosive in the mouth and throat as it precipitates proteins. In post-mortem appearance, the tongue, mouth and oesophagus are oedematous and corroded. The mucous membrane of the stomach is corrugated, loosened or hardened and is stained red or velvety.The intestines are inflamed.

[16] According to Modi symptoms and signs of poisoning by aluminium phosphide are similar to poisoning by zinc phosphide (p. 197, ibid). The chief symptoms after the administration of zinc phosphide are a vacant look, frequent vomiting with retching, tremors and drowsiness followed by respiratory distress at death. -inc phosphide acts as a slow poison and is decomposed by hydrochloric acid in the stomach with the liberation of phosphine which acts as a respiratory poison. Being a very fine powder zinc phosphide adheres firmly to the crypts in the mucous membrane of the stomach, and a very small quantity only in the stomach even after vomiting is sufficient to cause death by slow absorption.

[17] Phosphine released from zinc phosphide (rat poison) and from aluminium phosphide, is mainly used as a fumigant to control insects and rodents in food grains and fields. Liberated from the metal phosphide by the action of water or acids, gaseous phosphine exerts more potent pesticidal action, for it penetrates to all areas otherwise inaccessible for pesticide application. Pathological findings from phosphine inhalation are pulmonary hyperemia and oedema. It causes both fatty degeneration and necrosis of liver. (p. 174, ibid)

[19] We may briefly sum up the opinion of the learned authors from their published paper. Phosphine gas (active ingredient of ALP) causes sudden cardiovascular collapse; most patients die of shock, cardiac arrhythmias, acidosis and Adult Respiratory Distress Syndrome (ARDS). Aluminium phosphide is available in the form of chalky white tablets. When these tablets are taken out of the sealed container, they come in contact with atmospheric moisture and the chemical reaction takes place liberating phsophene gas (PH3) which is the active ingredient of ALP. This gas is highly toxic and effectively kills all insects and thus preverves the stored grains. When these tablets are swallowed, the chemical reaction is accelerated by the presence of hydrochloric acid in the stomach and within minutes phosphine gas dissipates and spreads into the whole body. The gas is highly toxic and damages almost every organ but maximal damage is caused to heart and lungs. Sudden cardiovascular collapse is the hallmark of acute poisoning. Patients come with fast thready or impalpable arterial pulses, unrecordable or low blood pressure and icy cold skin. Somehow these patients remain conscious till the end and continue to pass urine despite unrecorded blood pressure. Vomiting is a prominent feature associated with epigastric burning sensation. The patients will be smelling foul (garlic like) from their breath and vomits. Many of them will die within a few hours. Those who survive for some time will show elevated juglar venous pressure, may develop tender hepatomegaly and still later Adult Respiratory Distress Syndrome (ARDS), renal shut down and in a very few cases toxic hepatic jaundice. The active ingredient of ALP is phosphine gas which causes extensive tissue damage. A spot clinical diagnosis is possible in majority of cases of ALP poisoning. However, ALP on account of its very pungent smell (which can drive out all inmates from house if left open) cannot be taken accidentally.

[23] Thus on the state of the evidence as it exists we cannot conclude positively that aluminium phosphide (celphos) was administered to the deceased. This finding has also to be read in the light of very pertinent statement made by Smt. Beena. According to her while the accused and the

> deceased were busy talking in the inner room, the witness was sitting just outside in the outer room. When she entered in the inner room Prakash Devi complained of feeling uneasy. She never stated that she was administered anything by the accused or anything given by the accused was consumed by the deceased or that anything which the deceased was made to consume by the accused was the cause of her feeling of uneasiness. On the contrary it was in the presence of the witness Smt. Beena that the accused offered to give the deceased a tablet which could remove the feeling of uneasiness. Such tablet according to Smt. Beena was of two colours; its half portion was blue and half portion was white. Such could not have been the colour of celphos tablet. If only the tablet given by the accused to the deceased was celphos it is not likely that the deceased would have consumed it inasmuch as the pungent smell of celphos would have alerted Prakash Devi and Smt. Beena and certainly the deceased would not have consumed the tablet. It also sounds unnatural, and therefore, doubtful, if the accused would administer any poisonous tablet to the deceased by calling her to his house and at a point of time either when Smt. Beena was sitting just outside the room or when she was present inside the room. The presence of smell in the room, if any celphos tablet had remained in open there would not have escaped the attention of Smt. Beena. But she does not depose to the presence of any smell in the room having been felt by her.

24. Moreover, PW-3 Brahmi Devi in her cross-examination has specifically denied that poison was mixed in the food served to Anuradha by the accused and that due to consuming such poisonous food she died. PW-5 Rajinder Kumar who had given statement under section 164 Cr.P.C. has turned hostile. PW-6 Jeewan Lal has also turned hostile. He has denied that accused has never told about coming third person in his house. PW-11 Amit Kumar has specifically deposed that Anuradha has never come to reside with them. He was also declared hostile.

25. In case aluminium phosphide had been added to the food, it could be easily detected even as per statement of PW-13 Dr. Jatinder Kaul. When aluminium phosphide is taken out and comes in contact with atmospheric moisture and the chemical reaction takes place liberating phosphine gas (PH3) this gas is highly toxic. This food could not be consumed. Phosphine gas gives poisonous smell as per the statement of PW-13 Dr. Jatinder Kaul. PW-2 Mahinder Singh, father of the deceased, has also levelled allegations against the accused that he was having illicit relations with SHO Shreshta, but he has never made any complaint to the higher authorities.

26. The deceased was serving in the Police Department. In case she was given beatings by the accused, she would have lodged the complaint in the Police Station where she was working. The prosecution has failed to prove that accused has killed the deceased by mixing poison in her food and has also failed to prove any specific act of cruelty or harassment to the deceased by the accused. The version of the prosecution that the accused has administered the poison to the deceased forcibly cannot be believed since she was healthy person working in the Police Department.

27. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case against the accused for offences punishable under sections 498-A and 302 of the Indian Penal Code. Thus, there is no need to interfere with the well reasoned judgment of the learned Additional Sessions Judge (I), Kangra at Dharamshala.

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

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

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

Cr. Appeal No. 509 of 2009
Reserved on: February 26, 2016.
Decided on: March 01, 2016.

Indian Penal Code, 1860- Section 302- Deceased had gone from his house to visit a fair but had not returned - his dead body was found lying behind the liquor shop- accused was acquitted by the trial Court- independent witnesses have not supported the prosecution case- deceased was heavily drunk when he came to his shop- quantity of ethyl alcohol in blood of deceased was 271.00 mg %- possibility of his fall in the state of intoxication cannot be ruled out- held, that in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-15 to 18)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Mr.Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 31.8.2009, rendered by the learned Addl. Sessions Judge (FTC), Chamba, H.P. in Sessions Trial No. 5/09, whereby the respondent-accused (hereinafter referred to as accused), who was charged with and tried for offence punishable under Section 302 IPC, has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 10.7.2008, at about 6:30 AM, Roop Lal (now deceased), resident of village Dhanawal, alongwith his cousin Des Raj had gone from his house situated at Dhanawal to Bhanjararu to visit a fair but did not return back to his house in the evening. On the next day i.e. on 11.7.2008, in the morning, the dead body of Roop Lal was found lying behind a liquor shop, situated near bus stand Jhajhakothi. Ward Member Gram Panchayat Jhajhakothi, namely, Jeet Singh telephonically informed the police that the dead body of Roop Lal was lying behind the liquor shop near bus stand Jhajhakothi. The police reached the spot and recorded the statement of Lekh Raj (brother of deceased) under Section 154 Cr.P.C. Inquest papers were prepared. The body was sent to the hospital where post mortem was conducted. Blood stained earth was lifted from the spot. 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 15 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied the incriminating circumstances put to him. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused. On the other hand, Mr. Lakshay Thakur, Advocate, has supported the judgment of the learned trial Court dated 31.8.2009.

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

6. PW-1 Lekh Raj is the brother of the deceased. According to him, Roop Lal deceased was working as SPO. On 10.7.2008 at about 6:30 AM, his brother left for Bhanjararu to collect his salary and to see fair. His cousin brother Desh Raj also accompanied him. His brother Roop Lal (deceased) did not come back to the house in the evening. Next day, in the morning, he made enquiries from Des Raj, who disclosed to him that he and Roop Lal after seeing fair reached at Jhajhakothi and a quarrel took place in a hotel between Roop Lal (deceased) and Bhag Singh. The dispute was with regard to mobile phone. He along with Des Raj and his son Subhash Chand went to Jhajhakothi and noticed that the dead body of his brother Roop Lal was lying below the road. His statement was recorded vide Ext. PW-1/A. In his cross-examination, he admitted that he had gone to the house of Des Raj to enquire about Roop Lal at about 11:00 AM on 11.7.2008. Roop Lal never disclosed to him that there was any quarrel between him and Bhag Singh accused.

7. PW-2 Des Raj is the material witness. According to him, the deceased had gone to collect his salary. They reached at fair at about 2-2:30 PM. They went to hotel at Jhajhakothi. They took liquor and also had food. His cousin Roop Lal went into the shop of Manish. Again said, it was also hotel. The other three persons who were accompanying them i.e. Duni, Hugat Ram and Singh Ram left the place. He remained outside the hotel of Manish. Roop Lal took mobile from Bhag Singh who was also present in the hotel of Manish. Roop Lal tried to operate the mobile and then arguments took place between Roop Lal and Bhag Singh. During the arguments, Bhag Singh snatched the mobile from Roop Lal. Thereafter, Bhag Singh started inflicting blows upon Roop Lal. He inflicted 8-9 blows on his person. Accused dragged deceased outside the hotel on the road. He tried to separate them but he failed rather accused threatened to kill Roop Lal. He left the spot. Thereafter, Roop Lal was passing urine by the side of the road. After that he again heard noise of quarrel. He followed his other companions who were going to the village. He also admitted towards the end of his cross-examination that when he separated Roop Lal and Bhag Singh then accused Bhag Singh went inside the hotel and Roop Lal started proceeding on the road. He also admitted that night was quite dark. He also admitted that there was no light provision on the path which leads to Jhajhakothi.

8. PW-4 Duni Chand deposed that he alongwith Singh Ram and Hugat Ram had gone to Bhanjararu to see fair. At about 9:00 PM, Des Raj and Roop Lal met them at bus stand from where they took NC jeep and came to Jhajhakothi. It was drizzling outside and they went to a hotel at Jhajhakothi. They consumed liquor and took food at Jhajhakothi. Roop Lal and Des Raj went to another hotel.

9. PW-5 Vikas Thakur testified that Bhag Singh came to his shop at about 10-10:30 PM. When accused Bhag Singh came to his shop, Roop Lal also came there. He was drunk. Bhag Singh accused was also drunk. They met together in a friendly way. Bhag Singh took out a mobile from his pocket and while he was using it, Roop Lal asked him to show the mobile. An altercation took place between them. He gave 2-3 slaps to Roop Lal. After that Roop Lal was sent out of the shop. One boy who was accompanying Roop Lal, namely, Des Raj also came inside the shop. Bhag Singh threatened him also. He also went out of the shop and followed Roop Lal. Bhag Singh took one bowl of rice in his shop and left

the shop after spending 5-10 minutes. In his cross-examination, he admitted that Roop Lal was heavily drunk when he came to his shop. He also admitted that he was too drunk to walk and speak.

10. PW-10 Manish Kumar testified that a quarrel took place between Bhag Singh and deceased Roop Lal regarding mobile. They started pushing each other. They had broken their two tumblers during the process of quarrel. They got them separated and SPO Roop Lal was sent out from the shop. Des Raj was also inside the hotel at that time and talking with the accused. Bhag Singh had slapped deceased Roop Lal 2-3 times. Accused Bhag Singh took a bowl of rice from them and after taking that he also left their hotel. In his cross-examination, he admitted that the dead body was lying at a distance of 20 feet down the liquor shop.

11. PW-11 Dr. Jaswant Singh has conducted the post mortem examination and report is Ext PW-11/B. According to his opinion, the deceased Roop Lal died due to head injury leading to injury to centre brain leading to coma and death. The duration between injury and death was within few minutes and the time between death and post mortem was within 72 hours.

12. PW-14 ASI Man Chand deposed that an information was received through telephone at the Police Station on 11.7.2008 at 7:45 AM to the effect that dead body of Roop Singh was lying at Jhajhakothi. The police reached the spot. SHO inspected the spot. He filled in inquest papers. The post mortem of the dead body was got conducted.

13. PW-15 SHO/Insp. R.P.Jaswal deposed that he received telephonic message. He went to the spot and recorded the statement of Lekh Raj under Section 154 Cr.P.C. The inquest papers were prepared. The blood stained earth was lifted from the spot. Grey coloured jacket was also taken into possession.

14. PW-5 Vikas Thakur and PW-10 Manish Kumar have categorically deposed that accused and deceased had come to their hotel. They were heavily drunk. According to PW-5 Vikas Thakur, deceased had administered 2-3 slaps to the accused. According to him, Roop Lal (deceased) was heavily drunk when he came to the shop. Similarly, according to PW-10 Manish Kumar, the deceased was given 2-3 slaps by Bhag Singh accused. According to PW-5 Vikas Thakur and PW-10 Manish Kumar after the quarrel has taken place, the deceased went outside the shop and accused consumed a rice bowl in their shop.

15. According to PW-11 Dr. Jaswant Singh, deceased Roop Lal died due to head injury. The duration between injury and death was within few minutes and the time between death and post mortem was within 72 hours.

16. Mr. M.A.Khan, Addl. Advocate General for the State has drawn the attention of the Court to the statement of PW-2 Des Raj. According to him, accused had inflicted 8-9 blows on the person of deceased. However, when the statement of this witness was recorded under Section 161 Cr.P.C. vide Ext. PW-15/B, there is only mention that the accused has pushed the deceased and has given slaps to the deceased.

17. The body of the deceased was found near the liquor shop. The independent witnesses PW-5 Vikas Thakur and PW-10 Manish Kumar have not supported the case of the prosecution, as discussed hereinabove. According to them, only few slaps were administered to the deceased. The statement of PW-2 Des Raj is in variance to the statement recorded under Section 161 Cr.P.C. vide Ext. PW-15/B. It is also surprising that the brother of PW-1 Lekh Raj had not come back on 10.7.2008 but he made enquiries from PW-2 Des Raj at 11:00 AM on the next day. It is also unusual conduct of PW-1 Lekh Raj. In case his brother had not come back home, he would have made earnest efforts to make enquiries on 10.7.2008 itself.

18. According to the statement of PW-5 Vikas Thakur, deceased Roop Lal was heavily drunk when he came to the shop. He was too drunk to walk and speak. It has come in the forensic report Ext. PX that the quantity of ethyl alcohol in Ext. P/3 (blood) of deceased was 271.00 mg %. Thus, he was heavily drunk and the possibility of his fall cannot be ruled out. The prosecution has miserably failed to prove the case against the accused. Thus, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 31.08.2009.

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

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

Ved Parkash .....Appellant.

Versus

Uttam Chand and another .....Respondents.

RSA No.260 of 2003.
Decided on: 1st March, 2016

Specific Relief Act, 1963- Section 38- Plaintiff claimed that suit land was granted as Nautor to him- he is owner in possession of the suit land – defendants without any right, title or interest started digging the foundation over the suit land for construction of a house despite requests- defendants pleaded that they are in possession openly and continuously for a period of more than 30 years and that they have become owner by way of adverse possession- suit was decreed by the trial Court- decree was reversed in appeal and the case was remanded with the direction to decide the same after affording an opportunity to establish the identity of the suit land- Local Commissioner was appointed who submitted the report- suit was again decreed- decree was affirmed in appeal – in regular second appeal held that patta granting nautor land speaks about conducting of necessary inquiries through the Field Agencies –suit land was granted as Nautor to the plaintiff after enquiry which shows that suit land was lying vacant on the spot and was recommended to be allotted to the plaintiff- Kanungo also proves that possession was delivered to the plaintiff- Tatima does not mention Khasra number correctly and cannot be relied upon- report of Local Commissioner was accepted by the parties and there was no question of affording an opportunity of cross-examination- held, that in these circumstances, it cannot be said that evidence was not appreciated in right perspective – appeal dismissed. (Para-12 to 17)

For the appellant: Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. (Oral)

Challenge herein is to the judgment and decree dated 17.3.2003, passed by learned District Judge, Mandi, in Civil Appeal No.51/2000. Learned lower Appellate Court has dismissed the appeal and affirmed the judgment and decree dated 31.3.2000 passed by learned trial Court in Civil Suit No. 298/98/91.

2. The bone of contention in the present *lis* is a small piece of land measuring 0-2-10 Bigha, bearing Khasra No.1497/789/1, situate in Mohal Nagchala, Illaqa Balh, Tehsil Sadar, District Mandi. The suit land, as a matter of fact, forms part of land bearing Khasra No.1497/789, measuring 05.05.07 Bighas.

3. The Sub Divisional Collector, vide order dated 20.8.1987, Ext.PB has granted the suit land as Nautor to the plaintiff. The plaintiff claims that he is owner in possession of the suit land. The defendants, however, without any right, title or interest started digging the foundation over the suit land for the purpose of construction of a house. He requested them not to do so, but of no avail. Hence, the suit for the decree of permanent prohibitory injunction, restraining thereby the defendants from causing any interference over the suit land in any manner whatsoever or raising any construction thereon. In the event they succeed in raising construction over the suit land, the decree for mandatory injunction qua demolition of the construction so raised was also sought.

4. The defendants in the written statement have, however, denied the claim of the plaintiff being wrong and came forward with the version that the suit land is in their exclusive possession openly and continuously for a period over 30 years. It is they, who made the same fit for cultivation and sown crop of maize thereon and as such have acquired title in the suit land by way of adverse possession. The allegations that they started digging the suit land for the purpose of raising construction were denied being wrong and it is submitted that they have started the construction work over a different piece of land i.e. Khasra No.1497/789/2. The suit, therefore, has been sought to be dismissed.

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

1. Whether the plaintiff is entitled to the relief of permanent prohibitory and mandatory injunction, as prayed for? OPP.
2. Whether the defendants are in adverse possession over the suit land? OPD.
3. Relief."

6. The parties were put to trial on all the issues and they, in turn, have produced evidence comprising oral as well as documentary. Learned trial Court had initially decreed the suit on 13.6.1997, however, in an appeal learned lower appellate Court quashed the judgment and decree passed by learned trial Court and remanded the case to it to decide the same afresh after affording the plaintiff an opportunity to establish the identity of the suit land and the defendants to rebut the evidence in this regard produced by the plaintiff. Consequently, learned trial Court had appointed the Tehsildar (Sadar), as a Local Commissioner and sought his report qua identification of the suit land on the spot. The demarcation was conducted and report placed on record. Thereafter on appreciation of the evidence, learned trial Court has again decreed the suit.

7. In appeal, learned lower Appellate Court has affirmed the judgment and decree passed by learned trial Court and dismissed the appeal vide judgment and decree which is under challenge before this Court in the present appeal.

8. The complaint is that both Courts below have decreed the suit without assigning any reason. The plaintiff being out of possession, the suit could have not been decreed for the relief of injunction. The evidence available on record has not been appreciated in its right perspective. The report of the Local Commissioner being not ***per se*** admissible in evidence should have not been relied upon. The objections so as to the correctness of the report of Local Commissioner filed by the defendants were not taken into consideration. The evidence qua delivery of possession of the suit land to the plaintiff by the Patwari and Kanungo is stated to be not appreciated in its right perspective. The documents, Ext.DW3/A and Ext.DW10/B, have also been erroneously brushed aside.

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

> "Whether the impugned judgment is vitiated because of the misreading of the documentary evidence consisting of Ext.PX, PY, DW-10/A and DW-3/A."

10. Now it is in the light of what has been said hereinabove and the legal question framed for adjudication, I have heard learned counsel representing the parties on both sides. Mr. Satyen Vaidya, learned Senior Advocate, assisted by Mr. Vivek Sharma, Advocate, has strenuously contended that no legal and acceptable evidence, suggesting that the possession of the suit land was delivered to the plaintiff has come on record and rather the evidence available on record establishes that it is the defendants, who are in possession of the suit land. The decree for injunction, therefore, should have not been passed by both the Courts below. It is also canvassed that the objections raised on the report of Local Commissioner (Tehsildar Sadar) have neither been considered nor the defendants given opportunity to cross-examine the Local Commissioner.

11. On the other hand, Mr. G.R. Palsra, learned counsel, while taking this Court to the evidence available on record, has pointed out that what to speak of the evidence produced by the plaintiff; the evidence produced by the defendants itself demonstrates that the possession was already delivered to the plaintiff well before the issuance of Patta. According to Mr. Palsra, the defendants have misunderstood the identity of the suit land and the land they encroached upon, because according to him, the entire land is measuring 5-5-7 Bighas, whereas the suit land is only 0-2-10 Bigha.

12. On analyzing the rival submissions vis-à-vis the evidence discussed supra, it would not be improper to conclude that both the Courts below have appreciated the evidence available on record in its right perspective and not committed any illegality or irregularity in decreeing the suit. The conclusion so drawn by this Court is supported by Patta (Ext.PD) viz., the order of grant of suit land as Nautor to the plaintiff. This order speaks about conducting of necessary inquiries through the Field Agencies, such as, Forest Department, Gram Panchayat and Revenue Department etc. All the Field Agencies have recommended the grant of the suit land as Nautor to the plaintiff. It is thereafter, the Sub Divisional Officer (Civil), Sadar Sub Division, Mandi, has granted the suit land as Nautor to the plaintiff vide order Ext.PB. This order alone is sufficient to arrive at a conclusion that the suit land was lying vacant on the spot and it is for this reason, the same was recommended to be allotted to the plaintiff. Had the same been in possession of the defendants or any one else, the Field Agencies should have recorded so in its reports. The testimony of DW-3 Mohinder Kumar, the then Kanungo, reveals that the possession of the suit land was delivered to the plaintiff well before the issuance of Patta (Ext.PB). No doubt while again in the witness box as DW-10, he expressed his ignorance qua this aspect of the matter, however, his statement in the witness box as DW-3 coupled with the recitals in the order of sanction Ext.PB, leads to the only conclusion that the possession of the suit land was delivered to the plaintiff well before the issuance of Ext.PB. Otherwise also, the issuance of order of sanction (Patta) is a ministerial job and in the case in hand must have followed by the delivery of possession of the suit land to the plaintiff.

13. Much has been said about Tatima Ext.DW3/A. The same has been prepared by Mohinder Kumar DW-3. As a matter of fact, this document is hardly of any help to the defendants for the reason that as per the same, the land bearing Khasra No.1497/789/1, measuring 0-4-16 Bighas, is allegedly in the possession of the defendants as disclosed by DW-1. The defendants have sown wheat crop on this portion of the land. This part of the Tatima seems to be wrong, because the area of land bearing Khasra No.1497/789/1 allotted to the plaintiff as Nautor is 0-02-10 Bighas and not 0-04-14 Bighas. The Khasra number in

the Tatima, therefore, seems to be mentioned wrongly in Note No.2, because in the Tatima the land allotted to the plaintiff as Nautor has been denoted by Khasra No.1497/7689/1. Therefore, on the basis of this document, it cannot be said that the defendants have sown maize crop over the suit land.

14. As per the 1st Note in the Tatima, plinth 20" in height and 18" in width was found to be constructed over the land bearing Khasra No.1497/789/2. As a matter of fact, it is this piece of land over which, as per the stand of the defendants in the written statement, they constructed their house. Therefore, the defendants on this score also cannot claim to be in possession of the suit land.

15. On the other hand, the report submitted by the Local Commissioner indicates and identify the land measuring 0-2-10 Bighas denoted by Khasra No.1497/789/1. Local Commissioner has recorded the statements of both the parties. The plaintiff after having understood the boundaries of the suit land had placed stones on the boundary of this land. The defendants have also not disputed the identification of the suit land. Learned Senior Advocate has no doubt canvassed that the report is silent as to what was in existence over the suit land at the time of demarcation by the Local Commissioner and as such, the same should have not been accepted. I am not inclined to accept the submission so made for the reason that had the suit land been identified on the spot in possession of the defendants, why they should have filed objections to the report. Otherwise also, when the report was admitted to be correct by both the parties, there was no occasion to the trial Court to have called the Local Commissioner to be cross-examined by the parties. Therefore, Local Commissioner's report also substantiates the plaintiff's case. True it is that mutation of the suit land has been attested and sanctioned on 19.11.1992 i.e., during the pendency of the suit, however, that also cannot be a ground to arrive at a conclusion that the plaintiff was not in possession thereof, because the sanction and attestation of mutation does not confer any title in respect of the land and rather meant to keep the record straight for revenue and other similar purposes.

16. The oral evidence as has come by way of the testimony of DW3, DW4, DW5, DW6, DW8 and DW10 amply demonstrates that all the witnesses have deposed differently and contradicted each other.

17. In view of what has been said hereinabove, it cannot be said that both Courts have not appreciated the evidence available on record in its right perspective. The impugned judgment rather has been passed on proper appreciation of the facts and circumstances of the case and as such the same does not call for any interference. Consequently, the appeal fails and the same is accordingly dismissed. There is, however, no order so as to costs.

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

Virender Mohan Mahajan. ...Petitioner

Versus

H.P. Housing & Urban Development Authority. ...Respondent

CWP No.6920 of 2014 along with connected matters.
Date of decision: 1.3.2016

Constitution of India, 1950- Article 226- Appeals (RFAs) relating to acquisition are pending before the Court- in view of this, writ petition disposed of with the directions that the interim order shall remain in force till final disposal of those appeals – Learned Single Judge requested to decide the appeals within four weeks - liberty granted to the parties to question the same and take all the grounds taken in the writ petitions. (Para-2 to 6)

For the Petitioner(s): M/s Ajay Mohan Goel, Suneet Goel, Dheeraj K. Vashisht, Vipul Sharda and Anil Bansal, Advocates.

For the Respondent(s): Mr.C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir C.J. (Oral).

It is stated at the Bar by the learned counsel for the parties that the appeals (RFAs) relating to the acquisition, are pending before this Court thus, the impugned notices are pre-mature.

2. We deem it proper to refrain from passing any order on merit and dispose of these writ petitions by providing that the interim directions granted in all these writ petitions shall remain in force till final disposal of those appeals (RFAs).

3. Mr. C.N. Singh, Advocate to furnish particulars of all the RFAs before the Registry to be listed before the learned Single Judge.

4. The learned Single Judge is requested to determine these appeals within four weeks from today.

5. Registry is directed to list all these appeals before the learned Single Judge next week.

6. It is made clear that any party/parties, if aggrieved by the order to be made by the learned Single Judge, shall be at liberty to question the same and take all the grounds urged in these writ petitions.

7. Accordingly, all the writ petitions are disposed of, as indicated hereinabove.

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

Bhartiya Govansh Rakshan Sanverdhan Parishad, H.P .....Petitioner.

Versus

The Union of India & ors. .....Respondents.

CWP No. 6631 of 2014.
Reserved on: 25.2.2016.
Date of Order: 2.3.2016.

Constitution of India, 1950- Article 226- Affidavits have been filed by Superintendent of Police showing that action is being taken against the violators under the Prevention of Cruelty to Animals Act, 1960 and relevant law- steps have been taken for construction of

gausadans at various places- direction issued to Deputy Commissioners to finalize the land transfer cases at the earliest –direction also issued to Executive Officer of Nagar Panchayat MCs to comply with the direction punctually and faithfully- Conservator of Forest directed to obtain necessary permission under Forest Conservation Act- Department of Animal Husbandry and other departments directed to ensure the release of funds for the construction of gausadans- direction issued to transport the animals in accordance with the Transport of Animals Rules, 1978- State of Himachal Pradesh directed to set up State Level Farmers' Commission as recommended by National Commission on Farmers- Addl. Chief Secretary directed to release rs.5 crores subject to availability of funds to the urban bodies to construct to house the cows and other stray cattle- State of Himachal Pradesh further directed to formulate a Scheme for waiver of loans at least Rs. 50,000/- or in the alternative to permit them to pay the loans in installments by reducing the rate of interest by creating corpus in consultation with Nationalized/Gramin/Co-operative Banks- the Chief Secretary also directed to formulate a Scheme for providing insurance cover to their crops in consultation with National Insurance Companies- further direction issued to file the status report within three months (Para1 to 93)

For the petitioner(s):	Mr. Varun Thakur, Advocate.
For the respondents:	Mr. Ashok Sharma, ASGI with Mr. Nipun Sharma, Advocate, for respondents No. 1,2 & 10. Mr. M.A.Khan, Addl. AG with Mr. Ramesh Thakur, Asstt. AG for respondents No. 3 to 7 & 9.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, J.

In sequel to the directions issued by this Court on 14.10.2015, the Superintendent of Police, Sirmaur at Nahan has filed an affidavit. According to the averments contained in the affidavit, during the year 2015, total 13 numbers of cases have been registered in district Sirmaur against the violators/offenders under the various sections i.e. S. 429 IPC, Section 11 of Prevention of Cruelty to Animals Act, 1960, Section 8 of the H.P. Prohibition of Cow Slaughter Act, 1979 and Sections 114 & 115 of the H.P. Police Act, 2007, in which 79 animals have been rescued, 38 persons were arrested and 19 vehicles have been impounded. The Superintendent of Police, Sirmaur has undertaken to take stringent action against the violators/offenders.

2. The Superintendent of Police, Lahaul Spiti at Keylong has also filed the affidavit in pursuance to the directions issued by this Court on 14.10.2015. Three cases have been registered under Prevention of Cruelty to Animals Act, 1960. Challan was put in FIR No. 23/15 on 9.10.2015 and in FIR No. 24/15 on 11.10.2015. One accused has been convicted by Gram Panchayat Darcha under Section 11 of the Prevention of Cruelty to Animals Act, 1960 at PS Keylong.

3. The Superintendent of Police, Kullu has also filed the affidavit in pursuance to the directions issued by this Court on 14.10.2015. It is averred in the affidavit that two cases have been registered under Section 289 IPC and one case under Section 429 IPC. No case of slaughtering has come into the notice of the police in his district. The strict vigil is being kept on violators in his district.

4. The Addl. Superintendent of Police, Bilaspur has also filed the affidavit in pursuance to the directions issued by this Court on 14.10.2015. He has averred in his

affidavit that 5 cases have been registered under the provisions of Prevention of Cruelty to Animals Act, 1960, in the various Police Stations of this district and special efforts have been made to educate the people about the Prevention of Cruelty to Animals Act, 1960 and other provisions.

5. The Superintendent of Police, Police District Baddi, Distt. Solan, in his affidavit has stated that one FIR No. 18/15 dated 15.4.2015 has been registered under Section 429 IPC and Section 11 of Prevention of Cruelty to Animals Act, 1960 and Section 8 of the H.P. Prohibition of Cow Slaughter Act, 1979 at Ramshehar. The efforts were also made to trace the owners of stray animals and two stray cows were handed over to "Gaushala" at Satiwala-Barotiwala and entry to this effect was made in daily diary vide entry No. 34 dated 30.3.2015 and daily diary No. 33 dated 24.4.2015 at Police Station Barotiwala and a supurdair memo was also prepared to this effect.

6. According to the affidavit filed by the Superintendent of Police, Mandi, 3 cases have been registered under the provisions of section 11 of the Prevention of Cruelty to Animals Act, 1960, and Section 429 of the IPC in the year 2015 till 5.12.2015 in District Mandi. The Investigating Officers have completed the investigation and the concerned SHOs have presented the challans in Gram Panchayat Ghanala and Gram Panchayat Kot, respectively.

7. According to the affidavit filed by the Superintendent of Police, Una, FIR No. 102/15 dated 4.4.2015 under Section 11D of the Prevention of Cruelty to Animals Act, 1960, was registered at PS Una, in which two calves, 16 buffalos were being exported by the accused. Another FIR No. 158/15 dated 23.11.2015 under Section 11 H of Prevention of Cruelty to Animals Act, 1960, at PS Bangana was registered in which it was found that one cow and three calves were left abandoned.

8. The Superintendent of Police, Hamirpur in his affidavit has averred that 3 cases have been registered against the defaulters/violators under Section 289 IPC, one case under Section 429 IPC and one case under the Prevention of Cruelty to Animals Act, 1960, w.e.f. 1.1.2015 to 14.12.2015 in district Hamirpur.

9. The Superintendent of Police, Chamba, has disclosed in his affidavit that CCTV cameras have already been installed in entry/exit points of the district i.e. Traffic Check Posts Tunuhatti, Lahroo and Sewa Bridge to monitor the illegal transportation of animals in the vehicles but no violation has been noticed till date.

10. It is averred in the affidavit filed by Deputy Commissioner Hamirpur that 58 complete cases were received for transfer of land in Hamirpur, 29 in Bhoranj, 44 in Barsar, 38 in Nadaun and 24 in Sujanpur Sub Divisions. The land has been transferred in 18 cases in Hamirpur, 18 cases in Bhoranj, 36 cases in Barsar, 20 cases in Nadaun and 23 cases in Sujanpur Sub Divisions. 40 cases are under process in Hamirpur, 11 in Bhoranj, 8 in Barsar, 18 in Nadaun and 1 in Sujanpur Sub Divisions. The Deputy Commissioner Hamirpur is directed to ensure transfer of land cases in the district to Gram Panchayats within a period of four weeks from today.

11. In the affidavit filed by the Deputy Commissioner, Una, it is averred that out of 234 Gram Panchayats, government land has been transferred to 81 Gram Panchayats and revenue papers of 153 Gram Panchayats are under process. An amount of Rs. 15,65,000/- has been sanctioned by Zila Parishad and Panchayat Samiti from the 13th Finance Commission for the construction of gosadans. The District Panchayat Officer, Una has informed the Member Secretary District Coordination Committee vide letter dated 4.12.2015 that 2 more Gram Panchayats have been allocated the budget from the 13th

Finance Commission amounting to Rs. 2,50,000/-. In those Gram Panchayats where the land has been transferred, steps are being taken to start the construction of gosadans at the earliest. 169 stray cattle were treated in the Veterinary Institutions. 16708 cattle have been registered during the pendency of this case. All the Block Development Officers have been requested to transfer the land for remaining Gram Panchayats who require land for establishment of gosadans. 74 Gram Panchayats have not yet applied for land transfer to District Panchayat Officer, Una who has asked to call the meeting of these Gram Panchayats to clarify their requirement of land, if any. The Executive Officer, Municipal Committee, Una has submitted land transfer case in village Rampur on 30.11.2015 and the land transfer process is underway. The Notified Area Committee, Gagret has transferred land for construction of gosadan as per Annexure J of the affidavit. The Secretary, NAC Daulatpur Chowk was asked to send land transfer case within three days for establishment of gosadan. The land for gosadan has been transferred at Village Nangal Kalan for NAC Tahliwal. The gosadan is already functioning at Katohar Kalan under Mandir Nyas Mata Shri Chintpurni. In Una District 8 gosadans are already functioning, out of which, one is run by temple trust and rest 7 gosadans are supplied hay (fodder) worth Rs. 8,00,000/- as per stray cattle strength. The Deputy Commissioner Una is directed to ensure transfer of land cases in the district to Gram Panchayats within a period of four weeks from today.

12. The Addl. Chief Secretary (UD) to the Government of Himachal Pradesh has also filed the affidavit in pursuance to the directions issued by this Court on 14.10.2015. According to the affidavit, a provision of funds amounting to Rs. 10 lacs has been made by the SDO(C) Palampur for the construction of Gosadan at Palampur and an amount of Rs. 6 lacs has been released to MC, Palampur. The MC Kangra has presently no land available for the purpose and the proposal for land identification is under process. The Executive Officers, Palampur and Kangra are directed to construct the gosadans within their territory within 3 months from today after completing all the codal formalities.

13. The MC Dharamshala is running its own gosadan at Sarah since April, 2015. Two more sheds with approximate capacity of 60 stray animals is under construction. There will be a direction to the Executive Officer, MC Dharamshala, to complete the gosadans within 3 months from today.

14. Now, as far as MC Nurpur is concerned, two gosadans are being run by the government. There is a proposal for transfer of land for construction of new gosadan at Mahal Chakwan Khanni. The Executive Officer, MC Nurpur is directed to complete the codal formalities and construction be completed within 3 months.

15. At Dehra, the stray animals are being shifted to gosadan Bhuniri, run by NGO. However, new site has been selected near HRTC workshop. There will be a direction to the Executive Officer, Nagar Parishad Dehra to ensure the construction of gosadan within 3 months from today.

16. MC Jawalamukhi has identified land in village Jijal and presently caretaker hut and feeder store has been constructed at the site. There will be a direction to the Executive Officer, MC Jawalamukhi to ensure the construction of gosadan within 3 months from today.

17. At MC Chamba, the district administration has arranged the funds. There will be a direction to the Executive Officer, MC Chamba to ensure the construction of gosadan within 3 months from today.

18. At Nagar Parishad Chowari, the gosadan is under construction near Kaulm Khad. There will be a direction to the Executive Officer, Nagar Parishad, Chowari to ensure the construction of gosadan within 3 months from today on priority basis.

19. MC Dalhousi has identified land at Kathlak in ward No. 6. The MC has requested the DC, Chamba to provide funds for the construction of gosadan. There will be a direction to DC Chamba to provide necessary funds to MC Dalhousie within four weeks and thereafter the construction of the gosadan shall be completed within 3 months by MC Dalhousie.

20. Now, as far as MC Una is concerned, presently stray animals are being sent to gosadan at Rakkar Colony. The process of land identification is under process. There will be a direction to the Executive Officer, MC Una to ensure the construction of gosadan within 3 months from today.

21. At Nagar Panchayat Daulatpur, land has been identified in ward No. 5 near Mohalla Behli and the case has been submitted to DC Una on 28.5.2015. There will be a direction to the Deputy Commissioner, Una to finalise the transfer of land within four weeks from today and thereafter the Executive Officer, Nagar Panchayat, Daulatpur would be personally responsible for the construction of gosadan within 3 months.

22. The land has been identified in ward No. 3 near Police Station and the land transfer case has been forwarded to DC Una by Nagar Panchayat, Gagret on 12.5.2015. There will be a direction to the Deputy Commissioner, Una to finalise the transfer of land within four weeks from today and thereafter the Executive Officer, Nagar Panchayat, Gagret would be personally responsible for the construction of gosadan within 3 months.

23. At Mehatpur, land is being identified. There will be a direction to the Executive Officer, Mehatpur to do the needful within a period of 3 months from today, including identification of land and construction of gosadan.

24. At Santokhgarh, there is one gosadan of 110 animals capacity in ward No. 4. It is not apparent as to whether the gosadan at Santokhgarh, at present is catering the need of the hour or not. The Deputy Commissioner, Una shall file his personal affidavit in this regard and if there is requirement of another gosadan at Santokhgarh, steps in this regard shall be taken after completing all the codal formalities.

25. At MC Kullu, gosadan is under construction at Dhalpur. There will be a direction to the Executive Officer, MC Kullu for early construction of gosadan at Kullu within 3 months.

26. The gosadan at Manali has been constructed and is functional.

27. MC Nahan is sending the stray animals to Mata Balasundri gosadan situated on Nahan Kala-Amb road. However, a separate land at Nauni-ka-Bag has been identified for the purpose. There will be a direction to the Executive Officer, MC Nahan to ensure the construction of the gosadan within three months.

28. Similarly, for MC Paonta, land has been identified and transferred at ward No. 5 near Veterinary Hospital and tender has been awarded. The work has also commenced. There will be a direction to the Executive Officer, MC Paonta to ensure the construction of the gosadan within three months.

29. No land has been identified at Rajgarh for the purpose of construction of gosadan by Nagar Panchayat, Rajgarh. There will be a direction to the Executive Officer,

Nagar Panchayat Rajgarh to identify the land and complete all the codal formalities within four weeks from today and to complete the construction of gosadan within three months.

30. Now, as far as MC Shimla is concerned, a cattle parao in ward No. 6 Boileauganj has been constructed for accommodation of 50-60 stray animals. The Commissioner, MC Shimla is directed to construct the gosadan to house the cows and other stray cattle within 3 months from today.

31. The matter regarding land transfer for the construction of gosadan at MC Rampur has been sent to SDM Rampur. He is directed to take final decision in the matter within four weeks and thereafter, there will be a direction to the Executive Officer, MC Rampur to ensure the construction of gosadan at Rampur within 3 months.

32. MC Rohroo has identified the land at Rohroo Shimla road measuring 1.3 bighas. There will be a direction to the Deputy Commissioner, Shimla to ensure the transfer of land within four weeks and thereafter the Executive Officer, MC Rohroo, shall ensure the construction of the gosadan within 3 months.

33. The land has been identified at Kotkhai. The case for transfer of land has been sent to DFO Theog under Forest Conservation Act. The DFO, Theog is directed to obtain necessary NOCs involved in the transfer of land within four weeks and thereafter the Executive Officer, Nagar Panchayat Kotkhai shall ensure the construction of the gosadan within 3 months.

34. It is evident from the affidavit that at Sunni, gosadan namely “Shri Hari” is being run by private organization and Nagar Panchayat Sunni is also giving contribution to run this gosadan. There will be a direction to the Executive Officer, Nagar Panchayat Sunni to ensure the construction of gosadan within 3 months.

35. At Narkanda, the case for transfer of land has been sent through SDM Rampur to DC Shimla. There will be a direction to the DC Shimla to grant the necessary permission within a period of six weeks and thereafter, the Executive Officer, Nagar Panchayat Narkanda shall ensure the construction of gosadan within 3 months.

36. There is no gosadan at Mandi, as per the affidavit. The stray animals are being sent to gosadan Magal near Mandi which is being run by the NGO. There will be a direction to the Executive Officer, Mandi to ensure the construction of gosadan at Mandi within 3 months.

37. New gosadan has been constructed at Sundernagar with capacity of 100 animals.

38. No land is available with Nagar Panchayat Rewalsar for gosadan. However, in collaboration with Gram Panchayat Rewalsar at Ledha, two kms from Rewalsar the gosadan is proposed. The case for transfer of land has been forwarded. The DFO Mandi/Rewalsar are directed to finalize the case and thereafter, there will be a direction to Executive Officer, Nagar Panchayat Rewalsar, to ensure the construction of gosadan within 3 months from today after obtaining necessary permission.

39. Four kanal of land has been identified and transferred at Hathli Khad in MC Hamirpur. Tender was invited and work stands awarded. There will be a direction to the Executive Officer, MC Hamirpur to ensure the construction of gosadan within three months from today.

40. At Nadaun, land measuring 4.5 kanal stands transferred at ward No. 6. The work has been started. There will be a direction to the Executive Officer, Nagar Panchayat Nadaun to ensure the completion of construction of gosadan within three months from today.

41. The site has been selected near PWD rest house at Bhota for the purpose of construction of gosadan. There will be a direction to the Executive Officer, Nagar Panchayat Bhota to ensure the construction of gosadan within three months from today.

42. Similarly, the land has been identified and transferred at Khadla ward no. 6 Sujanpur. There will be a direction to the Executive Officer, MC Sujanpur to ensure the construction of gosadan at Sujanpur within 3 months from today.

43. Now, as far as MC Bilaspur is concerned, land transfer case has been sent to Deputy Commissioner Bilaspur for construction of gosadan. There will be a direction to DC Bilaspur to take a final decision within four weeks from today and thereafter the Executive Officer, MC Bilaspur shall ensure the construction of another gosadan at Bilaspur within 3 months.

44. The land has been identified at Muhal Sew, Tehsil Jhandutha. The case for transfer is under process. The case for transfer of land be finalized by the Executive Officer, Nagar Panchayat Talai within four weeks from today and thereafter the DC Bilaspur shall take a final decision for the construction of gosadan at Talai and gosadan be constructed within three months.

45. Gosadan has already been constructed at ward No. 4 with a capacity of 10 animals at MC Sri Naina Devi ji.

46. Similarly, site has been identified measuring 4.02 bighas in ward No. 6 Badhanighat. The land transfer case is being prepared. DFO Ghumarwin/Bilaspur is directed to ensure the clearance of the case under the Forest Conservaion Act.

47. It is apparent from the affidavit that there is no gosadan at MC Solan. There will be a direction to the Executive Officer, MC Solan to identify the land and do the needful within 3 months from today.

48. At Arki the construction work of gosadan has been started at Ward No. 2 near Veterinary Hospital, Arki. There will be a direction to the Executive Officer, Nagar Panchayat Arki to complete the same within 3 months from today.

49. Work has been awarded near Rehan Basera building, Sector 1 Parwanoo with a capacity of 25-30 stray animals. There will be a direction to the Executive Officer, MC Parwanoo to ensure the construction of gosadan within 3 months from today.

50. MC Baddi has selected the government land measuring 3.14 bigha for construction of gosadan and land transfer case has been forwarded to DC Solan. There will be a direction to the DC Solan to accord necessary approval within four weeks from today and thereafter there will be a direction to the Executive Officer, MC Baddi to ensure the construction of gosadan within 3 months.

51. All the Deputy Commissioners throughout the State of Himachal Pradesh are directed to finalise the land transfer cases, at the earliest, as ordered hereinabove, and the Executive Officers of the Nagar Panchayats/MCs are directed to comply with the directions punctually and do the needful.

52. The status report has also been filed by the Deputy Secretary (PR). According to the averments made in the affidavit, an amount of Rs. 5,34,84,939/- has been released to Panchayati Raj Institutions for the construction of gosadans. Number of Panchayats where land has been transferred is 392 and 14 gosadans have been constructed. This amount has been released by Zila Parishads and Block Samitis from the 13th Finance Commission. The Panchayati Raj Department has requested the Animal Husbandry Urban Local bodies Departments to release funds and comply with the directions issued by this Court from time to time.

53. The Deputy Commissioner, Shimla has filed the affidavit. The meeting of sub-committee Rampur sub-Division under the Chairmanship of SDM (Civil) Rampur was held on 25.11.2015 wherein directions were given to the BDO Rampur, Narkanda and Nankhari to expedite the process of arranging funds for construction of gosadans from the government. The cattle registration work is under process in collaboration with the Animal Husbandry Department. In Nankhari, total No. of 3462, in Kumarsain 5264 and in Rampur 9711 cattle have been registered by way of tattooing. The cattle registration work stands completed in Gram Panchayats Khaneti, Madhawani, Mangsu, Shamathla and Thanedhar. In rest of the Panchayats, registration work is in progress. The DC Shimla is directed to ensure the registration of animals in the remaining Panchayats. It is averred in the affidavit that in Blocks, Rohroo, Chirgaon, Jubbal-Kotkhai, 10 places have been identified for the construction of gosadans. The concerned BDOs are directed to ensure the construction at the identified places within their jurisdiction within four months from today.

54. A meeting of Sub-Divisional Level Committee Chopal was held on 28.11.2015 wherein the selection of land for the construction of gosadans in all the 54 Panchayats was completed. Out of 54 Panchayats, 34 Panchayats have submitted the case of land transfer after clearance from the Forest Department to the District Administration. The process is under progress in remaining 20 Panchayats. The Deputy Commissioner, Shimla is directed to get the clearance from the Forest Department qua 34 Panchayats and the process of land transfer qua remaining 20 Panchayats be also completed within a period of 6 weeks and gosadans be completed within 3 months.

55. Meeting under the Chairmanship of SDM, Theog was held on 28.11.2015. The directions have been issued to process the cases of land transfer of 72 Panchayats. The Deputy Commissioner/DFO concerned are directed to ensure the clearance within 8 weeks from today.

56. Meeting of Sub Committee Shimla (Rural) was held under the Chairmanship of SDM (R) on 30.11.2015. In Basantpur Block, selection of land has been completed in 25 Panchayats and out of these, joint inspection has been conducted in 8 Panchayats and NOC for these has been received. In Mashobra Block selection of land has been completed in 45 Panchayats and out of these joint inspections have been conducted in 7 Panchayats and NOC for the same has been received. With regard to tattoing, in Mashobra Block 35207 cattle are registered and 4167 amongst them have been tattooed. In 40 Panchayats work is in progress. In Basantpur Block, 2042 cattle have been tattooed. In 29 Panchayats in this Block, tattoing work is in progress. The SDM (R), is directed to complete the entire process in collaboration with the office of DC/DFO within four weeks and ensure the construction of gosadans within 3 months thereafter.

57. The total cattle population in Shimla District, as per the 2012 census is 2,76,783. The total cattle population registered since inception of the cattle registration scheme upto 28.2.2015 is 2,83,053. The Deputy Commissioner Shimla, SDM Rohroo, SDM

Chopal, SDM Theog and SDM Rampur are directed to comply with the directions in letter and spirit.

58. The Deputy Commissioner, Bilaspur has filed the affidavit in sequel to directions issued on 14.10.2015. According to the averments made in the affidavit, the district administration is concentrating on construction of six gosadans in the district located at Talli, Balghad, Balhseena, Kuthera, Ranikotla and Barmana (Lagat) where sufficient funds are available in the name of Gram Panchayat. The Deputy Commissioner-cum-Commissioner Temple Trust has sanctioned installments of Rs. 10 lacs each for the construction of cattle shed building for gosadans at above mentioned six sites. It is also undertaken in the affidavit that amount for Balhseena and Balghad will be released from the Baba Balak Nath temple trust and for gosadans Kuthera, Ranikotla, Barmana and Tallai from Shri Naina Devi Ji temple trust by the respective SDMs. The Deputy Commissioner Bilaspur and SDMs concerned are directed to release the funds as undertaken in the affidavit for the construction of gosadans within two weeks from today, if not already released. The SDMs/BDOs concerned shall be personally responsible for the construction of gosadans at all these places.

59. The Deputy Commissioner, Kullu has filed the affidavit. According to the affidavit, nearly 1000 cattle are being looked after in the seven gosadans being run in the district. The district administration has received proposals from 106 out of total 204 Gram Panchayats to construct gosadans. The Government of Himachal Pradesh has declared Distt. Panchayat Officer, Kullu as User Agency to move and process all cases of diversion of forest land for non-forestry purposes. He has undertaken to process all these cases in phased manner for diversion subject to suitability of land. The efforts will also be made to provide necessary micro chip in all the animals being kept in the household. The Deputy Commissioner, Kullu and Distt. Panchayat Officer, Kullu are directed to complete the codal formalities qua transfer of land and ensure construction of gosadans after releasing necessary funds within four months from today.

60. The Deputy Commissioner, Sirmaur has also filed the affidavit. As per the affidavit, there are 228 Gram Panchayats in the district and work of cattle registration has been completed and total 2,83,184 cattle have been registered. In 43 Gram Panchayats, the land has been transferred by way of gifts. The construction of work of 9 gosadans has been completed and 2 gosadans are already functioning and construction work in 21 Gram Panchayats has been started. The land for construction of gosadans has been identified in 124 Gram Panchayats. It has also been reported that Zila Parishad, Sirmaur has according approval of Rs. 45,97,910/- under 13th Finance Commission. The Sub Divisional Magistrate Nahan has reported that in order to construct a gosadan at Trilokpur, the Trilokpur Temple Trust has passed a resolution on 18.6.2015 to transfer the land. The case of land transfer is with the Deputy Commissioner, Sirmaur. He is directed to accord necessary sanction after doing codal formalities within four weeks from today. The transfer of land in the name of Gram Panchayats as per the details of para 13 of the affidavit be completed within four weeks from today and needful in these Gram Panchayats be done within four months.

61. The Deputy Commissioner, Chamba has filed the affidavit pursuant to the directions issued by this Court on 14.10.2015. It is evident from the affidavit that gosadans in Gram Panchayat Salooni has been completed. The construction of gosadan in Gram Panchayats Salwan and Diur have been completed up to roof level. The SDM Salooni is directed to ensure the completion in Gram Panchayats Salwan and Diur within two months from today. The construction work at Gram Panchayat Bhalei be completed within 3 months from today.

62. Now, as far as construction of gosadan in Gram Panchayat Gadfari is concerned, the case for diverting forest land to non-forestry purpose has been filed. The Conservator of Forests Chamba is directed to obtain necessary permission under Forest Conservation Act since an amount of Rs. 4,00,000/- has been released to Gram Panchayat Gadfari for the construction of gosadan. The gosadan thereafter be completed within 3 months.

63. The land has been identified at Sihunta, Porchore, Chowari and Nainikhad. The procedural requirements under the Forest Conservation Act, be got completed by the Conservator of Forests Chamba within four weeks and necessary funds shall be released to Gram Panchayats Sihunta, Porchore, Chowari and Nainikhad. Similarly, Conservator of Forests, Chamba is directed to obtain necessary permission under the Act for the construction of gosadans in Gram Panchayats Khani and thereafter SDM Bharmour shall ensure the construction of gosadan within 3 months.

64. The construction of gosadan in Gram Panchayats Bhanota, Jangi, Preena, Baloth, Mehla, Kidi and Bhariyan is under progress. The same be completed within three months, if not already completed.

65. The Superintendent of Police, Kinnaur has also filed the affidavit. According to him, necessary instructions have been issued by the Director General of Police to ensure the compliance of the orders passed by this Court from time to time.

66. The Superintendent of Police, Kangra, has also filed the affidavit. According to the averments made in the affidavit, FIR Nos. 332/2015, 346/2015, 354/2015, 238/2015, 105/2014, 112/2015, 45/2015 and 103/2015 have been registered against the defaulters under various provisions of Prevention of Cruelty to Animals Act, 1960 and under various Sections of IPC and the challan has already been put up in few cases. The Superintendent of Police, Kinnaur and Kangra are directed to file the latest status report giving therein the details of the cases filed against the defaulters.

67. The Deputy Commissioner Solan, has also filed the affidavit. We can take judicial notice of the fact that despite the directions issued by this Court from time to time, stray cattle can be seen on the National Highway between Shimla and Parwanoo, causing menace as well as danger to the commuters on this road. The Deputy Commissioner Solan shall personally ensure that no stray cattle are present in his jurisdiction on the National Highway. The affidavit filed by the Deputy Commissioner, Solan is sketchy and vague. He is directed to file the status report giving therein the details of the gosadans constructed in district Solan after the mandatory directions issued by this Court from time to time.

68. The Deputy Commissioner, Mandi in his affidavit has deposed that 6 gosadans in Mandi district are functioning at Dheem Kataru, Bhambla, Darpa, Gahar, Pangna & Sandhole. One non-forest land was identified and transferred to Panchayati Raj Department at Kunnu. The construction of gosadan has commenced. The process of opening of other new gosadans in other 25 cluster points is also going on and process of identification of land is complete. The process of transfer of forest land in the name of Panchayati Raj Department for opening gosadans is being taken up by the Distt. Panchayat Officer who is designated as Nodal Officer by the Deputy Commissioner. The Nodal Officer is directed to get the necessary NOC from Government of India under the Forest Conservation Act for the transfer of land to various Gram Panchayats for the construction of gosadans within four weeks from today.

69. The Deputy Commissioner, Kangra in his affidavit has informed the Court that gosadan Maira is smoothly running and there are 135 stray cattle in the gosadan. The

EO, MC Jwalamukhi has informed that two cattle sheds shall be completed before 31.1.2016. An amount of Rs. 5 lac has been deposited for this purpose in the office of Chairman Stray Cattle Management Committee, Jawalamukhi. The Executive Officer, MC Jwalamukhi is directed to ensure the construction of the sheds at the earliest. The land is being developed for construction of gosadan at Muhal Tehsil Dehra and pillars are being erected. The same be completed within four months from today. The construction of gosadans at Aima at Palampur be completed within four months from today, if not already completed. Land measuring 0-19-00 hect. in village Faket Lahar has been transferred in the name of BDO Nagrota Bagwan. The construction of gosadan be completed within four months, if not already completed. 7 FIRs have been registered regarding cruelty towards animals in the district Kangra during December 2014 to November 2015. A sum of Rs. 56 lac @ 6 lac per sub division for 8 sub divisions and Rs. 8 lac for one sub division has already been released by Zila Parishad for construction of gosadans and a sum of Rs. 24.70 lac have been sanctioned by the Panchayat Samitis for this purpose. This amount be spent for the construction of gosadans judicially. The District Revenue Officer has informed the Deputy Commissioner that 14 cases for transfer of land for construction of gosadans were received in his office. In five cases, the land has already been transferred for construction of gosadans. The remaining 9 cases be finalized, if not already finalized.

70. The Under Secretary, Department of Animal Husbandry, Dairying and Fisheries, Union of India, has also filed the affidavit. It is specifically averred in the affidavit that State Governments have already enacted legislations for banning/restricting/prohibiting slaughter of animals including milch animals, like cattle over the last sixty years. 24 States and 5 UTs have enacted legislations on the subject and the matter falls in Entry 15 of list II of the 7th Schedule of the Constitution. However, it has come in the affidavit that the Animal Welfare Board of India is working under the Ministry of Environment, Forests & Climate Change and Government of India provides financial assistance for shelter, fodder etc. to State Governments, non-Government Organizations etc. as per the mandate of Animal Welfare Board under the Ministry of Environment, Forests and Climate Change. It has come in the affidavit filed by the Chief Secretary to the State of Himachal Pradesh that the matter for the release of necessary funds for the construction of gosadans has been undertaken with the Animal Welfare Board of India, Chennai vide letter dated 14.12.2015. The Animal Welfare Board of India, Chennai working under the Ministry of Environment, Forests & Climate Change is directed to address the proposal made by the State Government dated 14.12.2015 and provide necessary funds for the construction of gosadans by the Local Bodies. The Secretary, Ministry of Environment, Forests & Climate Change is directed to do the needful within a period of 8 weeks from today.

71. According to the affidavit filed by the Deputy Commissioner, Kinnaur, 18504 cattle have been registered and 70 nos. of stray cattle have been treated in the district.

72. The Chief Secretary to the Government of Himachal Pradesh has also filed the affidavit. According to the averments made in para 4 of the affidavit whereby all the Deputy Commissioners in the State of Himachal Pradesh have been directed on 30.11.2015 to comply with the directions issued by this Court, on the basis of affidavits filed by them at different points in time in the Court. It is further averred in the affidavit that out of total 179 cases, 8 cases under Section 8 of the Prohibition of Cow Slaughter Act, 31 cases under Section 289 IPC, 2 cases under Section 428 IPC, 21 cases under Section 429 IPC, 84 cases under Section 114 of the HP Police Act and 33 cases under Prevention of Cruelty to Animals Act, 1960 have been registered w.e.f. 1.1.2014 to 5.12.2015. A sum of Rs. 4.88 crore has been released for the construction of gosadans in 93 Gram Panchayats. The land has been transferred in 392 Gram Panchayats for the construction of gosadans and 14 gosadans have

been constructed. The Addl. Chief Secretary (Revenue) has been directed to monitor implementation of orders of the Court as per letter dated 17.12.2015. The Addl. Chief Secretary (Revenue) has informed that all the Deputy Commissioners are providing full cooperation to departments/agencies which require land for construction of gosadans. The Director (OP) HPSEB has informed that 51 electricity connections have been released to gosadans in the State. Out of 58 gosadans, water connections have been provided to 43 gosadans. The Addl. Chief Secretary (I & PH) is directed to provide water connections to remaining 15 gosadans. It is also highlighted in the affidavit that there is financial crunch. The department of Animal Husbandry and other departments are directed to ensure release of funds for the construction of gosadans from the financial year 2016-17 by making necessary allocation of funds.

73. According to Rule 50 of the Transport of Animals Rules, 1978, the space requirement for cattle i.e. cows, bulls, bullocks, buffaloes, yaks and calves, while being transported in commonly sized road vehicles shall be as under:

TABLE – I

Space Allowance per Cattle

Cattle weighing upto 200 Kg.	1 Square Meter (Sq.mtr.)
Cattle weighing 200-300 Kg	1.20 Square Meter
Cattle weighing 300-400 Kg	1.40 Square Meter
Cattle Weighing above 400 Kg.	2.0 Square Meter

TABLE – II

Space requirement for Cattle while being transported in commonly sized road vehicles

		Number of Cattle			
Vehicle size Length x Width square meter	Floor Area of the vehicle in Square Meter	Cattle weighing upto 200 Kg (1 square Meter space per cattle)	Cattle weighing 200-300 Kg (1.20 Square Meter space Per cattle)	Cattle weighing 300-400 Kg (1.40 Square meter space per cattle)	Cattle weighing above 400 Kg. (2.0 Square meter space per cattle)
6.9 x 2.4	16.56	16	14	12	8
5.6 x 2.3	12.88	12	10	8	6
4.16 x 1.9	7.904	8	6	6	4
2.9 x 1.89	5.481	5	4	4	2

74. According to Rule 51, suitable rope and platforms should be used for loading cattle from vehicles. The cattle as per Rule 52 are required to be properly fed and given water at the time of loading. The water arrangements on route are to be made and sufficient quantities of water shall be carried for emergency under Rule 54. There should be sufficient feed and fodder with adequate reserve to last during the journey as well as adequate ventilation. Rule 56 provides that when cattle are to be transported by goods vehicle the following precautions are to be taken namely:

" (a) Specially fitted goods vehicles with a special type of tail board and padding around the sides should be used.

(b) Ordinary goods vehicles shall be provided with anti-slipping material, such as coir matting or wooden baord on the floor and the superstructure, if low, should be raised.

(c) no goods vehicle shall carry more than six cattle.

(d) each goods vehicle shall be provided with one attendant.

(e) while transporting, the cattle, the goods vehicle shall not be loaded with any other merchandise; and

(f) to prevent cattle being frightened or injured, they should preferably, face the engine."

75. Chapter VI deals with transport of sheep and goats. According to Rule 68, sheep and goats shall be transported separately; but if the lots are small special partition shall be provided to separate them. Rule 69 provides that the rams and male young stock shall not be mixed with female stock in the same compartment. According to Rule 70, sufficient food and fodder shall be carried to last during the journey and watering facility shall be provided at regular intervals. As per Rule 71, material for padding, such as straw, shall be placed on the floor to avoid injury if an animal lies down, and this shall be not less than 5 cm. thick. Rule 72 provides that the animals shall not be fettered unless there is a risk of their jumping out and their legs shall not be tied down. The following space is required for transporting sheep and goat by rail/road:

Sheep and Goat: Space requirement while being transported by Rail/Road

Approximate weight of animal in Kilogram	Spare required in square meters	
	Wooled	Shorn
Not more than 20	0.17	0.16
More than 20 but not more than 25	0.19	0.18
More than 25 but not more than 30	0.23	0.22
More than 30 but not more than 40	0.27	0.25
More than 40	0.32	0.29

76. Rule 75 specifically lays down that goods vehicles of capacity of 5 or 4 1/2.tons, which are generally used for transporting animals, shall carry not more than forty sheep or goats. Chapter VII provides for transportation of poultry. Rule 79 provides that in transport of poultry other than day old chicks and turkey poult by rail, road or air, the poultry to be transported shall be healthy and in good condition and shall be examined and certified by a veterinary doctor for freedom from infectious diseases and fitness to undertake the journey. The poultry transported in the same container shall be of the same species and of the same age group. The poultry shall be properly fed and watered before it is placed in containers for transportation and extra feed and water shall be provided in suitable troughs fixed in the containers. The arrangements shall be made for watering and feeding during transportation and during hot weather, watering shall be ensured every six hours and the male stock shall not be transported with female stock in the same container. While transporting the poultry by road, the container shall not be placed one on the top of the other and shall be covered properly in order to provide light, ventilation and to protect from

rain, heat and cold air. The dimensions for containers for transportation are provided under Rule 83.

77. These Rules are not followed in letter and spirit while transporting poultry and cattle i.e. cows, bulls, bullocks, buffaloes, yaks and calves, throughout the State, causing them immense pain. There shall be a direction to the Police Department through Director General of Police, Himachal Pradesh to ensure that the animals are transported strictly as per the Transport of Animals Rules, 1978 and the transporters who violate these rules while transporting animals should be sternly dealt with under the various provisions of the Prevention of Cruelty to Animals Act, 1960. The Director General of Police, Himachal Pradesh is also directed to ensure that at entry and exit points, there is no violation to the Transport of Animals Rules, 1978 to ensure safe transportation of animals.

78. We have also expanded the scope of the Writ Petition in order to mitigate the hardships faced by the farmers. Farming is dated back as far as neolithic era. Farming also includes keeping animals by people for food and raw materials. There should be enough food for everybody. it should be safe and good. In India, still in large tracts of land, traditional agriculture is undertaken though in advanced countries it is intensive agriculture. The farming sector is not an organized sector. However, due to peculiar topographical and geographical conditions prevailing in the State of Himachal Pradesh, the farmers are dependent on rain. The farmers have no common forum to redress their grievances and it is thus of great public importance that the State should intervene to protect their interests. The Commissions are constituted by the Union/State Governments and their recommendations should ordinarily be accepted and if the same are not accepted, cogent reasons must be assigned. The farmers are under tremendous pressure. It is difficult for them to make both ends meet. The agriculture growth is falling.

79. The Court can take judicial notice of the fact that stray cattle are playing havoc with the crops. Neither the State Government nor the Urban and Local bodies have taken any meaningful steps to eradicate this menace. This menace can only be addressed by housing stray cattle in the gosadans/gaushalas/cattle sheds. There is also monkey and Neelgai menace faced by the farmers. The massive damage caused by monkeys, Neelgai and wild boars is causing immense loss to the crops in the State of Himachal Pradesh. The harvesting, rain/snow pattern has also changed due to global warming thereby reducing the productivity. It is the duty of the State Government to ensure social order for promotion of welfare of the people as enshrined under Article 38 of the Constitution of India. Article 48 of the Constitution of India requires the State to organise agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.

80. In order to obviate the distress suffered by the farmers throughout India, the National Commission on Farmers (NCF) was constituted on November 18, 2004 under the chairmanship of Prof. M.S. Swaminathan. The NCF has submitted four reports in December 2004, August 2005, December 2005 and April 2006, respectively. The fifth and final report was submitted on October 4, 2006. The Swaminathan Committee on Farmers provides that measures should be taken by the State to prevent diversion of prime agricultural land and forest to corporate sector for non-agricultural purposes. The Court can take judicial notice that the land holdings are shrinking since agricultural land is also required by the State and also for corporate sector for non-agricultural purposes. The acquiring of prime agricultural land should be the last resort. The National Commission on Farmers was mandated to make suggestions on issues such as:

a) a medium-term strategy for food and nutrition security in the country in order to move towards the goal of universal food security over time;

b) enhancing productivity, profitability, and sustainability of the major farming systems of the country;

c) policy reforms to substantially increase flow of rural credit to all farmers;

d) special programmes for dryland farming for farmers in the arid and semi-arid regions, as well as for farmers in hilly and coastal areas;

e) enhancing the quality and cost competitiveness of farm commodities so as to make them globally competitive;

f) protecting farmers from imports when international prices fall sharply;

g) empowering elected local bodies to effectively conserve and improve the ecological foundations for sustainable agriculture.

81. According to the report, the causes for farmers distress are unfinished agenda in land reform, quantity and quality of water, technology fatigue, access, adequacy and timeliness of institutional credit and opportunities for assured and remunerative marketing. Adverse meteorological factors add to these problems. The farmers need to have assured access and control over basic resources, which include land, water, bioresources, credit and insurance, technology and knowledge management, and markets. The main recommendations of the National Commission on Farmers are to distribute ceiling-surplus and waste lands; prevent diversion of prime agricultural land and forest to cooperate sector for non-agricultural purposes; ensure grazing rights and seasonal access to forests to tribals and pastoralists, and access to common property resources; establish a National Land Use Advisory Service, which would have the capacity to link land use decisions with ecological meteorological and marketing factors on a location and season specific basis; and to set up a mechanism to regulate the sale of agricultural land, based on quantum of land, nature of proposed use and category of buyer.

82. As per the report, out of the gross sown area of 192 million hect., rainfed agriculture contributes to 60 per cent of the gross cropped area and 45 per cent of the total agricultural output. The report recommends comprehensive set of reforms to enable farmers to have sustained and equitable access to water and to increase water supply through rainwater harvesting and recharge of the aquifer should become mandatory. "Million Wells Recharge" programme, specifically targeted at private wells should be launched.

83. According to the report, the per unit area productivity of Indian agriculture is much lower than other major crop producing countries. The comparative yield of select crops in various countries (kg/hect.) is as under:

"Country	**Crop**				
	Paddy	**Wheat**	**Maize**	**Groundnut**	**Sugarcane**
India	2929	2583	1667	913	68012
China	6321	3969	4880	2799	85294
Japan	6414	-	-	2336	-
SA	6622	2872	8398	3038	80787

Indonesia	4261	-	2646	1523	-
Canada	-	2591	7974	-	-
Vietnam	3845	2711	4313	1336	65689”

84. In order to achieve higher growth in productivity in agriculture, the NCF has made the following recommendations:

“a) Substantial increase in public investment in agriculture related infrastructure particularly in irrigation, drainage, land development, water conservation, research development and road connectivity etc.

b) A national network of advanced soil testing laboratories with facilities for detection of micronutrient deficiencies.

c) Promotion of conservation farming, which will help farm families to conserve and improve soil health, water quantity and quality and biodiversity.”

85. The proportion of households below the poverty line was 28% in 2004-05 (close to 300 million persons). Several studies have shown that the poverty is concentrated and food deprivation is acute in predominantly rural areas with limited resources such as rain-fed agricultural areas. The Commission has recommended following measures for prevention of suicide by farmers:

“a) Provide affordable health insurance and revitalize primary healthcare centres. The National Rural Health Mission should be extended to suicide hotspot locations on priority basis.

(21) Set up State level Farmers' Commission with representation of farmers for ensuring dynamic government response to farmers' problems.

(22) Restructure microfinance policies to serve as Livelihood Finance, i.e. credit coupled with support services in the areas of technology, management and markets.

(23) Cover all crops by crop insurance with the village and not block as the unit for assessment.

(24) Provide for a Social Security net with provision for old age support and health insurance.

(25) Promote aquifer recharge and rain water conservation. Decentralise water use planning and every village should aim at Jal Swaraj with Gram Sabhas serving as Pani Panchayats.

(26) Ensure availability of quality seed and other inputs at affordable costs and at the right time and place.

(27) Recommend low risk and low cost technologies which can help to provide maximum income to farmers because they cannot cope with the shock of crop failure, particularly those associated with high cost technologies like Bt cotton.

(28) Need for focused Market Intervention Schemes (MIS) in the case of life-saving crops such as cumin in arid areas. Have a Price Stabilisation Fund in place to protect the farmers from price fluctuations.

(29) Need swift action on import duties to protect farmers from international price.

(30) Set up Village Knowledge Centres (VKCs) or Gyan Chaupals in the farmers' distress hotspots. These can provide dynamic and demand driven information on all aspects of agricultural and non-farm livelihoods and also serve as guidance centres.

(31) Public awareness campaigns to make people identify early signs of suicidal behavior."

86. The Commission has also recommended that it is imperative to raise the agricultural competitiveness of farmers with small land holdings. Productivity improvement to increase the marketable surplus must be linked to assured and remunerative marketing opportunities. The following measures have been suggested:

a) Promotion of commodity-based farmers' organisations such as Small Cotton Farmers' Estates to combine decentralised production with centralised services such as post-harvest management, value addition and marketing, for leveraging institutional support and facilitating direct farmer-consumer linkage.

b) Improvement in implementation of Minimum Support Price (MSP). Arrangements for MSP need to be put in place for crops other than paddy and wheat. Also, millets and other nutritious cereals should be permanently included in the PDS.

c) MSP should be at least 50% more than the weighted average cost of production.

d) Availability of data about spot and future prices of commodities through the Multi Commodity Exchange (MCD) and the NCDEX and the APMC electronic networks covering 93 commodities through 6000 terminals and 430 towns and cities.

e) State Agriculture Produce Marketing Committee Acts [APMC Acts] relating to marketing, storage and processing of agriculture produce need to shift to one that promotes grading, branding, packaging and development of domestic and international markets for local produce, and move towards a Single Indian Market.

87. By way of abundant caution, it is made clear that '**agriculture produce'** means all produce and commodities, whether processed or unprocessed of agriculture, horticulture, apiculture, sericulture, livestock and products of livestock, fleeces (raw wool) and skins of animals, forest produce and fisheries for the purpose of determining 50% of the weighted average cost production.

88. The farmers are debt ridden. They are not in a position to repay the debts due to ever decreasing prices of their produce. The worst affected are small and marginal farmers. Sometimes, they take recourse to extreme measures such as suicide etc. It is expected from the State to provide a mechanism to reduce their burden by creating a corpus to waive off their loans at least to the extent of Rs. 50,000/-. Most of the agricultural land in the State of Himachal Pradesh is rainfed. Whenever, there is scanty rain, the crops fail. The State is required to formulate a Scheme providing insurance cover to their crops in consultation with the National Insurance Companies at minimal premium.

89. Accordingly, the State of Himachal Pradesh through the Chief Secretary is directed to implement the broader recommendations made by the National Commission on Farmers (NCF), constituted on November 18, 2004 under the chairmanship of Prof. M.S. Swaminathan and also to consider providing MSP (minimum support price) for the following agricultural products grown/harvested by the farmers in the State of Himachal Pradesh which should be at least 50% more than the weighted average cost of production to reduce the distress of farming community within three months from today:

"1. Cereals

English Name	Hindi Name
1. Paddy	Dhan
2. Rice	Chawal
3. Wheat	Kanak
4. Maize	Makki
5. Barley	Jau
6. Buck Wheat	Kutu
7. Finger millet	Ragi
8. Haraka	Kodra
9. Common millet	Cheena
10. Italian millet	Kangoone
11. Spiked millet	Bajra

2. Pulses

1. Pigeon pea	Arhar
2. Lentil	Massur
3. Black gram	Urd
4. Green gram	Moong
5. Peas dry	Matar Khushk
6. Cow peas	Lobhia
7. Pulses split	Dal Dali
8. Gram	Chana
9. French bean/ Soyabean.	Rajmash/Bhararh.

3. Oilseeds

1. Mustard	Sarson
2. Indian rape	Toria
3. Linseed	Alsi
4. Groundnut shelled and unshelled.	Mungphali
5. Sesamum	Til
6. Rochet	Taramira
7. Cotton seed	Binaula
8. Indian Colza	Rai

4. Fruits

1. Mango	Am
2. Banana	Kela
3. Lichies	Lichies
4. Sweet orange	Malta
5. Lemon	Neemboo
6. Grapes	Angoor

7. Pomegranate-seed.	Anardana
8. Apple	Saib
9. Orange	Sangtra
10. Peach	Aru
11. Plum	Alucha
12. Pears	Naspati
13. Guava	Amrud
14. Chilgoza	Niyoza
15. Apricot	Khurmani
16. Persimon	Japani Phal
17. Watermelon	Tarbuz
18. Walnut	Akhrot
19. Almond	Badam
20. Musk-Melon	Kharbooza
21. Papaya	Papita

5. Vegetables

1. Potatoes	Alu
2. Onion dry	Piaz Khushk
3. Brinjal	Baingan
4. Bottle gourd	Ghia
5. Lady's finger	Bhindi
6. Red gourd	Halwa Kadu
7. Tomato	Tamator
8. Cauliflower	Phulgobhi
9. Cabbage	Bandhgobhi
10. Sponge gourd	Ghia-tori
11. Green peas	Matar hari
12. French bean	Pharas bean
13. Leaves of Indian colza mustard and spanich etc.	Sag
14. Carrot	Gajar
15. Raddish	Muli
16. Turnip	Salgam
17. Tinda gourd	Tinda
18. --	Kathal
19. --	Zami Kand
20. Arum	Arbi
21. --	Kachalu
22. Fenu greek	Methi hari
23. Hill capsicum	Mirch badi
24. Bitter gourd	Karela
25. Ash gourd	Petha

26. Cucumber	Khira
6. Fibres.	
1. Cotton ginned and unginned.	Kapas Aur rui
7. Animal Husbandry Products.	
1. Poultry	--
2. Eggs	Anda
3. Cattle	–
4. Sheep	Bhed
5. Goat	Bakri
6. Wool	Oon
7. Butter	Makhan
8. Ghee	Ghee
9. Milk	Dudh
10. Goat meat and Mutton.	Bakri-aur Bhed-ka-gosht.
11. Fish	Machhali.
8. Condiments, spices and other	
1. Ginger	Adarak
2. Garlic dry	Lahasn khushk.
3. Chillies dry and green.	Mirch
4. Turmeric	Haldi
5. Coriander	Dhaniya khushk and hara.
9. Narcotics	
1. Tabacco	Tambaku
10. Miscellaneous	
1. Sugarcane	Ganna
2. Gur and Shakkar	Gur aur Shakkar
3. --	Khandsari
4. Bark of walnut	Dandassa
5. --	Dhoop
6. Edible mushroom	Guchi
7. --	Banakhsa
8. Bhabar grass	Bhabar ghas
9. Discoria	Singli-Mingli
10. Kmru Patti/ Pattis	Pathis.
11. Catechu	Katha
12. Viola	Ambla
13. Sausarealappa	Kuth
14. Timber	Imarti Lakri.”

90. The State of Himachal Pradesh through the Chief Secretary is also directed to set up State Level Farmers’ Commission with representatives of farmers for ensuring

dynamic government response to farmers' problems as recommended by the National Commission on Farmers (NCF). The Addl. Chief Secretary (PR), the Addl. Chief Secretary (UD), the Addl. Chief Secretary (AH) are also directed to release five crore each, subject to availability of funds, to the Urban Bodies i.e. Municipal Corporations/Municipal Councils/Nagar Panchayats/Gram Panchayats for the construction of gosadan/gaushalas/cattle sheds, within a period of three months from today. This amount can also be spread over a period of time taking into consideration the financial crunch faced by the State Government, as noticed by us in the affidavit filed by the Chief Secretary to the Government of Himachal Pradesh.

91. The State of Himachal Pradesh through Chief Secretary is directed to formulate a Scheme for waiver of loans raised by small marginal farmers, at least upto Rs. 50,000/- or in the alternative to permit them to pay the loans in installments by reducing their rate of interest, if need be by creating corpus in consultation with Nationalized/ Gramin/Co-operative Banks. The Chief Secretary to the State of Himachal Pradesh is also directed to formulate a Scheme for providing insurance cover to their crops in consultation with National Insurance Companies, within a period of six months from today at minimal premium.

92. The Chief Secretary to the Government of Himachal Pradesh, Addl. Chief Secretary(UD), Addl. Chief Secretary (PR), Addl. Chief Secretary (AH), the Deputy Commissioners and Superintendent of Police of all the Districts and Secretary, Ministry of Environment, Forests & Climate Change, Government of India are directed to file the status report/compliance report within three months. The Chief Secretary to the Government of Himachal Pradesh shall be personally liable to ensure the compliance of the mandatory directions issued by this Court.

93. The description of farmer has aptly been described by the American Poet Edwin Markham's poem ***"The Man with the Hoe".*** This poem was called "the battle-cry of the next thousand years" and translated into 37 languages. We quote:

> ".....Bowed by the weight of centuries he leans
> Upon his hoe and gazes on the ground,
> The emptiness of ages in his face,
> And on his back the burden of the world....."

94. List on 13.6.2016 for further orders. Copy Dasti.

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

Daljit Kumar son of Shri Bhagat Ram ....Revisionist/Auction purchaser

Versus

H.P. State Financial Corporation through its Manager (Legal) and others ....Non-Revisionists

Civil Revision No. 323 of 2003
Order Reserved on 24th February 2016
Date of Order 2nd March 2016

Code of Civil Procedure, 1908- Section 115- Property of the loanee was put to auction in default of payment -D, an auction purchaser purchased half share for consideration of Rs.

3,54,000/-, but did not deposit the whole of the amount - he filed an application pleading that half share was 0-01-72 hectares but the area was shown as 0-01-52 hectares in the sale proclamation- he prayed that the auction proceedings be cancelled and the amount deposited by him be refunded to him- Learned District Judge held that full amount was not deposited by the auction purchaser, sale is non-est and liable to be set aside- held, in revision that it was mentioned by the District Judge in his order that share mentioning 1.52 hectares would be auctioned- this area was also mentioned in the sale proclamation - auction purchaser was legally bound to deposit the amount- forfeiture of auction amount is in the discretion of the Court- forfeiture of the entire amount in the present case is harsh - forfeiture modified and half of the amount ordered to be forfeited. (Para-9 to 16)

Cases referred:

Raghunath Lenka vs. Karunakar Rout and another, AIR 1957 Orissa 257
United Commercial Bank vs. Mani Ram and others, AIR 2003 HP 63

For the Revisionist:	Mr. R.K.Bawa, Sr. Advocate with Mr.Jeevesh Sharma, Advocate.
For Non-Revisionist No.1:	Mr. Ashwani K. Sharma, Advocate with Ms.Monika Shukla Advocate.
For Non-Revisionists Nos. 2 and 3:	None.
For Non-Revisionists Nos. 4 & 5:	Mr. M.L. Chauhan and Mr. Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 115 of Code of Civil Procedure 1908 against order dated 9.9.2002 passed by learned District Judge Mandi (H.P.) in Civil Miscellaneous Petition No. 202 of 2000 filed in execution petition No. 15 of 1997 titled HPFC vs. Sarwan Automobiles.

Brief facts of the case

2. M/s Sarwan Automobiles Shop village Barchhawar Sarkaghat District Mandi H.P. through its sole proprietor Sarwan Kumar applied for grant of loan to the tune of ` 316000/- (Rupees three lacs sixteen thousand only) for construction of factory and to purchase the machinery. It is pleaded that H.P. Financial Corporation Shimla sanctioned the loan of Rs.190000/- (Rupees one lac ninety thousand only) and mortgage deed of immovable property comprised in Khata No. 81 min Khatauni No. 216 min Khasra No. 1119 situated in village Barachhwar P.O. and Tehsil Sarkaghat District Mandi H.P. was executed. Loanee did not pay the loan amount within time and thereafter H.P. Financial Corporation Shimla filed petition under Section 31 of H.P. State Financial Corporation Act 1951 for recovery of loan amount. Learned District Judge Mandi passed order for recovery of Rs.300626/- (Rupees three lacs six hundred twenty six only) with costs and interest upto 31.8.1993 and further ordered that M/s Sarwan Automobiles shop will liable to pay interest at the rate of 16½% with half yearly rests. Learned District Judge further affirmed interim order dated 2.12.1993 restraining Sarwan Kumar proprietor M/s Sarwan Automobiles from transferring or removing the machinery plant and other equipments installed in factory. Learned District Judge Mandi further ordered for sale of mortgaged property mentioned in mortgage deed Ext.PB placed on record qua land measuring 1.52 hectares situated in village Barchhwar Tehsil Sarkaghat District Mandi H.P. and also ordered for sale of factory

building, fixtures, fitting including electric installation and also plant and machinery described in Schedule B as security for the loan amount. Learned District Judge further ordered that Corporation would be at liberty to apply for sale after the expiry of period of appeal.

3. Thereafter H.P. Financial Corporation filed execution petition No. 15 of 1997. Thereafter sale of half share of Sarwan comprised in Khasra No. 1119 old Khasra No. 1162 new siutuated in village Barchhwar Tehsil Sarkaghat District Mandi H.P. measuring 0-01-52 hectares was auctioned. Thereafter Daljeet Kumar auction purchaser purchased the share of Sarwan Kumar on dated 25.3.2000 in consideration amount of Rs.354000/- (Rupees three lacs fifty four thousand only) being the highest bidder and deposited 1/4th of total amount on the same day. Thereafter on 4.4.2000 Daljeet Kumar auction purchaser filed application under Order 21 Rule 90 and Section 47 of CPC before learned District Judge Mandi pleaded therein that half share of Sarwan Kumar in mortgaged property comprised in Khasra No. 1162 was to the extent of 0-01-72 hectares but when proclaimation of sale by public auction was issued by Court under Order 21 Rule 66 CPC then less area was shown as 0-01-52 hectares. Auction purchaser pleaded therein that auction proceedings be cancelled and amount deposited by auction purchaser be refunded to him or area of auction of immovable property be enhanced to 0-01-72 hectares and time to deposit rest of auctioned money be extended.

4. Per contra response filed on behalf of H.P. State Financial Corporation Shimla pleaded therein that Sarwan had mortgaged his half share with H.P. State Financial Corporation Shimla comprised in Khasra No. old 1119 and 1162 new situated in village Barchhwar Tehsil Sarkaghat District Mandi. It is pleaded that when final order was passed by learned District Judge Mandi (H.P.) then area was mentioned as 0-01-52 hectares and in final order of learned District Judge area of mortgaged land was no where shown as 0-01-72 hectares and prayer for dismissal of application sought.

5. Learned District Judge on 22.3.2002 framed following issues:-

1. Whether auction and sale are liable to be cancelled as alleged? OPA
2. Whether applicant is entitled to the refund of the auction money deposited by him? OPA
3. Relief.

Learned District Judge Mandi decided issue No.1 in affirmative and held that his predecessor on 16.5.2000 held that full amount of auction money was not deposited by auction purchaser as provided under Order 21 Rule 85 CPC and held that sale in favour of auction purchaser is nonest and liable to be set aside. Learned District Judge Mandi (HP) decided issue No. 2 in negative. Learned District Judge Mandi dismissed the application filed by auction purchaser namely Daljit Kumar on 9.9.2002.

6. Feeling aggrieved against the order dated 9.9.2002 revisionist filed the present civil writ petition.

7. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist No.1 and learned Additional Advocate General appearing on behalf of non-revisionists Nos. 4 and 5 and Court also perused entire record carefuly.

8. Following points arise for determination in civil revision petition:-

1. Whether civil revision is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2. Relief.

9. Findings upon point No.1 with reasons

9.1 Submission of learned Advocate appearing on behalf of revisionist that as per report of halqua patwari placed on record share of Sarwan Kumar was 0-01-72 hectares and not 0-01-52 hectares and on this ground revision petition be accepted is answered accordingly for reasons hereinafter mentioned. When the final order was passed by learned District Judge Mandi H.P. on 3.6.1996 in petition No. 3 of 1994 titled H.P. Financial Corporation vs. M/s Sarwan Automobiles Shop learned District Judge has specifically mentioned that only share measuring 1.52 hectares would be auctioned from old Khasra No. 1119 situated in village Barchhwar Tehsil Sarkaghat District Mandi. It is held that executing Court legally cannot modify the final order of competent authority of law. In present case auction purchaser did not file any application for modification of original order passed by learned District Judge Mandi dated 3.6.1996 announced in petition No. 3 of 1994.

10. Submission of learned Advocate appearing on behalf of revisionist that revisionist could not deposit the remaining auction amount because correction application was filed before executing court by auction purchaser within fifteen days and on this ground revision petition be accepted is decided accordingly for reasons hereinafter mentioned. It is held that executing Court was not legally competent to modify the original order of learned District Judge passed in petition No. 3 of 1994 titled HPFC vs. M/s Sarwan Automobiles Shop. In original petition No. 3 of 1994 it was directed by learned District Judge Mandi in positive manner that only 1.52 hectares of mortaged land comprised in Khasra No. 1119 situated in village Barchhwar would be auctioned by way of sale. Auction purchaser came to know about less area after auction and thereafter applied before executing Court for correction of area. It is proved on record that full details of immovable property which was to be auctioned was specifically mentioned in positive manner in Annexure A Schedule-I. Court has perused Annexure-A Schedule-I carefully and there is recital in Annexure-A Schedule-I that land measuring 0-01-52 hectares comprised in Khasra No. 1119 situated in village Barchhwar Tehsil Sarkaghat District Mandi would be auctioned. Court is of the opinion that auction purchaser was under legal obligation before giving bid at the time of auction to peruse Annexure-A Schedule-I. Area of auctioned land was notified to the general public prior to auction of mortgaged property.

11. Another submission of learned Advocate appearing on behalf of revisionist that halqua patwari has specifically mentioned in his report that half share of Sarwan in Khasra No. old 1119 and new 1162 was 0-01-72 hectares and on this ground revision petition be accepted is also decided accordingly. Court is of the opinion that report of halqua patwari would not automatically modify the final order of learned District Judge Mandi (HP) passed in petition No. 3 of 1994 decided on 3.6.1996. Auction purchaser did not apply at any point of time to modify the final order dated 3.6.1996 passed by learned District Judge Mandi in petition No. 3 of 1994 titled HPFC vs. M/s Sarwan Automobile Shop. Hence it is held that report of halqua patwari would not automically modify the final order passed by learned District Judge in petition No. 3 of 1994.

12. Submission of learned Advocate appearing on behalf of revisionist that learned executing Court did not consider the fact that matter stood compromised between HPFC vs. M/s Sarwan Automobiles on 25.4.2001 and execution petition was dismissed by learned District Judge Mandi as one time settlement is also decided accordingly for the reasons hereinafter mentioned. It is proved on record that auction of immovable mortgaged property was conducted on 25.3.2000 and it is also proved on record that auction purchaser filed application under Order 21 Rule 90 read with Section 47 CPC on 4.4.2000 within

fifteen days after auction. It is proved on record that as per certificate given by halqua patwari the share of Sarwan in Khasra No. old 1119 new 1162 was 0-01-72 hectares.

13 It is proved on record that during the pendency of disposal of application filed by auction purchaser H.P. Financial Corporation filed application on 25.4.2001 pleaded therein that one time settlement has been executed inter se HPFC and M/s Sarwan Automobiles Shop to the tune of Rs.350000/- (Rupees three lacs fifty thousand only). Learned Advocate appearing on behalf of HPFC submitted that Corporation has received the amount to the tune of Rs.350000/- (Rupees three lacs fifty thousand only) as final settlement inter se HPFC and M/s Sarwan Automobiles Shop and prayed that execution petition be disposed of accordingly. Thereafter learned District Judge on 25.4.2001 dismissed the application as partly satisfied. It was held in case reported in ***AIR 1957 Orissa 257 titled Raghunath Lenka vs. Karunakar Rout and another*** that forfeiture of deposited amount under Order 21 Rule 86 CPC is discretion of Court. It was held that in old Code the words 'shall be forfeited' was mentioned in Rule 86 but now word 'shall' has been substituted by word 'may if the Court thinks fit' in Rule 86. It was held that executing Court after taking into consideration the circumstances should exercise judicial discretion in the matter of forfeiture.

14. Hon'ble High Court of H.P. in case reported in ***AIR 2003 HP 63 titled United Commercial Bank vs. Mani Ram and others*** held that forfeiture of auctioned money is discretion of Court. Hon'ble High Court held that if there is default in payment of remaining auctioned money by auction purchaser and if reason given by auction purchaser is valid and credible then Courts are under legal obligation to consider the factors. Hon'ble High Court of H.P. in case cited supra forfeitted the half amount of deposited amount and directed that remaining consideration amount be refunded to auction purchaser.

15. In present case auction was conducted on 25.3.2000 and auction purchaser filed CMP No. 202 of 2000 under Order 21 Rule 90 and under Section 47 of CPC on 4.4.2000 within fifteen days of auction and same was disposed of on 9.9.2002. In the present case it is proved on record that sale by way of auction in favour of revisionist was set aside by learned District Judge Mandi H.P. on 17.7.2000 and fresh warrant of sale was issued in terms of order dated 11.1.2000 returnable for 29.9.2000. Fresh proclaimation at the spot was ordered for 17.8.2000 and fresh auction order was issued for 18.9.2000. It is proved on record that fresh auction purchaser was Lekh Raj. It is proved on record that executing Court was to exercise fresh sale proceedings in accordance with law. It is proved on record that subsequent auction purchaser namely Lekh Raj deposited amount to the tune of Rs.133500/- (Rupees one lac thirty three thousand five hundred only) on 29.9.2000. It is proved on record that thereafter objections were filed by H.P. Financial Corporation and serious allegations were levelled against Shri Govind Ram Bailiff. It is proved on record that on 30.11.2000 learned executing Court censured conduct of Bailiff. Thereafter on 25.4.2001 H.P. Financial Corporation withdraw execution petition on the ground of one time settlement inter-se H.P. Financial Corporation and M/s Sarwan Automobile.

16. Hence it is held that forfeiture of 1/4th of entire amount of auction purchaser to the tune of Rs.88500/- (Rupees eighty eight thousand five hundred only) is harsh in nature. In the ends of justice it requires modification. It is held that interest of justice will be met if half of amount to the tune of Rs.44250/- (Rupees forty four thousand two hundred fifty only) is forfeited. Point No.1 is decided accordingly.

Point No. 2 (Relief)

17. In view of findings upon point No.1 civil revision is partly allowed. It is ordered that only half of deposited amount will be forfeited and amount to the tune of Rs.44250/- (Rupees forty four thousand two hundred fifty only) will be refunded to

revisionist/auction purchaser alongwith upto date interest. Order of learned executing Court dated 9.9.2002 is modified to this extent only. No order as to costs. Revision petition is disposed of. File of learned executing Court alongwith certified copy of order be sent back forthwtih. Civil Revision is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Gokul Ram ....Appellant
Versus
Union of India ...Respondent.

RSA No.318 of 2015
Date of Decision: 2.3.2016

Specific Relief Act,1963- Section 38- M.C. Shimla had issued Teh Bazari receipts in favour of the plaintiff- plaintiff claimed that land does not belong to Union of India- he filed a suit for restraining the defendant from evicting the plaintiff from the suit land- suit was decreed by the trial Court on the premise that defendant had failed to establish his ownership- this decree was reversed in appeal – khasra number over which tea stall was being run by the plaintiff was not given- witness of the defendant deposed about the ownership- held, that in these circumstances, the Appellate Court had rightly reversed the judgment of the trial Court. (Para-2 to 16)

For the Appellant : Mr. Neeraj Gupta, Advocate.
For the Respondent : Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Angrez Kapoor, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

There is a limit to which an encroacher of public land can extend his luck. It cannot be disputed that the suit property does not belong to the plaintiff. It also is not in dispute that neither the Municipal Corporation, Shimla nor the Union of India (who claim to be the owner of the suit property), have allowed the plaintiff to occupy the suit premises. Thus what is the plaintiff's right to occupy the same, remains unproven on record. In the absence of any authorization or legal sanction, mere issuance of *Teh Bazari* receipts (Ex.AW-1/A, PW-2/A, Mark 'C', 'D', 'E' and 'F'), by the Municipal Corporation of Shimla, who is not the owner of the property, would not confer any right, much less indefeasible, upon the plaintiff to occupy the premises in question.

2. Plaintiff-appellant Gokul Ram, hereinafter referred to as the plaintiff, has filed the present appeal under the provisions of Section 100 of the Code of Civil Procedure, assailing the judgment and decree dated 7.5.2015, passed by the learned Additional District Judge-I, Shimla, Himachal Pradesh, in Civil Appeal No.23-S/13 of 2014, titled as *Union of India v. Gukul Chand,* whereby judgment and decree dated 30.4.2014, passed by the Civil Judge (Jr. Division), Court No.5, Shimla, Himachal Pradesh, in Civil Suit No.84-1 of 2002, titled as *Gokul Ram v. Union of India,* stands reversed.

3. Who is the owner of the suit land is a question raised by the plaintiff. Significantly, he has not led any evidence to establish such fact. Official of the Municipal Corporation, Shimla (Shri Brij Lal – PW-2) has deposed that the land does not belong to the Corporation.

4. It is contended by the plaintiff that the land does not belong to the Union of India (sole defendant) and as such their action of dispossessing him is without any legal sanction. But while doing so, he conveniently forgets two substantial facts: (i) himself having moved an application (Ex. DW-5/A) for getting his unauthorized and illegal possession regularized, in terms of the Policy framed by the State (said document reflects the Khasra number to be the one which is the subject matter of the suit), (ii) an order passed by this Court, in an earlier round of litigation (CWP No.760/1995, titled as *Gokul Chand v. The Estate Officer & another*, decided on 29.4.1996), with regard to the same subject matter (land), recording his undertaking to the following effect:

> "……
>
> On instructions, the learned counsel for the petitioner has stated that the petitioner wants to vacate the said premises within two years and the same will hand over to the respondents. In our opinion two years is a long time, therefore, we allow only one year to the petitioner to hand over the vacant possession of the premises to the respondents. During the above period he shall not give the premises on subletting or inducting the new person and that he shall not construct any permanent structure. He shall execute a bond before the registry of this Court stating clearly that he shall hand over the vacant possession within one year from today and shall also not induct any sub-tenant or any other person to reside in the premises. He shall also give an undertaking within one week from today."
>
> ……" (Emphasis supplied)

5. It appears that by abusing process of law, on one pretext or the other, plaintiff has been able to retain his possession over the suit land, and that too in gross violation of his undertaking furnished to this Court, though it is argued by the learned Assistant Solicitor General of India that immediately after complying with the order, plaintiff forcibly took possession of the very same land and when steps to regain the possession were taken, he filed a Civil Suit dated 31.8.2002. Noticeably since then his possession stands protected by way of various interim orders passed by the Courts below.

6. At some stage all litigations must come to an end, more so when no indefeasible right stands violated or infringed.

7. Record reveals that vide Notice/Order dated 6.12.1994 (Ex. DW-2/C), proceedings were initiated against the plaintiff, under the provisions of Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (hereinafter referred to as the Act). The District Judge, vide judgment and decree dated 7.6.1995 (Ex. DW-2/D), dismissed the plaintiff's appeal, which further led to the passing of order dated 29.4.1996 (Ex. DW-3/A) by this court. However, on 21.8.2002, again notice (Ex. DW-2/E) was issued, seeking ejectment of the plaintiff, under the Act. Hence, the action initiated by the Union of India is totally in consonance with law.

8. Significantly, plaintiff did not implead Municipal Corporation, Shimla as a party to present suit. But however, on the strength of *Teh Bazari* receipts, so issued by the officials of the Corporation, filed a suit, praying for the following relief:

"It is, therefore, respectfully, prayed that the suit of the plaintiff may kindly be allowed and the decree for Permanent Prohibitory Injunction restraining the Defendant from evicting and dispossessing and interfering with the possession of the plaintiff from and on the suit property i.e. Tea Stall erected on Retaining Wall near road/Parking IGMC, Hospital, Shimla on Sanjauli Lakkar Bazar road through its servants, contractors, labourers etc., etc. may kindly be passed."

9. In defence, while pleading ownership of the land, defendant specifically denied the land being owned by the Municipal Corporation, Shimla.

10. Based on the pleadings of the parties, trial Court framed the following issues:

1. Whether the plaintiff is entitled for a decree of permanent prohibitory injunction, as prayed? OPP
2. Whether the present suit is not maintainable? OPD
3. Whether this Court has got no jurisdiction to adjudicate the controversy between the parties? OPD
4. Relief.

11. Trial Court decreed the suit in the following terms:

"In view of the aforesaid findings already made while discussing issues, the suit of the plaintiff is decreed. Decree sheet be prepared accordingly."

12. Trial Court decreed the suit on the premise that the defendant failed to establish its ownership over Khasra No.1467/1. However, the Lower Appellate court, reversed such findings of fact, judgment and decree, by observing as under:

"21. The aforesaid findings are totally contrary to the case pleaded on behalf of the plaintiff. <u>There is no case of plaintiff that the plaintiff is in possession of Khasra No.1467/1. The learned Civil Judge (Junior Division), Court No.5, Shimla has failed to appreciate that Khasra No.1467/1 can only be a part of Khasra No.1467</u>.

22. There is no convincing evidence on the case file to show that the plaintiff has constructed a new Tea Stall in another place, especially when the plaintiff has failed to establish on record the identify (sic: identity) of the land as discussed above. The impugned judgment and decree passed by the learned Civil Judge (Junior Division), Court NO.5, Shimla is not sustainable in the eyes of law. The plaintiff is not entitled for decree of permanent prohibitory injunction as prayed and the suit of the plaintiff is not maintainable in the present form. The findings passed by learned Civil Judge (Junior Division), Court No.5, Shimla on issues No.1 and 2 are set-aside. Issue No.1 is decided against the plaintiff while issue No.2 is decided in favour of the defendant." (Emphasis supplied)

13. It be only observed that the plaint is conspicuously silent with regard to Khasra number over which the Tea Stall is being run by the plaintiff. It is not the proven case of the plaintiff that Khasra No.1467/1 is owned by the Municipal Corporation, Shimla. Even as a witness, he could not depose such fact. He is not even aware about the ownership of Khasra No.1467 and 1467/1.

14. The witness from the Municipal Corporation is categorical that the land is not owned by the Corporation, whereas defendant's witness has deposed about its ownership.

15. As such, in the given facts and circumstances, no interference is called for. Findings, judgment and decree dated 7.5.2015, passed by the learned Additional District Judge-I, Shimla, Himachal Pradesh, in Civil Appeal No.23-S/13 of 2014, titled as *Union of India v. Gukul Chand* cannot be said to be illegal or perverse. Also findings cannot be said to be erroneous or based on incorrect/ incomplete appreciation of material on record.

16. As such, it cannot be held that findings returned by the first appellate Court are illegal, perverse and erroneous, warranting interference by this Court. No question of law, muchless substantial question of law, arises for consideration in the present appeal. Interim order vacated, reserving liberty to the defendant to take action in accordance with law. For all the aforesaid reasons, the appeal is dismissed and disposed of, so also the pending application(s), if any.

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

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

Cr. Appeal No.: 487 of 2015
Reserved on: 26.2.2016
Date of Decision: 02.3.2016

Protection of Children from Sexual Offences Act, 2012- Section 6- Prosecutrix was raped and threatened by the accused- subsequently, she went to the police Station where FIR was recorded- her medical examination was conducted, which confirmed the rape- her radiological age was found to be 13 ½ years to 15 years – accused was sentenced and convicted by the trial Court – testimony of the prosecutrix was credible and confidence inspiring - she supported the prosecution version- there is no improvement or embellishment over her previous statement- her statement was corroborated by the testimonies of PW-2 and PW-4- she was proved to be less than 15 years of age- her testimony regarding the rape was confirmed by medical evidence- underwear of the victim indicated presence of DNA of more than one person- DNA profiling was compatible with DNA of accused- held, that in these circumstances, trial Court had rightly convicted the accused- appeal dismissed. (Para-10 to 15)

For the Appellant: Mr. Vikas Rathore, Advocate.
For the respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

This appeal stands directed against the judgement rendered on 21/30.05.2015 by the learned Special Judge, Kangra at Dharamshala, Himachal Pradesh in

Sessions Case No.9-K/VII-2013, whereby the appellant stands convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.25000/- and in default to undergo simple imprisonment for two more years for commission of offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

2. The prosecution story, in brief, is that the prosecutrix is in close relation of the accused. She is related to him as niece. In the year, 2013 she was a student of 10th class in Sauhra School. On 27.1.2013 at about 11 a.m., she had gone to Kedar Studio Sauhra for getting her photographs. The photographer told the prosecutrix that the photographs were not ready and, therefore, the prosecutrix was coming back to her house from there. On the way, the accused Harnam Singh had met her near the house which was under construction and belonged to the father of the prosecutrix. The accused asked the prosecutrix to accompany him in order to make love. The prosecutrix being of immature age could not understand as to what the accused had told her and she accompanied him. He took her to one room of that house which was under construction. He had kissed her there and thereafter he started pressing her breasts. She could not understand as to what the accused was doing. Thereafter the accused had forcibly removed the Salwar of the prosecutrix and then forcibly made her lie down in the room with her back on the ground and thereafter, he had put off his pant and then had committed penetrative sexual assault with the prosecutrix for 8-10 minutes. After performing this forcible sexual intercourse with her, the accused had given a hundred rupee note to her and directed her not to disclose about this occurrence to any one. The prosecutrix had thereafter gone to her house and had not talked to anybody about this occurrence. She was under fear and kept on thinking about the occurrence all alone. Realizing that the accused had committed a wrong act with her for which the accused should be punished, she gathered some courage and thought of getting justice for herself. Then she had straightaway gone to the Police Post Gaggal, all by herself. She narrated the occurrence to ASI/Incharge of the Police Post, Gaggal. The said ASI on hearing the prosecutrix, informed her mother telephonically on which her mother, grandmother, Taya and Tai came to the Police Post Gaggal and in their presence, the statement of the prosecutrix was reduced into writing vide rapat No. 8 Ex.PW-3/A. Videography of her statement had also been conducted vide CD Ex.PW-13/E. The said rapat was sent to Police Station, Kangra, through Constable Bhinder Singh, on the basis of which FIR Ex.PW-10/A came to be registered against the accused. The currency note of Rs. 100/- was also handed over by the prosecutrix to the Police which had been given to her by the accused after committing penetrative sexual assault with her. The currency note of Rs. 100/- was taken into possession by the Police vide memo Ex.PW-3/B. The prosecutrix had herself given in her own hand-writing Ex. PW-3/C about the occurrence which had taken place with her. The lady constable Surendra Kumari was deputed to get the prosecutrix medically examined from the doctor vide application Ex.PW-2/A and accordingly she was medically examined vide MLC Ex. PW-2/C. Her x-ray examination had also been conducted vide form Ex.PW-2/B and x-ray films Ex.PW-2/D to Ex. PW-2/F and report Ex.PW-2/G was procured according to which the age of the prosecutrix was more than 13 ½ years, but less than 15 years. As per medical examination, the prosecutrix was found to have been subjected to sexual intercourse, but the final opinion was reserved till receipt of the FSL report. The pubic hair, vaginal swabs and slides were prepared and preserved and the clothes and undergarments of the prosecutrix were sealed by the doctor in accordance with codal formalities and were handed over to the police, which were deposited with the MHC, who entered the same in Malkhana register, the entry abstract of which are Ex.PW-8/A to Ex.PW-8/C. The accused was arrested and his medical examination was got conducted vide application Ex.PW-1/A and as per MLC Ex.PW-1/B, he was found capable to perform sexual intercourse. At the time of medico-legal examination of the accused, the pubic hair, garment including undergarments of the accused had been sealed in two parcels and were

handed over to the Police which were deposited with the MHC. The same had also been entered in the Malkhana register, the entry abstract of which is Ex. PW-8/A. The blood sample of the accused had also been taken for which application Ex.PW-13/B was moved and the blood sample of the accused was taken for which forms Ex.PW-14/A and Ex.PW-14/B were filled in. The police had moved application Ex.PW-6/A before the Secretary Gram Panchayat Sauhara, for obtaining the birth certificate of the prosecutrix, who had issued the birth certificate Ex.PW-6/B. He had also issued family register copy Ex.PW-6/C of the prosecutrix to the police. The Police had also moved application Ex.PW-7/A before the Head Master Govt. High School, Sauhara, for obtaining the date of birth certificate of the prosecutrix and accordingly the Head Master of the said school issued date of birth certificate Ex.PW-7/B to the Police, according to which the date of birth of the prosecutrix was 15.7.1998. The police also visited the spot and prepared site plan Ex.PW-12/A and thereafter the photographs of the spot, Ex.PW-13/D-1 to D-9 were taken and CD of these photographs had also been prepared.

3. The case property of this case was sent to FSL Junga with docket Ex.PW-12/E, vide RC Ex.PW-8/D through constable Hans Raj No. 514 on 3.2.2013, who had deposited the case property in FSL Junga on 4.2.2013 in the same condition. The FSL Junga sent the report Ex.PA to the Police and thereafter the police had shown that report to the doctor, who had then given final opinion Ex.PW-2/H according to which the prosecutrix had been found to have been subjected to sexual intercourse on 27.1.2013.

4. On completion of investigation into the offences allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

5. The accused-appellant herein stood charged for committing an offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The accused-appellant pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined 15 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, stood recorded wherein he pleaded innocence and claimed false implication. In defence he chose to lead evidence and examined one witness.

7. The accused-appellant stands aggrieved by the judgment of conviction recorded by the learned trial Court. Shri Vikas Rathore, learned Advocate 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.

8. 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 Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference rather meriting vindication.

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

10. The accused-appellant is alleged to have committed aggravated sexual assault upon minor prosecutrix. Exts.PW-15/A and PW-15/B constituting the pedigree table of the prosecutrix and the accused, proven by PW-15 conclusively denotes the factum

of both belonging to the same family. Firm conclusivity to the enunciations aforesaid in Exts.PW-15/A and PW15/B stands acquired by the prosecutrix deposing in tandem thereto in her examination-in-chief, factum whereof remaining unconcerted to be shred apart by the learned defence counsel while subjecting her to cross-examination, is obviously personificatory of the defence acquiescing to the enunciations in Exts.PW-15/A and PW-15/B.

11. Be that as it may, this Court is now enjoined to traverse through the prosecution evidence for discerning therefrom the pre-eminent fact of the version qua the alleged incident deposed by the prosecutrix being credible as well as inspiring. In the event of an incisive reading of her deposition underscoring the factum of her testimony being credible besides inspiring, this Court would be constrained to record findings of conviction against the accused-appellant. A threadbare scanning of the testimony of the prosecutrix unfolds the factum of her deposition comprised in her examination-in-chief candidly communicating therein a version qua the ill-fated incident in tandem with besides in corroboration to the report qua the occurrence constituted in Ext.PW-10/A. A sharp reading of her deposition comprised in her cross-examination omits to convey of hers either contradicting her version recorded in her examination-in-chief qua the ill-fated incident, also its incisive reading portrays of there being no occurrence therein of any improvement or embellishment over her previous statement recorded in writing for fostering an inference of her version qua the incident comprised in her examination-in-chief, hence standing belittled or lacking in creditworthiness. In sequel, it has to be aptly concluded that her testimony qua the occurrence is both inspiring as well as credible for rendering a conclusive determination qua the guilt of the accused-appellant.

12. Even though no corroborative evidence to the creditworthy testimony of the prosecutrix is enjoined to be emanating nor is it imperative to allude to any evidence corroborative to the credible, inspiring testimony qua the ill-fated occurrence recorded in the deposition on oath of the prosecutrix, yet the prosecution has led firm evidence corroborative to the trustworthy evidence qua the ill-fated occurrence embedded in the testimony of the prosecutrix. The germane corroborative evidence stands comprised in the testimonies of PW-2 and PW-4. With potent corroboration hence, standing lent by the PWs aforesaid to the version qua the incident spelt out by the prosecutrix in her deposition recorded on oath, gives firm conclusivity to an apt inference of the prosecution succeeding in proving the guilt of the accused-appellant.

13. Now it is imperative to determine besides reckon the age of the prosecutrix at the stage contemporaneous to the occurrence. PW-2 Dr. Parampreet Bawa in her deposition on oath has recorded therein the factum of the radiological age of the prosecutrix ranging between 13½ years but less than 15 years. She has denied the suggestions put to her in her cross-examination by the learned defence counsel qua the age of the prosecutrix being more than 16 years. Moreover, she has also denied the suggestion put to her in her cross-examination by the learned defence counsel qua the age of the prosecutrix as unraveled by skigram being more than 18 years and there being chances of error of two years on either side. Contrarily, she has clarified of occurrence of variations in her minimum and maximum age ranging between 6 to 8 months. Sequelly, the testimony of PW-2 manifests the factum of the age of the prosecutrix at the time contemporaneous to the occurrence being less than 15 years. Even if the opinion qua the age of the prosecutrix deposed on oath by PW-2 is infirm, yet infirmity, if any, gripping the opinion of PW-2 qua the age of the prosecutrix at the stage contemporaneous to the occurrence, stands overcome by abstract of birth register of the prosecutrix comprised in Ext.PW-6/C and her birth certificate comprised in Ext. PW-7/B, both of which unflinchingly are communicative of the factum of

the prosecutrix at the stage contemporaneous to the occurrence standing aged below 15 years. In aftermath, invincible evidence alluded to aforesaid underpins a formidable conclusion of the prosecutrix standing aged below 15 years at the stage contemporaneous to the occurrence.

14. The medical evidence too needs advertence. PW-2 who conducted the medical examination of the prosecutrix in quick spontaneity to the ill-fated occurrence of 27.1.2013, has with candor and firmness deposed of hers on the strength of the report of FSL comprised in Ext.PA holding an opinion of the prosecutrix standing subjected to sexual intercourse on 27.1.2013. The opinion underscored by PW-2 is lent corroborative vigour by Ext.PW12/A, which bespeaks the factum of Ext.PA the underwear of the victim indicating the presence of DNA of more than one person besides DNA profiling thereof being compatible with the DNA of accused Harnam Singh. The aforesaid best evidence qua the inculpatory role of the accused in the offence committed by him has immense conclusivity for founding thereupon a clinching verdict as aptly recorded by the learned trial Court of the accused forcibly subjecting the minor prosecutrix to sexual intercourse.

15. 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.

16. In view of the above, we find no merit in this appeal which is accordingly dismissed. In sequel, the impugned judgement is affirmed and maintained. Record of the learned trial Court be sent back forthwith.

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

Cr.A.Nos.33, 35, 75, 135 and 335 of 2010.
Reserved on: 24th February, 2016.
Date of Decision: March 02, 2016.

1. **Cr.Appeal No.33 of 2010**:	
Ram Lal @ Bittu	...Appellant.
Versus	
State of H.P.	...Respondent.
2. **Cr.Appeal No.35 of 2010**:	
Bittu & Anr.	...Appellants.
Versus	
State of H.P.	...Respondent.
3. **Cr.Appeal No.75 of 2010**:	
Randhir Singh	...Appellant.
Versus	
State of H.P.	...Respondent.
4. **Cr.Appeal No.135 of 2010**:	
Sunder Lal @ Sunder	...Appellant.
Versus	
State of H.P.	...Respondent.

5. **Cr.Appeal No.335 of 2010**:

State of H.P. ...Appellant.

Versus

Kamlesh Kumar & Ors. ...Respondents.

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1. Cr.Appeal No.33 of 2010:

For the Appellant: Mr.Anoop Chitkara, Advocate.

For the respondent: Mr.M.A.Khan, Additional A.G.

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2. Cr.Appeal No.35 of 2010:

For the Appellants: Mr.Satyen Vaidya, Sr.Advocate with Mr.Vivek Sharma, Advocate.

For the respondent: Mr.M.A.Khan, Additional A.G.

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3. Cr.Appeal No.75 of 2010:

For the Appellant: Mr.Lokeshwar Seauta, vice Mr.D.P.Chauhan, Advocate.

For the respondent: Mr.M.A.Khan, Additional A.G.

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4. Cr.Appeal No.135 of 2010:

For the Appellant: Mr.Ashok Sharma, Sr.Advocate with Mr.Angrez Kapoor, Advocate.

For the respondent: Mr.M.A.Khan, Additional A.G.

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5. Cr.Appeal No.335 of 2010:

For the Appellant: Mr.M.A.Khan, Additional A.G.

For the respondents: Mr.Vipin Rajta, Advocate vice Mr.M.L.Brakta, Advocate for respondents No.2, 4 & 5.

Indian Penal Code, 1860- Section 395, 396, 460, 457 and 120-B- One 'R' was found murdered in his house- cause of death was found to be asphyxia- articles were found scattered in the room- an anonymous telephonic call was received by the police from STD Booth, Baddi that caller could throw light on the murder in question- police called owner of the booth and asked him to detain the caller- police visited Baddi and interrogated the caller who disclosed that offence was committed by accused- police interrogated accused 'G'- the weapons of offence, vehicle used in the commission of offence and the stolen articles, belonging to the deceased, were recovered from different places at the instance of the accused- investigation revealed that accused 'V' had facilitated the sale of stolen ornaments to accused M –melted gold and silver were recovered- DNA found in stubs of Cigarette and Bidi which matched with the DNA of accused - accused were convicted by the trial Court- held in appeal that no satisfactory evidence was led by the prosecution regarding conspiracy prior to the commission of offence- the disclosure statements and the recoveries effected pursuant to those statements were not satisfactorily proved- material witnesses were not examined and recovered articles were not connected to the death of the deceased- it was not elicited in the cross-examination that blunt side of Khukri could have led to the fracture of hyoid cartilage and hyoid bone leading to asphyxia- towel and rope which could have caused asphyxia causing death were not produced by the prosecution- owner of the booth had not established the identity of the caller- it was not mentioned in the site plan that Cigarette and Bidi were lying on the site of the occurrence- no entry was made in the malkhana register regarding the collection of these items – trial Court had not properly appreciated the evidence- appeal accepted- accused acquitted. (Para-10 to 19)

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

Cr.A.Nos.33, 35, 75, 135 of 2010.

These appeals stand directed against the impugned judgment rendered on 29.12.2009 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions Trial No.78/7 of 2005 whereby the learned trial Court convicted the appellants as under:-

Section 396 IPC: To undergo imprisonment for life and to pay a fine of Rs.5000/- each and in default to further undergo rigorous imprisonment for one year;

Section 395 IPC: To undergo rigorous imprisonment for ten years and to pay a fine of Rs.3000/- each and in default to further undergo rigorous imprisonment for six months;

Section 460 IPC: To undergo rigorous imprisonment for seven years and to pay a fine of Rs.2000/- each and in default to further undergo rigorous imprisonment for three months;

Section 120-B IPC: To undergo rigorous imprisonment for seven years and to pay a fine of Rs.2000/- each and in default to further undergo rigorous imprisonment for three months;

Section 457 IPC: To undergo rigorous imprisonment for two years and to pay a fine of Rs.1000/- each and in default to further undergo rigorous imprisonment for two months;

Cr.Appeal No.335 of 2010:

2. The instant appeal has arisen against the impugned judgment rendered on 29th December, 2009 by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. in Sessions Trial No.78/7 of 2005 whereby the learned trial Court acquitted the respondents, namely, Gurdev Singh, Raj Kumar, Vikas Negi, Madhukar Bhagmore and Kamlesh qua the charge framed against them.

Cr.A.Nos.33, 35, 75, 135 and 335 of 2010:

3. The prosecution story, in brief, is that during the intervening night of 15th/16th January, 2005, one Dr.Ram Krishan was found murdered in his house situated at village Kallari. The police was informed about the murder upon which Inspector Shiv Chaudhary, SHO, Police Station, Ghumarwin visited the spot and found that the hands and eyes of the deceased were tied and adhesive tape was put on his mouth and the articles inside the house were lying scattered. This information was recorded by the said SHO in a rukka prepared on the spot and sent it to the police station on the basis of which formal FIR was registered. Thereafter, photographs of the spot were taken and inquest report was prepared. The postmortem of the dead body of the deceased was got conducted by the doctor who opined that the cause of death was asphyxia caused by strangulation and stabbing of mouth and nostril by adhesive tape. During investigation, the Investigating Officer found one broken tooth, one empty four square Cigarette packet, one cover U.S.P. tape, one handkerchief, the remains of burnt cigarettes and Bidi etc. which were seized and separately taken into possession. The viscera of the deceased was preserved and sent to F.S.L. Junga for examination. It is further alleged that on 10th April, 2005 around 2:30 p.m. a unanimous telephonic call was received by the police from STD Booth at Baddi, District Solan that he could throw light on the murder in question. Thereafter, the police called back the owner of the STD Booth, namely, Mushtak Mohammad and asked him to detain the person who had called the police from his booth. Thereafter, the police visited Baddi and interrogated the person, namely, Hari Ram alias Padam Bahadur who disclosed that the offence in question was committed by Gurdev Singh, Raj Kumar alias Raju, Sunder Lal,

Bittu etc. Thereafter, the police interrogated accused Gurdev Singh and traced the outgoing calls etc. of the telephone from the Department concerned. It is further alleged that prior to this incident, accused Gurdev Singh, Sunder Lal and Raj Kumar had visited the place of occurrence. Thereafter, the other accused were also arrested in the case. On the basis of disclosure statements, made by the accused persons, weapons of offence, vehicle used in the commission of offence and the stolen articles, belonging to the deceased, were recovered from different places at the instance of the accused persons. The investigation further revealed that accused Vikas Negi facilitated the sale of stolen ornaments to accused Madhukar Bhagmore who melted the same and sold 35 grams of gold to Satya Jewellers. The melted gold and silver were recovered during investigation from Satya Jewellers and accused Madhukar Baghmore. The police had also taken blood sample etc. of accused for conducting DNA test with DNA found in burnt remains of Cigarette and Bidi which matched with the DNA of accused Rajiv and Randhir Singh. On conclusion of the investigation into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

4. The accused, namely, Ram Lal alias Bittu, Sunder Lal alias Sunder, Randhir Singh, Rajiv Kumar, Bittu, Kamlesh Kumar alias Kamal, Gurdev Singh and Raj Kumar alias Raju were charged for theirs having committed offences punishable under Sections 120-B, 395, 396, 457 and 460 of the Indian Penal Code and accused, namely, Vikas Negi and Madhukar Baghmore were charged for theirs having committed offences punishable under Sections 412/201 of the Indian Penal Code, by the learned trial Court to which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 55 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused were given an opportunity to adduce evidence in defence yet they chose not to lead any evidence in defence.

6. On appraisal of the evidence on record, the learned trial Court returned findings of conviction against accused/appellants, namely, Ram Lal alias Bittu, Sunder Lal alias Sunder, Randhir Singh, Rajiv Kumar and Bittu and acquitted accused/respondents, namely, Kamlesh Kumar alias Kamal, Gurdev Singh and Raj Kumar alias Raju, Vikas Negi and Madhukar Baghmore qua the offences they stood charged.

7. The learned counsels appearing for the appellants/accused/convicts have concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, they contend that the findings of conviction be reversed by this Court in exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

8. Shri M.A.Khan, learned Additional Advocate General, has with considerable force and vigour 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 liable for reversal by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction and concomitantly an appropriate sentence being imposed upon the accused/respondents. On the other hand, the learned counsel appearing for the respondents-accused, have, with considerable force and vigour, contended qua the findings of acquittal, recorded by the Court below, being

based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather meriting vindication.

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. The inculpatory evidence marshaled by the Investigating Officer against accused Ram Lal @ Bittu is connotative of the aforesaid accused running an eatery in close proximity to the house of the deceased, at village Kallari. In proof thereof, the prosecution has relied upon the depositions recorded on oath of PW-13 (Nirmala Devi) and PW-17 (Hardial Singh). A close and sharp reading of the testimonies of the aforesaid witnesses unflinchingly underscores the factum of accused Ram Lal @ Bittu having taken two rooms on rent in close vicinity to the house of the deceased, wherefrom he was operating an eatery. Moreover both in their recorded depositions on oath have bespoken therein the factum of accused Ram Lal @ Bittu having without paying rent qua it to its owner stealthily departed there-from in the night intervening 18th-19th June, 2004. Nonetheless the evidence aforesaid is neither potent nor formidable for fostering an inference of accused Ram Lal @ Bittu alongwith co-accused Bittu and Randhir Singh immediately prior to the occurrence in as much as on 13.1.2005 having visited the house of the deceased, as deposed by PW-3 (Siri Ram) and PW-4 (Pushpa Devi), the probative worth whereof would stand alluded to herein-after. Abysmal want of evidence magnificatory of accused Ram Lal @ Bittu joining the company of co-accused aforesaid at Kallari on 13.1.2005, obviously also his standing not deposed by PW-3 and PW-4 to be last seen by the aforesaid witnesses in the company of the deceased on 13.1.2005 at Kallari, does dispel the factum of co-accused Ram Lal @ Bittu conspiring with the accused aforesaid in murdering the deceased. Dehors the aforesaid lack of display by the aforesaid evidentiary material of any element of conspiracy hence inhering or existing inter-se accused Ram Lal @ Bittu and the accused aforesaid, no other clinching or affirmative evidence stands adduced by the prosecution qua accused Ram Lal @ Bittu holding any conspiracy with the co-accused aforesaid more especially prior to the perpetration of the crime nor clinching evidence stands adduced by the prosecution of his holding conspiracy with the other co-accused qua whom an inculpatory role stand fastened, galvanized from recovery therefrom of either khukri Ex.P-42 recovered under memo Ex.PW-35/C, tyre Lever (Ex. P-28), Screw driver (Ex. P-29) and Jamoor (Ex.P-45) under memo Ex. PW-30/B and other stolen items i.e. Bag Ex**.**P18 under memo Ext.PW-7/A, brief case Ext.P-26, gold ring Ext.P-24 under memo PW-8/A, Guilt ring Ext.P-25 under memo Ext.PW-8/B. With no forthright evidence of immense potency existing on record in personification of accused Ram Lal @ Bittu holding a conspiracy with other co-accused in theirs allegedly murdering the deceased or in the alleged commission of dacoity of various articles from his house, sequelly the assay on the part of the prosecution to qua accused Ram Lal @ Bittu, propound any theory of his conspiring with them, stands annihilated. Be that as it may, the Investigating Officer yet has concerted to link or connect accused Ram Lal @ Bittu in the commission of the offence for which he stood charged, tried and convicted, on the anchorage of Ext.PW-7/A where-under FDR Ext.P-98 in the name of the deceased stood recovered from the house of the accused aforesaid at Tutu. The connectivity there-from of the accused aforesaid in the offences alleged to have been committed by him, stands enfeebled rather fully shattered in the face of recovery witness of FDR, Mast Ram PW-8, even though testifying qua recovery thereof from the premises of accused aforesaid standing effectuated under Memo PW-7/A, nonetheless proof hence of effectuation of recovery thereof from the premises of the accused aforesaid is rendered skeptical with PW-1 (Brahm Dutt Sharma) in his cross examination earmarking the factum of the deceased on his birthday having distributed to his daughters his immovable assets comprised in the FDRs. The earmarking of the aforesaid salient fact in the cross-examination of PW-1 prods an inference of the

daughters of the deceased who had received the relevant FDRs on his birthday, coming to subsequent to the ill fated occurrence purvey them to the Investigating Officer, who concomitantly took to on the mere flimsy reason of the accused aforesaid purportedly stealthily departing six months prior to the occurrence from the vicinity of the house of the deceased untenably conclude therefrom, of the accused committing the offences ascribed to him, whereafter he proceeded to invent its recovery from the premises occupied by the accused aforesaid. Impetus to the inference aforesaid stands lent by the factum of the disclosure statement comprised in Ext.PW-36/C proven by PW-36 standing signed as witnesses by Karam Singh and Nain Singh both of whom are residents of Bilaspur. In pursuance to both aforesaid proving disclosure statement comprised in Ext.PW-36/C they accompanied the Investigating Officer to the premises taken on rent by accused Ram Lal @ Bittu at Tutu. Only Mast Ram was examined by the prosecution in support of the recitals constituted in the recovery memo qua FDR Ext.P-98 comprised in Ext.PW-7/A. Even though, as afore-stated PW-8 Mast Ram supports the factum of its recovery by the Investigating Officer at the instance of the accused Ram Lal @ Bittu from his tenanted premises at Tutu yet PW-7 the other witness to the aforesaid recovery memo, in his deposition comprised in his examination-in-chief omitted to identify accused Ram Lal @ Bittu to be the person whose premises he along with the Investigating Officer visited on 22.4.2005, whereat recovery of FDR Ext.P-98 stood effectuated there-from. Contrarily, he identified accused Randhir Singh as Bittu. The effect of the aforesaid mis-identification of accused Ram Lal @ Bittu by PW-7 or his failing to identify him omits to give any momentum or fillip to the espousal of the prosecution of his being the person who was in occupation of the premises aforesaid purportedly occupied by him as a tenant at the apposite stage when he along with the Investigating Officer visited his house at Tutu wherefrom recovery of FDR stood effectuated. His further testimony comprised in his cross examination conducted by the learned Public Prosecutor though articulates the factum of accused aforesaid purchasing articles from his shop yet its creditworthiness stands stripped arising from the factum of his subsequently in his cross examination conducted by the learned defence counsel denying the factum of accused Ram Lal @ Bittu ever purchasing any Karyana articles from his shop on a credit basis. Even though he was a witness of the locality where accused Ram Lal @ Bittu was allegedly staying as a tenant of his brother-in-law Kanshi Ram, hence it was imperative for the prosecution to elicit from him a firm testimony of accused Ram Lal @ Bittu staying as a tenant of his brother-in-law Kanshi Ram. However, the aforesaid firm testimony for the reasons aforesaid is amiss. In sequel, the prosecution was under a solemn bounden legal obligation to adduce firm and clinching evidence in portrayal of accused Ram Lal @ Bittu putting up as a tenant at Tutu under Kanshi Ram. The aforesaid evidence was comprised in the deposition of Kanshi Ram. However, Kanshi Ram stood never cited as a witness nor examined by the prosecution to enable this Court to conclude with firmness of his letting out his premises to accused Ram Lal. The witnesses who accompanied the Investigating Officer were not local witnesses hence even if PW-8 Mast Ram has proved the recitals recorded in Ext.PW-36/C where-under at the instance of accused aforesaid recovery of FDR Ext.P-98 stood effectuated under Memo Ext.PW-7/A from the premises purportedly occupied as a tenant by him under Kanshi Ram yet the mere factum of the prosecution hence proving through PW-8 the recitals comprised in Ext.PW-36/C cannot constrain a conclusion of recovery of FDR Ext.P-98 standing effectuated from the premises occupied as a tenant by accused Ram Lal @ Bittu under Kanshi Ram. As a corollary, the inference which ensues is of the premises visited by PW-8 along with the Investigating Officer wherefrom recovery of FDR Ext.P-98 stood purportedly effectuated at the instance of the accused aforesaid by the Investigating Officer were not the premises occupied as a tenant by accused Ram Lal @ Bittu. The effect of the aforesaid inference is of the recovery of FDR Ext.P-98 being amenable to a deduction of its standing effectuated under Memo Ext.PW-7/A

from not the premises taken on rent by accused Ram Lal @ Bittu from Kanshi Ram rather its recovery standing effectuated from elsewhere. The taint which hence the recovery of FDR Ext.P-98 under Memo Ext.PW-7/A acquires, erodes the efficacy of the propagation of the prosecution of accused aforesaid standing connected in the commission of the offences alleged against him. The apt sequitur of the above inference besides deduction which ensues therefrom is of the implication of the accused aforesaid or his standing arrayed as an accused by the prosecution in the commission of the offences alleged against him stands harboured not on any formidable or clinching evidence rather stands anchored upon mere suspicions as well as surmises nursed by the Investigating Officer reared by the factum of the furtive besides surreptitious departure of the accused aforesaid from the tenanted premises adjoining the house of the deceased at Kallari. Obviously, an investigation reared by suspicion is both skewed as well as wholly unreliable. A skewed investigation had led to an invented recovery/discovery of FDR from the purported premises of the accused aforesaid whereas for the reasons aforesaid it could have with ease as well as with facility given the where-withals of the Investigating Officer introduced therein. A necessary concomitant of the aforesaid inference is of motive, if any, which stood nourished by the accused aforesaid for committing the offences alleged against him for which he stood charged, tried and convicted, too faces annihilation. Also necessarily an important link propagated by the prosecution qua the accused aforesaid loses its potency as well as its vitality. With the inefficacious recovery of FDR Ext.P-98 from the alleged premises of the accused aforesaid besides motive of the accused aforesaid in committing the offences alleged against him standing decapitated, the natural effect thereof is no evidence of probative worth and sinew existing on record against the accused aforesaid, for hence sustaining any conclusion of his committing the offences for which he stood charged, tried besides obviously unwarrantedly convicted by the learned Court below especially when there is also for the reasons aforesaid no worthwhile evidence of his holding any conspiracy with the other co-accused. In sequel the recovery if any, for reasons aforesaid of bag of the deceased Ext.P-18 under Memo Ext.PW-7/A from the premises of the accused can also be concluded to be an ingenious invention resorted to by the Investigating Officer for connecting him in the offences alleged.

11. The factum of accused Ram Lal @ Bittu purportedly staying at Hotel Everest along with co-accused Sunder Singh, Randhir Singh and Rajiv Kumar with effect from 16.1.2005 to 18.1.2005 as manifested in hotel register Ext.P-44 is also inconclusive for concluding there-from of accused Ram Lal @ Bittu holding any conspiracy with them in committing the offences alleged against them especially in the face of the entry qua their stay in Hotel Everest on the dates aforesaid, standing not proved to be scribed by any of the accused aforesaid. Contrarily when on a sharp reading of the apposite entry recorded therein an inference of it standing introduced therein at the behest of the Investigating officer stands aroused, obviously nullifies its probative worth.

12. The inculpatory pieces of evidence collected by the Investigating Officer for sustaining the charge against accused Sunder Lal stands primarily embedded in the recovery of tyre Lever (Ex. P-28), Screw driver (Ex. P-29) and Jamoor (Ex.P-45) under memo Ex. PW-30/B, in pursuance to a disclosure statement comprised in Ex.PW-30/A as purportedly made by him.

13. Even if effectuation of recovery of the aforesaid incriminatory pieces of evidence by the Investigating Officer at the instance of the accused aforesaid under memo Ex.PW-30/B stands efficaciously proven against the accused aforesaid nonetheless the effect as well as the impact of Post mortem report comprised in Ex.PW-26/A, in no circumstance can be lost sight of nor is overlookable. In the event of this Court on a threadbare analysis of the testimonies of PW-26 and PW-50 who jointly authored PW-26/A recording an

inference of their testimonies unearthing the prime factum of the contusions as well as reddish blue abrasions recited in the post mortem report to be existing on the body of the deceased standing not forthrightly nor candidly testified by both PW-26 and PW-50 to stand begotten by weapons/strangulatory materials as allegedly recovered by the Investigating Officer at the instance of the accused, the ensuing sequel therefrom would be of there being lack of connectivity or relatibility inter-se the recovery of the aforesaid at the instance of the accused with the cause of demise of the deceased. As a corollary, with effectuation of recoveries thereof from accused Sunder Lal while being not germane to the cause of demise of the deceased nor hence having any nexus with it renders them amenable to be construable to be contrived as well as engineered by Investigating Officer, to on strength thereof falsely implicate the accused aforesaid. PW-26 and PW-50 who proved Post Mortem Report Ex.PW-26/A have recorded therein on theirs respectively observing the body of the deceased, the hereinafter narrations/recitals:-

> "Emaciated, 5.2" length, Red chuni covering eyes. Leaucoplast (Adhesive tape pasted over mouth nostrils. Blood stained fluid oozing from Nostril. Chocolate coloured half sleeves sweater light chocolate sweater. Blue Neck (Seater only neck) Grey pants with Naals and grey kurta, two pockets. Brown striped underwear with Naala ushaped. White Banyan 85 reddish blue coloured. Contusion in front and lateral both sides of neck in area 6cmx10 and there are reddish blue abrasions over said contusion confront side nick 3 cmx1cm below this there is another abrasion of reddish brown colour of same size i.e. 3xmx1mm below and left side of these said two abrasion, there is third reddish colour abrasion. Size 4 cmx1mm and below it 11cm long continuous abrasion having same breath.
>
> Other ante-mortem contusion, over right lateral knee joint. All 1x1cm. Left patella, 2x2cm. Left skin, 2cm long contusion. Right elbow posture of hands crossed over abdomen, left eye having contusion, above eyebrow and lower eye lid, 4x4cm. Rigormartis and postmortem staining blush purple over back. Right shoulder having 4 contusions as described. Tips of finger bluish of hands. Cranum and spinal cord-normal,
>
> Thorex.
>
> On dissections of neck the subcutaneous tissue and underlying muscles are grossly contusion with pressure dark, blood, fluid oozed. Cricoid and thyroid cartilage and hyoid bone on both sides are fractured. Trachiea was normal and mucous membrane congested. Pleurac W.N.L. (normal), right and left lungs-congested. Hear Normal.
>
> Abdomen.
>
> Walls and Peritoneum – were normal, Stomach contains semi-digested food with no pungent smell, small intestines and large intestines were normal, Liver, Spleen and Kidney congested. Bladder empty.
>
> Muscles bone joins.
>
> Already described.
>
> Opinion.
>
> Viscera was sent for chemical examination. Chemical Analyst Report No. 86A N.P.B Ras 67/05 dated 17.1.2005 shows no evidence of poison. Deceased has died due to Asphyxia. Cause by

strangulation and stabbing of mouth and nostril by adhesive tape. Iissued Ext. PW-25/A post-mortem report (four leaves), which is in my hand and bears my signatures, and Dr. Didhra I have seen tape Ext. P-6, which is called as adhesive tape. Strangulation may be by rope or by a piece of cloth."

14. A reading of the opinion elucidated therein qua the cause of demise of the deceased is significant. Both have on oath testified a firm opinion of the demise of the deceased being attributable to asphyxia caused by strangulation and stabbing of mouth and nostril by adhesive tape Ext.P-6. Both have unequivocally in their respective depositions testified qua the contusions and abrasions observed by both to be found occurring on the neck of the deceased being a sequel to user thereon of a rope and cloth towel. Since the hyoid cartilage and hyoid bone of the deceased were fractured besides since the Investigating Officer had subsequently effectuated the recovery of tyre Lever (Ex.P-28), Screw driver (Ex. P-29) and Jamoor (Ex.P-45) under memo Ex.PW-30/B at the instance of accused Sunder Lal constrained the prosecution to during the course of holding the examination-in-chief of PW-50 produce Khukri Ex.P-42 recovered under memo Ext.PW-35/C in Court qua with a blow from its blunt side stood purportedly delivered on the neck of the deceased, occasioning fracture of his hyoid cartilage and hyoid bone, for it being shown to him for lending sustenance to the inculpatory role ascribed to accused Sunder Lal. Even though, he testified on oath qua the fracture of hyoid cartilage and hyoid bone of the deceased occurring or standing occasioned by a blow with the blunt side of Khukri standing delivered on the neck of the deceased. Nonetheless the effect of the opinion testified on oath by PW-50 qua the user of blunt side of khukri by the accused on the neck of the deceased begetting fracture of his hyoid cartilage and hyoid bone leading to asphyxia stands overwhelmed rather enfeebled by the Public Prosecutor omitting to (a) during the course of conducting the examination-in-chief of PW-26 co-author of Ext.PW-26/A produce Khukri in Court, for facilitating elicitation of an opinion from him in conformity with the one voiced in the examination-in-chief of PW-50 qua the fracture of hyoid cartilage and hyoid bone standing begotten by the user of its blunt side on the neck of the deceased by accused Sunder Lal. Since both unanimously in their respective examinations-in-chief testified a firm opinion qua the demise of the deceased being attributable to asphyxia caused by strangulation and stabbing of mouth and nostril by adhesive tape, it was incumbent upon the prosecution to, obviously obtain from both during the course of recording of their respective examinations-in-chief, an opinion in conformity besides in unanimity qua the user of blunt side of khukri by accused Sunder Lal on the neck of deceased begetting fracture of his hyoid cartilage and hyoid bone leading to asphyxia. Sequally the unilateral opinion voiced by the PW-50 during his examination-in-chief qua fracture of hyoid cartilage and hyoid bone of the deceased standing begotten by user thereon of blunt side of khukri is not sufficient for carrying forward the propagation of the prosecution of its recovery under memo Ex. PW-35/C from accused Bittu connecting him with the occurrence of contusions as well as reddish blue abrasions existing on the neck of the deceased. Even otherwise a close scrutiny of the testimony of PW-50 unveils the prime factum of his at the stage when he conducted the post mortem examination on the body of the deceased standing uninformed by the Investigating Officer rather un-awakened by the latter qua his holding an opinion of the fracture of hyoid cartilage and hyoid bone of the deceased standing spurred by the user thereon of the blunt side of Khukri by co-accused. On the contrary, PW-50 and PW-26 both unanimously in their respective depositions have voiced therein of no weapon of offence sanding produced before them by the Investigating Officer at the time contemporaneous to theirs jointly conducting post mortem examination on the body of the deceased nor any towel or rope standing produced before them thereat by the Investigating officer whereas each of the aforesaid has been unanimously pronounced by both PW-26 and PW-50 in their respective

depositions to be the strangulatory items or the materials, user whereof caused asphyxia of the deceased. Contrarily the only item produced by the Investigating Officer preceding the authors of Ext.PW-26/A holding a post mortem examination on the body of the deceased was adhesive tape Ext.P-6 recovery whereof for the reasons ascribed hereinafter stands concluded to be also unreliable. The haziness gripping the mind of the investigating Officer qua the cause of the demise of the deceased was assayed by him to be overcome by his subsequent to the authors of PW-26/A recording therein an affirmative opinion qua the cause of the demise of the deceased being attributable to asphyxia caused by strangulation and stabbing of mouth and nostril by adhesive tape, proceeding to at the instance of the accused recover tyre Lever (Ex. P-28), Screw driver (Ex. P-29) and Jamoor (Ex.P-45) under memo Ex. PW-30/B. An adept investigation bereft of any obscurity gripping the mind of the investigating Officer for it to hence attain credibility enjoined upon him to at the outset preceding the holding of Post mortem examination on the body of the deceased by PW-50 and PW-26 produced before them any or all of the items aforesaid especially when production thereat would easily have facilitated an opinion from both qua their user on the neck of the deceased by the accused wherefrom their recoveries stood effectuated under various memos besides concomitantly of their respective user thereon sequelling or begetting the aforesaid ante-mortem injuries noticed to be occurring on the neck of deceased by both PW-26 PW-50. However, the purported strangulatory items/materials i.e towel and rope user whereof on the neck of deceased purportedly caused asphyxia sequelling the demise of the deceased stood un-produced by the Investigating Officer before PW-50 and PW-26 excepting adhesive tape effectuation of recovery whereof is for reasons assigned herein-after replete with a taint of invention besides concoction by the Investigating officer. Dehors the above, non-production by the Investigating Officer of all aforesaid items or weapons of offence allegedly used by the accused in begetting fracture of hyoid bone and hyoid cartilage or theirs sequelling contusions and abrasions occurring on the neck of the deceased before both PW-26 and PW-50 co-authors of Ext.PW26/A at the time contemporaneous to theirs jointly holding Post Mortem examination on the body of the deceased yet it was incumbent upon both, to on theirs holding post mortem examination on the body of the deceased whereat they noticed thereon occurrence of contusions besides reddish blue abrasions besides fracture of his hyoid cartilage and hyoid bone, to thereat in conformity unflinchingly voice the factum of the cause of the demise of the deceased being attributable to asphyxia caused by strangulation and stabbing of mouth and nostril by their respective user thereon. Both were experts. Consequently, even when PW-50 during his examination in chief was subsequently solitarily shown Khukri Ex. P-42 blunt side whereof stood thereat opined by him to stand used by accused in begetting fracture of hyoid cartilage and hyoid bone of the deceased, the solitary besides unilaterally opinion articulated thereat by him is bereft of any tenacity inasmuch as (a) when it was open for him to at the initial stage in Ext.PW-26/A with candour and unequivocation pronounce therein of the aforesaid occurrence of contusions and reddish blue abrasions on the neck of the deceased besides fracture of his hyoid cartilage and hyoid bone being squarely attributable to user thereon of towel besides blunt side of sharp edged weapon especially when its voicing thereat with candor by him would have lent sustenance and succor to user by the accused of blunt side of Khukri Ex.42 or towel Ext.P-36 on the neck of the deceased for begetting strangulation/throttling leading to asphyxia sequelling his demise. Obviously lack of any pronunciation or enunciation at the outset in Ext.PW-26/A qua their user by the accused on the neck of the deceased begetting the afore-referred sequels renders the deposition of PW-50 of user of towel and blunt side of Khukri begetting strangulation besides fracture of hyoid cartilage and hyoid bone of the deceased leading to asphyxia sequelling his demise to be a mere afterthought spurred by proddings received by the prosecution to in tandem with the recovery of towel, Khukri, unveil in his deposition in his examination in chief, an opinion in

portrayal of efficacy of recoveries thereof besides theirs linking and connecting the accused. (b) Imperatively, hence the pronunciation aforesaid reared by afterthought cannot constrain a conclusion from this Court of the occurrence of contusions besides abrasions on the neck of the deceased as also fracture of his hyoid cartilage and hyoid bone standing begotten by user thereon of towel, rope and blunt side of Khukri. Be that as it may, hence recovery of towel, rope and Khukri cannot obviously provide firm connectivity of any of the accused wherefrom each of the aforesaid stood recovered by the Investigating Officer, in the offence alleged to have been committed by them.

15. Also the recovery of adhesive tape Ext.P-6 recovered under memo Ext.PW-30/A from accused Randhir Singh is both frail as well as a legally feeble piece of evidence against him in the face of PW-31 Ashok Kumar owner of the Chemist shop wherefrom it stood purportedly purchased not supporting the prosecution story. Furthermore, the recovery of Gold Ring Ex. P-24 and Guilt ring Ex. P-25 recovered under Memo Ext.PW-11/B at the instance of accused Randhir Singh is both flimsy as well as fragile in the face of both PW-11 and PW-13 in their respective cross-examinations not lending any sustenance to the prosecution version.

16. The significance of the testimony of PW-45 (Mushtaq Mohammad) now comes to the fore-front. It was from his STD booth wherefrom information stood purveyed to the police by an anonymous caller, of his holding evidence to give headway to the police in reaching to the persons who committed the offence recorded in F.I.R. Ext.PW-24/B. The call purportedly made from the Booth of PW-45 was anonymous. PW-45 was the best person to reveal the identity of the caller. However, his deposition is far away from constraining this Court to conclude qua any call standing made there-from by any person to the police agency whereupon F.I.R. stood recorded. The identity of the caller from the booth of PW-45 remaining un-surfaced rather camouflaged whereas a purported anonymous call made from the booth of PW-45 led to the recording of F.I.R. is connotative of the Investigating Officer conjuring an anonymous call from the booth of PW-45 qua the occurrence whereupon he recorded an F.I.R. An anonymous and conjured call from the booth of PW-45 has led to the recording of an enigmatic F.I.R. qua the occurrence. As a natural corollary the investigation launched qua the occurrence or the investigation qua the identity of the accused may hence be concluded to be arising from information purveyed by an enigmatic person to the police agency concerned. The revelation of the identity of the caller from the booth of PW-45 was imperative for investigation partaking the virtue of transparency. Concealment of his identity whereas he provided clues to the identity of the accused has tainted the investigation. Predominantly also the camouflaging of his identity has eroded the genesis of the prosecution case besides has prejudiced the accused with theirs standing disabled to given his identity remaining unrevealed seek his joining as a prosecution witness for enabling them to cross examine him for shattering the purported information or the pieces of evidence he held or possessed qua the identity of the accused, evidences whereof he purveyed to the Investigating Officer, whereupon an investigation qua the occurrence stood launched by him. Consequently, it appears that the entire investigation has been mis-directed, it standing misled by an enigmatic or hidden person who while holding a vendetta against the accused may have out of spite unveiled their identity, to the Investigation Officer. In aftermath, the entire investigation is mis-navigated.

17. The prosecution did meet with success before the trial Court in attributing an incriminatory role to both accused Randhir Singh and Rajiv Kumar @ Kalu. The success achieved by the prosecution in securing conviction from it against both the accused aforesaid arose from DNA report Ext.PW-53/A proved by PW-53 (Dr.Sanjeev) voicing therein the factum of Bidi, Cigarette butts (Ex. 4(a), 4(b) and 5(a) to 5(d)) recovered from the site of

occurrence under memo Ext.PW-1/A matching with the DNA profiling of accused Randhir Singh and Rajiv Kumar @ Kalu. The opinion aforesaid falters for the reason (a) it remaining un-enunciated in site plan Ext.PW-15/C of Bidi and Cigarette butts existing on the site of occurrence (b) there existing no entry in the Malkhana Register of the Police Station concerned qua the Investigating Officer after collecting them from the site of occurrence depositing them in the Malkhana concerned wherefrom he retrieved them for dispatching them for availing an opinion from the FSL concerned. The aforesaid lack of enunciation in the site plan besides lack of an entry qua deposit in the Malkhana of the Police Station concerned in quick spontaneity to the purported collection of Cigarette and bidi butts from the site of occurrence by the Investigating Officer contrarily enables this Court to conclude of the DNA profiling of bidi and Cigarette butts with the DNA profiling of accused Randhir Singh and accused Rajiv Kumar @ Kalu though opinionated being compatible being both unreliable besides inconclusive in returning findings of conviction against the accused aforesaid. For reiteration, especially for lack of enunciation thereof in site plan qua their occurrence thereat besides lack of deposit thereof in the police Malkhana in quick spontaneity to their collection from the site of occurrence an inference of their introduction against the accused as incriminatory materials or inculpatory pieces of evidence being an ingenuously doctored, contrivance at the instance of the Investigating Officer, stands aroused. The prosecution has propagated the factum of accused Randhir Singh and Rajiv Kumar @ Kalu immediately prior to the occurrence standing sighted with the deceased. The factum of the accused aforesaid immediately prior to the occurrence visiting the house of the deceased stands anvilled upon the testimonies of PW-3 and PW-4. However, the testimonies of both the aforesaid in lending succor to the propagation aforesaid of the prosecution of it constituting a preeminent conclusive piece of evidence of both accused aforesaid subsequently too visiting the site of occurrence to fructify their mission of committing the offences alleged against them is rendered suspicious as well as stands engulfed in an aura of embellishment besides improvement rendering it incredible, which incredibility imbuing it stands spurred by the factum of both deposing the factum aforesaid only in their depositions recorded on oath before the learned trial Court hence in detraction besides digression from their previous statements recorded in writing whereunder the facts aforesaid remain unrecited. Lack of occurrence of the aforesaid factum in their previous statements recorded in writing, for reiteration constitutes the aforesaid factum of both accused aforesaid deposed by PW-3 and PW-4 immediately prior to the occurrence sighted at the house of the deceased, to be a tainted besides an embellished best piece of evidence hence incredible whereupon no reliance can stand imputed by this Court. As a sequitur with both PW-3 and PW-4 never sighting both accused Randhir Singh and Rajiv Kumar at any stage prior to the occurrence, sequelly there was no enjoined necessity upon the agencies/Court concerned to hold a test identification parade of the accused aforesaid nor also was it warranted for the learned trial Court to on both the accused aforesaid refusing to participate in the test identification parade draw an adverse inference against them. As a corollary, it was wholly unwarranted for the learned trial Court to proceed to rely upon the identification of the accused in Court by PW-3 and PW-4.

18. So far as accused Kamlesh Kumar, Gurdev Singh, Vikas Negi and Madhukar Baghmore are concerned, on a wholesome reading of evidence adduced on record against them, this Court is of the firm view that the appreciation of evidence qua them as done by the learned trial Court does not suffer from any perversity or absurdity nor it can be said that the learned trial Court in recording findings of acquittal in favour of the accused aforesaid has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or 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 qua them merits any interference.

19. However, the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused, namely, Ram Lal alias Bittu, Sunder Lal alias Sunder, Randhir Singh, Rajiv Kumar and Bittu. The appreciation of the evidence, as done by the learned trial Court, suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference qua the accused aforesaid.

20. In view of above discussion, Criminal Appeals No.33, 35, 75 and 135 of 2010, filed by the appellants/accused are allowed besides the Criminal Appeal No.335 of 2010, preferred by the State, is dismissed qua respondents Kamlesh Kumar, Gurdev Singh, Vikas Negi and Madhukar Baghmore. The judgment of acquittal rendered by the learned Court below qua respondents aforesaid is maintained and affirmed. So far as accused/respondent No.8 (Raj Kumar) is concerned, appeal preferred against him by the State, be kept pending he being a proclaimed offender. In sequel, the impugned judgment of 29.12.2009 rendered by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P. (Camp at Bilaspur), so far it convicts accused aforesaid is set-aside. The appellants/accused are acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

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

****

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

Ramesh Hans son of Sh. Milkhi Ram. .....Revisionist.

Vs.

Km.Sudha Hans D/o Late Sh Ranjeet Singh & others. .....Non-revisionists.

Civil Revision No. 8 of 2015.
Order reserved on: 25.2.2016.
Date of Order: March 2, 2016.

Code of Civil Procedure, 1908- Section 115- Limitation Act, 1963- Section 5- Appeal preferred by the applicant was barred by 47 days- application for condonation of delay was filed which was dismissed by the trial Court- held, that Advocate was a patient of the cancer who had to visit several places for his medical treatment- delay was due to illness of the Advocate and was liable to be condoned- application allowed subject to the payment of the cost of Rs.3,000/- (Para-10 to 13)

Cases referred:

Collector Land Acquisition Anantnag and another Vs. Mst. Katiji, AIR 1987 SC 1353 (DB)
Basawaraj and another Vs. Special Land Acquisition Officer, 2013 (14) SCC 81
Lanka Venkateswarlu Vs. State of Andhra Pradesh and others, 2011 (4) SCC 363
Karta Ram Gupta and another Vs. Ashwani Kumar Sharm, 2011 (3) Shim. LC 203
Kishan Chand Vs. Ram Chand, 2011 (1) Shim. LC 597

For the revisionist: Mr. Pradeep K. Gupta, Advocate.
For Non-revisionist 1 to 4: Mr.Pratima Malhotra, Advocate.
For Non-revisionist-6: Mr. Naveen K.Dass, Advocate.
For Non-revisionist 5&7: None despite service.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present revision petition is filed under Section 115 of the Code of Civil Procedure against the order dated 23.12.2014 passed by learned Addl. District Judge Bilaspur whereby learned Addl. District Judge Bilaspur dismissed petition filed under Section 5 of Limitation Act for condonation of delay of 47 days.

BRIEF FACTS OF THE CASE:

2. Km.Sudha Hans daughter of late Sh Ranjeet Singh plaintiff filed suit for declaration to the effect that plaintiff be declared joint owner in possession of land to the extent of 1/8th shares in the land and house situated in khata/khatanuni No.6 Min/296 khasra No. 1222, 1227 Plot No. 148 measuring 164.98 Sq.metre situated in up mohal Diara Tehsil Sadar District Bilaspur HP. Plaintiff sought additional relief of injunction against the defendants restraining defendants from dispossessing the plaintiff or causing any interference with the possession of plaintiff from two rooms, kitchen, bath room and latrine. Defendants contested the suit before learned trial Court. As per pleadings of parties following issues framed by learned trial Court on 16.8.2010.

1. Whether plaintiff is joint owner in possession of 1/8th share in the suit property as alleged? ...OPP.

2.Whehter plaintiff is entitled for relief of permanent injunction as prayed for? ...OPP

3. Whether plaintiff has no cause of action to file present suit? ...OPD.

4.Whether suit of plaintiff is not maintainable? ...OPD

5. Whether plaintiff has no locus standi to file present suit? ...OPD.

6.Whether suit of plaintiff is barred by limitation? ...OPD.

7. Whether plaintiff is estopped by her act and conduct to file present suit?....OPD.

8 Relief.

3. Learned trial Court decided issues No. 1 and 2 in affirmative. Learned trial Court decided issues No. 3,4,5, 6 and 7 in negative. Learned trial Court passed decree to the effect that plaintiff is joint owner in possession of suit land to the extent of 1/8th shares in plot-house No. 148 situated over land comprised in khata/khatauni No.6 min 296 khasra Nos. 1222, 1227 measuring 164.98 Sq. yards situated in up mohal Diara Tehsil Sadar District Bilaspur HP. Learned trial Court restrained defendants No. 1 to 3 and 7 permanently from causing any interference and dispossessing plaintiff from one room, kitchen, bathroom and latrine situated over suit land.

4. Feeling aggrieved against the judgment and decree passed by learned trial Court revisionist filed appeal before learned District Judge and also filed application under Section 5 of Limitation Act for condonation of delay of 47 days. Learned first appellate Court on dated 19.10.2013 framed following issues upon application filed under Section 5 of Limitation Act.

1. Whether there are sufficient grounds to condone delay in filing appeal as alleged?. ..OPP.

2. Whether appellant has not come to Court with clean hands?...OPR.

3. Relief.

5. Learned first appellate Court decided issues No. 1 and 2 in negative and dismissed the application filed under Section 5 of Limitation Act.

6. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionists and also perused entire record carefully.

7. Following points arise for determination in present revision petition:

1. Whether revision petition filed by revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?.

2. Relief.

8.Finding on point No.1 with reasons:

8.1 AW1 Ramesh Chand has stated that civil suit was filed before learned trial Court and he engaged Advocate namely Sh Daya Sagar Bhardwaj. He has stated that he used to attend court proceedings occasionally. He has stated that his Advocate told him that he should not attend court proceedings regularly. He has stated that his Advocate told him that he would call him when he would be required in court proceedings. He has stated that his Advocate was patient of sugar, blood pressure and cancer. He has stated that on dated 18.10.2012 he went to residential house of his Advocate and his Advocate told him that case was decided by learned trial Court on 31.8.2012. He has stated that his Advocate was busy in his medical treatment. He has stated that thereafter he filed application for the copy of judgment of learned trial Court. He has stated that his Advocate told him that he would file appeal. He has stated that on 29.11.2012 he again visited residential house of his Advocate and inquired about filing of appeal. He has stated that his Advocate told him that he could not file appeal because learned Advocate remained busy in medical treatment at Chandigarh and Delhi. He has stated that his learned Advocate could not file appeal within time due to illness . He has stated that medical discharge summary of his Advocate is mark 'A' and treatment slip is mark 'A-1'. He has stated that his original Advocate was Sh. D.S.Bhardwaj and he did not see Sh B.R.Rathore Advocate at any point of time. He has denied suggestion that he did not file appeal within time intentionally. He has denied suggestion that he did not properly prosecute the case.

8.2 AW2 Abbey Bhardwaj has stated that Sh. D.S.Bhardwaj was his father. He has stated that in the month of August-September 2012 his father was patient of cancer. He has stated that Sh D.S.Bhardwaj used to visit Ludhiana, Chandigarh, Delhi, Shimla and Mandi for medical treatment. He has stated that his father died on 9.2.2013. In cross examination he has admitted that during illness of his deceased father used to attend Court. He has stated that his father had performed his professional duty with devotion.

8.3 RW1 Smt. Sudha Hans has stated that she filed civil suit before learned trial Court for her share. She has stated that case was decided in her favour on dated 31.8.2012. She has stated that she used to attend the hearing of learned trial Court. She has stated that Sh Ramesh Hans used to attend Court proceedings occasionally. She has stated that Daya Sagar Bhardwaj and Sh Bali Ram Rathore Advocates used to appear on behalf of revisionist. She has stated that her brother did not file any appeal against the judgment and decree passed by learned trial Court. She has stated that only her uncle Ramesh Hans filed appeal. She has stated that her uncle did not adduce any oral evidence before learned trial Court in civil suit. She has stated that her uncle has stated before learned trial Court that

he would not adduce any oral evidence. She has stated that when case was registered for final arguments before learned trial Court at that time revisionist was present in Court. She has stated that date for announcement of judgment was given by learned trial Court in the presence of revisionist. She has stated that judgment was announced by learned trial Court on 31.8.2012. She has stated that she has informed about announcement of judgment by learned trial Court to the revisionist. She has stated that residential house of Sh.D.S.Bhardwaj and Sh. Bali Ram Rathore is nearby the house of revisionist. She has stated that application filed under Section 5 of Limitation Act should not be condoned because intentionally appeal was not filed by revisionist within time. She has admitted that revisionist is her uncle. She has admitted that on dated 31.8.2012 when judgment was announced on that date revisionist did not appear before learned trial Court.

9. Following documentary evidence adduced by revisionist. Ext.A copy of order sheet dated 4.8.2012, Ext.B copy of order sheet dated 18.8.2012, Ext.C copy of order sheet dated 30.8.2012 and Ext.D copy of order sheet dated 31.8.2012.

10. Section 5 of Limitation Act provides for extension of time in case of appeal and application other than those filed under Order XXI CPC. It was held in case reported in AIR 1987 SC 1353 (DB) titled Collector Land Acquisition Anantnag and another Vs. Mst. Katiji and others that (1) Ordinarily a litigant does not stand to benefit by lodging an appeal late. (2) It was held that refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. It was held that when delay is condoned the highest that would happen is that a cause would be decided on merits after hearing the parties. (3) It was held that every day's delay must be explained does not mean that a pedantic approach should be made. It was held that doctrine must be applied in a rational manner. (4) It was held that when substantial justice and technical considerations are pitted against each other then cause of substantial justice deserves to be preferred. It was held that there is no presumption that delay is always occasioned deliberately or on account of culpable negligence, or on account of mala fides. It was held that a litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk. It was held that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice.

11. In the present case AW1 Ramesh Chand when he appeared in witness box has specifically stated that on 18.10.2012 he went to residential house of his Advocate. He has stated that on 29.11.2012 again he went to residential house of his Advocate. He has stated that his Advocate was patient of cancer and his Advocate used to visit several places at Chandigarh and Delhi for his medical treatment of cancer.

12. Testimony of AW1 Ramesh Chand is corroborated by AW2 Abbey Bhardwaj who is the son of D.S.Bhardwaj. AW2 has stated that his father was patient of cancer. AW2 has specifically stated that his deceased father D.S.Bhardwaj used to visit Ludhiana, Chandigarh, Delhi, Shimla and Mandi for his medical treatment. AW2 has stated that his father died on 9.2.2013. Testimonies of AW1 Ramesh Chand and AW2 Abbey Bhardwaj are trustworthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of AW1 and AW2. Testimony of AW1 and AW2 is further corroborated by documentary evidence i.e. discharge summary issued by super specialty hospital Max whereby it has been specifically mentioned that Advocate D.S.Bhardwaj was admitted on 14.9.2012 in hospital and he was patient of carcinoma. It is well settled law that marked documents can be looked for corroborative purpose under law. Court has also perused document mark 'A' issued by IGMC Shimla HP wherein medical treatment was obtained by Advocate of revisionist.

13. Submission of learned Advocate appearing on behalf of non-revisionists that delay is not bonafide and on this ground revision petition be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. AW2 Abbey Bhardwaj has stated in positive manner that his father D.S.Bhardwaj was patient of cancer. AW2 Abbey Bhardwaj has specifically stated that his father used to visit Ludhiana, Chandigarh, Delhi, Shimla and Mandi for his medical treatment. AW2 has specifically stated in positive manner that his father D.S.Bhardwaj died on 9.2.2013. Testimony of AW2 Abbey Bhardwaj remained un-rebutted on record. Testimony of RW1 Sudha Hans is not sufficient to rebut the testimony of AW1 Ramesh Chand and AW2 Abbey Bhardwaj. The facts of the present case and the facts of the ruling cited by learned Advocate appearing on behalf of non-revisionists i.e. 2013 (14) SCC 81 titled Basawaraj and another Vs. Special Land Acquisition Officer, 2011 (4) SCC 363 titled Lanka Venkateswarlu Vs. State of Andhra Pradesh and others, 2011 (3) Shim. LC 203 titled Karta Ram Gupta and another Vs. Ashwani Kumar Sharma and 2011 (1) Shim. LC 597 titled Kishan Chand Vs. Ram Chand are different and distinguishable and are not applicable in the present facts and circumstances of the case because in the ruling cited by learned Advocate appearing on behalf of non-revisionists the Advocate engaged by the party was not suffering from cancer. It is well settled law that parties cannot be penalized due to illness of Advocate. Court is of the opinion that it is expedient in the ends of justice to allow revision petition and it is held that delay in filing the appeal was due to illness of Advocate who was appearing on behalf of revisionist. Hence point No.1 is answered in affirmative.

Point No.2 (final order).

14. In view of findings on point No.1 revision petition is allowed and order of learned Additional District Judge Ghumarwin District Bilaspur HP camp at Bilaspur passed in CMP No. 173/6 of 2012 titled Ramesh Hans Vs. Km.Sudha Hans and others dated 23.12.2014 is set aside and application filed under section 5 of Limitation Act is allowed and delay is condoned in the ends of justice. Costs to the tune of Rs. 3000/- (Three thousands) is also imposed upon revisionist. Learned Additional District Judge Bilaspur will admit the appeal filed under Section 96 CPC and thereafter after hearing both the parties will dispose of appeal within three months because Civil Suit No. 110/1 of 2008 was instituted on 1.10.2008 and appeal requires expeditious disposal. Parties are directed to appear before learned Additional District Judge Ghumarwin District Bilaspur HP on 4.4.2016. File of learned Additional District Judge Ghumarwin along with certify copy of order be sent forthwith. Observation made hereinabove is strictly for the purpose of deciding present revision petition and shall not effect merits of the case in any manner. Revision petition is disposed of. Pending application if any also disposed of.

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

Sarjeevan Singh and another .....Appellants

Versus

Ram Nath and another .....Respondents

RSA No. 620/2005
Reserved on March 1, 2016
Decided on March 2, 2016

Specific Relief Act, 1963- Section 38- Plaintiffs filed a suit seeking permanent prohibitory injunction for restraining the defendants from interfering with the suit land or raising construction over the same pleading that they are co-owners in joint possession of the suit land and defendants are strangers- defendants opposed the suit pleading that they are in possession on payment of rent since the time of their forefather – their names were wrongly deleted by Consolidation authorities without their knowledge – a revision petition was filed under Consolidation of Holding Act which was allowed - trial Court decreed the suit- an appeal was preferred which was allowed—in second appeal held, that Consolidation Officer had restored the revenue entries which existed prior to their deletion- plaintiffs had never challenged the order passed by the competent authorities during consolidation proceedings- it was duly proved that defendants were paying Chakota to the plaintiffs - the Appellate Court had rightly appreciated the evidence - the trial Court had committed an error while reading revenue entries- appeal dismissed. (Para-13 to 18)

For the Appellants	:	Mr. T.S. Chauhan, Advocate.
For the Respondents	:	Mr. N.K. Thakur, Senior Advocate with Mr. Rohit Bharoll, Advocate

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal has been instituted against judgment and decree dated 31.8.2005 rendered by learned Additional District Judge, Fast Track Court, Una, District Una, HP in Civil Appeal No. 145/98 RBT 99/04/98.

2. “Key facts" necessary for the adjudication of the present appeal are that the appellants-plaintiffs (hereinafter referred to as plaintiffs” for convenience sake) filed a suit against respondents-defendants (hereinafter referred to as 'defendants' for convenience sake) for issuance of permanent injunction restraining the defendants from interfering in any manner or raising construction over the suit land measuring 0-06-65 square metres comprised in Khewat No. 97 min, Khatauni No. 242 min, Khasra Nos. 839, 840 and 841 as entered in Misal Hakiat 1988-89 situate in village Kotla Kalan, Tehsil & District Una, Himachal Pradesh jointly owned and possessed by the plaintiffs, and in the alternative suit for possession. According to the plaintiffs, they are co-owners in joint possession of the land as detailed above. Defendants are strangers and have nothing to do with the suit land.

3. Suit was contested by the defendants. According to the defendants, plaintiffs are neither owners nor in possession of the suit land. It is further averred that defendants have been coming in possession of the suit land on payment of rent since the time of their forefathers under owners and have been so recorded in the revenue record in the year 1978-79. Consolidation authorities deleted the names of the defendants wrongly and illegally, at the back of the defendants and without their knowledge. Thereafter, defendants filed revision petition under Section 54 of the Consolidation of Holdings Act, which was allowed.

4. Replication was filed. Issues were framed by learned trial Court on 22.9.1993. He decreed the suit vide judgment and decree dated 24.6.1998. Defendants feeling aggrieved filed an appeal before the Additional District Judge, Fast Track Court, Una against judgment and decree dated 24.6.1998. Learned Additional District Judge, Fast Track Court, Una allowed the appeal on 31.8.2005. Hence, this Regular Second Appeal.

5. The appeal was admitted on 19.5.2006, on the following substantial question of law:

"Whether the reversal of the decree of the trial court by the first Appellate Court is the result of mis-appreciation and misconstruction of the evidence adduced by the parties?"

6. Mr. T.S. Chauhan, Advocate, has supported the judgment and decree dated 24.6.1998. According to him, first appellate Court has misread the oral as well as documentary evidence on record. He then contended that the order Ext P-1 dated 18.12.1990 by Senior Sub Judge, was not collusive.

7. Mr. N.K. Thakur, learned Senior Advocate has supported the judgment and decree passed by learned first appellate Court.

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

9. Plaintiff Sarjeevan has appeared as PW-1. According to him, they were owners in possession of 1 ½ Kanal of land. Land was in the shape of a hill. Suit land was inherited from their forefathers. He did not know when consolidation was done in the village. He denied that defendants have been coming as tenants. He did not know that names of the defendants were ever deleted from the revenue record during consolidation.

10. PW-2 Roop Singh has deposed that he had seen the suit land which is 1 ½ Kanal and is owned and possessed by the plaintiffs. In his cross-examination, he deposed that he did not know whether defendants were tenant over the suit land.

11. DW-1 Ram Nath has testified that suit land is 1 ½ Kanal. It was in their possession from the time of their forefathers. Previously, they were paying Chakota to the tune of Rs.1.75 Paisa. Consolidation was done in the village in 1979-80 and Joginder Singh has recorded land in his name. Revision was preferred before the Director of Consolidation. Director issued direction to the Consolidation Officer to correct the entries. Consolidation Officer decided the case in their favour. Plaintiffs never filed an appeal against said order. Mutation qua the suit land was sanctioned in his favour. He was owner in possession of the suit land.

12. DW-2 Tara Chand deposed that he had seen the suit land. It was owned and possessed by the defendants. Plaintiffs are not in possession of the suit land.

13. Plaintiffs have tendered in evidence photocopy of Order dated 18.12.1990 rendered by Senior Sub Judge, Una in Civil Suit No. 159/90 whereby a decree for joint possession with 3/4th share of plaintiffs and remaining 1/4th share with defendants, was passed. Ext. P-2 is the copy of Misal Hakiat Bandobast Jadid Sani for the year 1988-89, in which suit land has been shown to be in possession of Joginder Singh son of Lachhman Singh and as per remarks column vide mutation No. 196, plaintiffs have been shown to be co-owners in possession to the extent of ¾ share as this mutation has not been finalised till date. Nature of suit land was Barani Avval. Ext. P-3 is the copy of Misal Hakiat Bandobast for the year 1988-89, in which Joginder Singh has been shown owner-in-possession but new Khasra No. 1715 and 1717 including old Khasra No. of 1715 has been mentioned as 1595 and of old Khasra No. 1717 has been mentioned as 1597 and nature of the land has been shown as Gair Mumkin Toda and Bheth. Copy of Bandobast Jadid Sani for the year 1988-89 is Ext. P-4.

14. Defendants have tendered in evidence copy of Misal Hakiat Bandobast for the year 1988-90 and same copy has been tendered in evidence by the plaintiffs as Ext. P-4. Ext. P-4 shows that vide mutation No. 214, the ownership has been transferred in the name of the defendants and defendants have been recorded in the column of possession. However, in the note pertaining to daily diary No. 48 dated 10.10.1991, different Khasra numbers have been shown including the suit land in Ext. D-1 and Ext. P-4. Ext. D-2 is the copy of order dated 14.7.1988 under Section 54 of the HP Holdings (Consolidation and Prevention of Fragmentation) Act in which defendant Ram Nath and Bal Krishan have impleaded Joginder Singh and others challenging the deletion of revenue entries qua tenancy during consolidation and the directions were issued to the Consolidation Officer to pass an appropriate order after giving an opportunity to the parties and holding proper inquiry thereof. Ext. D-3 is the order of Consolidation Officer, Una dated 14.12.1992 in pursuance of direction under Section 54 of the HP Holdings (Consolidation and Prevention of Fragmentation) Act vide order Ext. D-2, whereby he restored the revenue entries which existed before their deletion which also included suit land. Learned first appellate Court has rightly come to the conclusion that the decree Ext. P-1 dated 18.12.1990 rendered by learned Senior Sub Judge in Civil Suit No. 159/1990 was collusive to defeat order passed by the Consolidation Officer restoring entries in the name of the defendants vide Order passed by the Director Ext. D-2 dated 14.7.1988 and of Consolidation Officer Ext. D-3 dated 14.12.1992. Vide Ext. D-2, entries of possession of the suit land qua the defendants in lieu of tenancy rights were restored. There is specific reference to the old Khasra Nos. 1715 and 1717, out of which present Khasra Nos. 839, 840 and 841 have been carved out.

15. Learned trial Court has committed error while reading revenue entries resulting in miscarriage of justice. Moreover, plaintiffs have never challenged the orders passed by the competent authorities during consolidation proceedings. First appellate Court has correctly appreciated oral as well as documentary evidence. It has come in the statement of DW-1 Ram Nath, that they were paying Chakota to the tune of Rs.1.75 paisa to the owners. Substantial question of law is answered accordingly.

16. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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

Tara Devi & ors. .....Appellants.

Versus

Kaushalya Devi & ors. .....Respondents.

RSA No. 249 of 2003.
Reserved on: 1.3.2016.
Decided on: 2.3.2016.

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession of the suit land pleading that predecessors-in-interest of the respondents No. 2 to 4 were owners in possession of the suit land as co-sharers- they had sold their share to the plaintiff and one 'L' through registered sale deed- 'L' died and was succeeded by the plaintiff- mutation was not sanctioned due to mistake of Patwari- name of 'N' was appearing in the revenue record- defendants purchased the share of 'N'- plaintiff filed a civil suit against the defendants and

the others qua the share of 'N'- suit was decreed by Sub Judge, Amb- defendants were proclaiming that they had purchased the share of 'J' and 'S' in the suit land- defendants claimed that they were bonafide purchaser for consideration- suit was dismissed by the trial Court- an appeal was preferred which was allowed- sale deed was not proved before the trial Court but was proved in appeal- entire land was shown in the ownership and possession of Gram Panchayat- suit was filed by the proprietary body against the Gram Sabha challenging the vestment of suit land in Gram Panchayat - suit was decreed by the trial Court and the findings were affirmed by the Appellate Court- proprietary body came in possession of the suit land- revenue entries were required to be corrected on the basis of sale deed- cause of action arose when the suit land was sold by the defendants No. 4 & 5 in favour of defendants No.1 to 3- suit was filed well within the limitation- appeal dismissed.

(Para-13 to 17)

For the appellant(s): Mr. Ajay Sharma, Advocate.

For the respondents: Mr.N.K.Thakur, Sr. Advocate with Mr. Rahul Verma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Una, H.P. dated 25.3.2003, passed in Civil Appeal (RBT) No. 186/01/94.

2. Key facts, necessary for the adjudication of this regular second appeal are that Kaushalya Devi, respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for possession of land measuring 90 kanals 9 marlas comprised in Kh. Nos. 47, 134, 147, 280, 308, 349, 445, 447, 449, 482, 549, 569, 598 and 600 situated in village Nohan Tehsil Amb, Distt. Una, H.P. The predecessor-in-interest of respondents No. 2 to 4, namely Sh. Jagrup Singh and Santokh Singh alongwith one Smt. Naresh Devi were owners of the land alongwith share in Shamlat i.e. suit land as co-sharers. They sold their land along with share in Shamlat to the plaintiff and one Loharu son of Tani Ram through registered sale deed dated 27.12.1966 for consideration of Rs. 2,000/-. The plaintiff was put in possession of the entire land including the suit land. She was coming in possession of the suit land since then. Loharu died and he was succeeded by the plaintiff. Thereafter, plaintiff is coming in possession as co-sharer in the suit land. However, due to mistake of the patwari, mutation in respect of the Shamlat land was not sanctioned in favour of the plaintiff and name of the earlier owners continued. The appellants-defendants (hereinafter referred to as the defendants) and few others purchased the share of Naresh Devi since the name of Naresh Devi was coming in the revenue record. The plaintiff filed civil suit against the appellants and others qua the share of Naresh Devi. The suit was decreed by the then Sub Judge, Amb on 24.5.1985. The appellants were proclaiming that they have purchased the share of Sh. Jagrup Singh and Santokh Singh in the suit land. The plaintiff did not admit the factum of sale but even if there was any sale, it was illegal.

3. The suit was contested by defendants. According to them, plaintiff had no right, title and interest in the suit land nor she was put in possession of the same. According to them, the owners were in possession of the suit land and they have sold the same to the defendants for sale consideration through registered sale deed. They were bonafide purchasers without notice. The entries were rightly alleged to be appearing in the name of erstwhile owners and plaintiff never raised any objection before the consolidation authorities. Sh. Jagrup and Santokh Singh also filed the written statement. According to

them, they have never executed any sale in favour of plaintiff or Loharu and if plaintiff succeeds in proving the sale deed, the same was void and ineffective as the plaintiff never entered into the possession of the suit land and secondly they being in possession have become its owners by way of adverse possession.

4. The learned Sub Judge (II), Amb, H.P., framed the issues and suit was dismissed on 29.4.1994. The plaintiff, preferred an appeal before the learned Addl. District Judge, Una. The learned Addl. District Judge, Una, allowed the same on 25.3.2003. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 30.3.2005:

> "1. Whether share in Shamlat (which is admittedly in the ownership of the State) can be transferred by way of sale, if not, the impugned judgment and decree as passed contrary to the above said settled position stand vitiated and liable to be quashed and set aside?
>
> 2. Whether the suit as filed is hit by provisions of Article 100 of the Limitation Act, having been filed beyond the period of limitation and this aspect having not been looked into by the courts below, impugned judgment and decrees as passed stand vitiated and liable to be quashed and set aside?
>
> 3. Whether the impugned judgment and decree stand vitiated having been passed without looking into the factum of misjoinder and non-joinder of necessary parties?"

6. Mr. Ajay Sharma, Advocate, for the appellant, on the basis of substantial questions of law, has vehemently argued that the share in Shamlat land could not be transferred by way of sale. He then contended that the suit was barred by limitation. He lastly contended that there was non-joinder of necessary parties. On the other hand, Mr. Naresh Thakur, Sr. Advocate, has supported the judgment and decree dated 25.3.2003.

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

8 The plaintiff Kaushalya Devi has appeared as PW-1. She testified that the suit land was purchased by her and Laharu from Santokh Singh and Jagrup about 17-18 years back. When the suit land was purchased, khata of the suit land was joint. She had filed suit against Naresh Devi which was decreed in her favour. Laharu died and she has succeeded him. The defendants were claiming ownership of the suit land by way of sale deed which was not correct. She placed on record Ext P-1 to P-6. Ext. P-1 is the copy of jamabandi for the year 1980-81 pertaining to the suit land which shows defendants and others in possession of the suit land as owners. Ext. P-2 and P-3 are the copies of judgment and decree dated 1.4.1989 of the appeal preferred by Tara Devi against the judgment and decree passed by the Sub Judge, Amb dated 24.5.1985. Ext. P-4 and P-5 are the copies of jamabandi for the year 1965-66 and 1975-76 pertaining to the suit land.

9. The defendants have placed on record Ext. D-1 and D-2, copies of judgment and decree sheet dated 30.6.1992 rendered by the then Sub Judge, Amb in case titled as Tani Ram Vs. Kaushalya Devi. Ext. DA to DD are the copies of missal hakiat Ishtemal and missal hakiat Bandobast for the year 1980-81 to 1986-87.

10. One of the defendants Tara Devi appeared as a witness. According to her, the plaintiff had also filed a suit against her. However, the plaintiff did not include the suit land in that suit. She purchased the suit land from Jagrup and Santokh as they were in

possession in the year 1983. She has also proved copies of sale deed Ext. DW-1/A to DW-1/D.

11. DW-2 Ram Prashad is the stamp vendor.

12. DW-3 Santokh Singh deposed that the suit land is 60-65 kanals. He has neither sold the land to Loharu nor Kaushalya Devi. The possession was not handed over to them.

13. The sale deed was not proved before the trial Court. The plaintiff filed an application under Order 41 Rule 27 CPC. The application was allowed and the plaintiff has proved sale deed Ext. A-1. The original sale deed was lying in the decided case. It was brought by record keeper AW-1 Sarwan Dass. Sh. M.G.Sharda Advocate has testified that Jagrup Singh, Santokh Singh and Naresh Devi had executed the sale deed in favour of Kaushalya Devi and Loharu vide Ext. A-1. They had also agreed to part with their rights in the Shamlat land. The sale consideration was Rs. 2000/-. The validity of the sale deed was also gone into in earlier litigation. The suit was decreed by the learned Sub Judge, Amb vide judgment dated 24.5.1985 vide Ext. P-6. The defendants preferred an appeal against the same. The learned District Judge vide judgment and decree dated 1.4.1988 Ext. P-2 & P-3 dismissed the same. In the earlier suit, only share of Naresh Devi which was sold was under challenge whereas rest of the share has been assailed in the present suit.

14. It would be pertinent to state here for the completion of facts that as per the copy of jamabandi for the year 1965-66 Ext. P-5, the entire land was shown in the ownership and possession of the Gram Panchayat. According to Ext. P-3, it is stated that earlier, a suit was filed by the proprietory body of the village against the Gram Sabha whereby the vestment of the suit land in the Gram Panchayat was challenged. The suit was decreed by the trial Court and the findings were affirmed by the appellate Court on 23.12.1969. It is, in these circumstances, the proprietory body came in possession of the suit land. The plaintiff has proved the sale deed Ext. A-1 executed in the year 1966. The revenue entries were required to be corrected on the basis of sale deed Ext. A-1 whereby the suit land was purchased alongwith the Shamlat land. There is no merit in the contention of Mr. Ajay Sharma, Advocate that the Shamlat land could not be sold by defendants No. 4 & 5, namely Jagrup and Santokh Singh since they themselves have claimed to have purchased the same piece of land.

15. Now, as far as the issue of limitation is concerned, the trial Court has framed issue No. 2 to this effect. It was decided in favour of the plaintiff. The learned trial Court has rightly come to the conclusion that the cause of action has arisen to her to file the suit when defendants No. 4 & 5 have sold the land to defendants No. 1 to 3. The suit was filed within 12 years from the sale. Thus, Article 12 of the Limitation Act, was not attracted in this case.

16. Neither Karam Singh nor Gulwant Singh or Tani Ram were necessary parties for the adjudication of the lis.The plaintiff has purchased the land from defendants No. 4 & 5, namely, Jagrup and Santokh Singh and Naresh Devi has sold the land to her in the year 1966. The substantial questions of law are answered accordingly.

17. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Court on its own motion ...Petitioner(s).

Versus

State of Himachal Pradesh and others ...Respondents.

CWPIL No. 1 of 2016
Date of order: 03.03.2016

Constitution of India, 1950- Article 226- Deaths caused due to the jaundice outbreak in Shimla and Solan- Affidavit has been filed by Secretary (I&PH) stating the steps taken by the State Government for the implementation of the direction issued by High Court- direction issued to file a fresh status report about the steps taken for creation of the statutory body- steps taken in terms of preliminary report submitted by Committee as regards STPs, Shimla and STPs in the entire State of Himachal Pradesh – SIT directed to conclude the investigation, as early as possible- SIT also directed to examine the role of the Officers who were manning the posts from 2007- Chief Secretary and Secretary (I&PH) directed to file a fresh affidavit indicating whether any action has been taken against any other Officers/Officials besides the Officers/Officials who were manning the post at present- Additional Chief Secretary (I & PH), Secretary (I&PH), Engineer-in-Chief(s) and Superintending Engineer(s), who were manning the posts from 18th September, 2014 till the jaundice outbreak are prima facie held to violate the Court directions- they are directed to show cause as to why they should not be dealt with in accordance with the Contempt of Courts Act- Superintendent of Police and District Magistrate directed to make the people aware about the jaundice outbreak by beat of drum- SIT further directed to investigate jaundice outbreak at Solan and to submit report- all the respondents and the other persons/ authorities directed to file affidavits/status reports within three weeks.

(Para-1 to 44)

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

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

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

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for the respondents-State.

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

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

The following judgment of the Court was delivered:

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

Ms. Anuradha Thakur, present Secretary (I&PH) to the Government of Himachal Pradesh has filed affidavit, which finds place at pages No. 269 to 394 of the paper book, in compliance to the directions passed by this Court vide order, dated 25th February, 2016.

2. In para 4 of the said affidavit, it is stated that vide Annexure-9, the respondent-State has constituted a Committee headed by Additional Chief Secretary (Health) to the Government of Himachal Pradesh in relation to the statutory body to be created in terms of the directions contained in para 24 of the order (supra), is suggestive of the fact that the State-respondents are taking steps to comply with the directions contained in para 24 of the order (supra) and till it is established, the State-respondents have to file status report in terms of the directions contained in para 27 of the order (supra).

3. The Secretary (I&PH) has given the details as to what steps have been taken in compliance to the directions contained in para 27 of the order (supra).

4. It has also been averred in the status report that the Ministry of Urban Development, Government of India, is the nodal Ministry coordinating the sewerage system and video conference of the sub-committee is to be held with the said Ministry on 4th March, 2016, in order to seek technical assistance and knowledge regarding governance structure on water supply and sewage treatment.

5. The Committee, constituted by the Engineer-in-Chief (I&PH) to examine the operation and maintenance of Sewage Treatment Plants (for short "STP"), has submitted the preliminary report (Annexure-10), which is at pages 358 to 384 of the paper book. The said preliminary report is only viz-a-viz the STPs in Shimla. Nothing has been said by the said Committee about other STPs in the entire State of Himachal Pradesh.

6. Secretary (I&PH) is directed to file a fresh report about the steps taken for creation of the statutory body, the time to be taken to establish the said statutory body, steps taken in terms of the preliminary report submitted by the Committee (Annexure-10) regarding the STPs in Shimla and also viz-a-viz the STPs in the entire State of Himachal Pradesh.

7. The Special Investigating Team (for short "SIT") has filed the report, which finds place at pages No. 395 to 420 of the paper book.

8. It is made loud and clear to SIT as to whosoever may be involved in the commission of the said offences, should not be given any liberty or shown any leniency. Why SIT has not made any arrests so far in terms of the status report submitted on 2nd March, 2016. In case, SIT feels any handicap or any officer(s) is/are not cooperating, it should disclose the same.

9. SIT is directed to try to conclude the investigation, in terms of the directions contained in the order (supra), as early as possible and bring all those persons to book, who are involved in the commission of offences.

10. In terms of para 38 of the order (supra), SIT was directed to pinpoint the officers responsible from the year 2007 till today, but, so far, names of the accused persons have not been disclosed in the status report.

11. In response to the directions contained in para 40 (i) of the order (supra), the names of the officers, who were manning the posts from the year 2007 have been furnished by the Secretary (I&PH) in the affidavit, figuring at pages No. 324 to 343 of the paper book (Annexure-6). Annexure-7 of the affidavit contains the details of the payment and the officers who have made the payments to the contractor. SIT to examine the role of all the said officers and if any officer(s)/official(s) is/are involved, draw action.

12. In sequel to the directions contained in para 40 (ii), (iii) & (iv) of the order (supra), the Secretary (I&PH) has given details of the amount released in favour of the

contractor w.e.f. 1st January, 2007, in terms of Annexure-7 (pages 344 to 353 of the paper book). It does not disclose as to what was the procedure followed for releasing the amount in favour of the contractor and who had passed the bills. The compliance viz-a-viz para 40 (iii) stands discussed hereinabove and the details of the deaths caused due to the jaundice outbreak are given at pages 385 and 386 of the paper book (Annexure-11).

13. The affidavit filed by the Secretary (I&PH) contains the details of the action drawn against the concerned Superintending Engineer, who has been transferred and a show cause notice has been issued to him to explain his position and the other officers, i.e. the Executive Engineer, Assistant Engineers and Junior Engineers have been placed under suspension in terms of Annexures-12 and 13-A to 13-E (pages 387 to 393 of the paper book).

14. The Chief Secretary and the Secretary (I&PH) to the Government of Himachal Pradesh are directed to file fresh affidavits indicating therein as to whether only these officers were involved right from the year 2007 till today or whether these officers were presently manning the posts and that is why immediate action has been drawn against them and whether any action has been drawn against any other officer/official. They are further directed to file a detailed report relating to the directions contained in para 40 (ii), (iv) and (v).

15. Ms. Anuradha Thakur, present Secretary (I&PH) to the Government of Himachal Pradesh, in para 2 of the affidavit, has tendered her explanation. It is stated that she has taken over on 15th February, 2016 and just after one week, has held interdepartmental meetings. Further averred that she has made the statement in the earlier affidavit on the basis of record that the officers have complied with the directions made by this Court in CWPs No. 441 of 2007 and 4122 of 2014 and the same was not based on her personal knowledge. However, she has tendered unconditional and unqualified apology, is accepted.

16. It is apt to record herein that it appears that she has made the efforts and is making the efforts to control the jaundice outbreak and to prevent the same in future.

17. The question is – what action has been taken against the Additional Chief Secretary (I&PH), Secretary(ies), Secretary (I&PH) and the other officers, who were manning the posts right from 18th September, 2014?

18. The Additional Chief Secretary (I&PH), Secretary (ies), Secretary (I&PH), Engineer-in-Chief(s) and Superintending Engineer(s), who were manning the posts from 18th September, 2014, till the jaundice outbreak, are, *prima facie,* held to have violated the Court directions. Present Secretary (I&PH) is directed to furnish the details of the said officers.

19. Registry is directed to frame Rule against the said officers, are directed to show cause as to why they should not be dealt with in terms of the provisions contained in the Contempt of Courts Act.

20. The Chief Secretary to the Government of Himachal Pradesh has not filed any affidavit in terms of the directions contained in paras 40 and 44 of the order (supra). Learned Advocate General stated at the Bar that the affidavit filed by the Secretary (I&PH) is the affidavit on behalf of the Chief Secretary also, which is not factually and legally correct. Chief Secretary is directed to file affidavit in terms of the directions contained in paras 40 and 44 of the order (supra) and also to remain present before this Court on the next date.

21. The Additional Chief Secretary (Urban Development and Town Country Planning Department) to the Government of Himachal Pradesh has filed affidavit, which

leads nowhere, is directed to remain present before this Court on the next date of hearing and explain her position. She is also directed to file fresh affidavit.

22. In compliance to directions contained at para 45, the Superintendents of Police, Kangra, Bilaspur, Sirmaur, Chamba & Solan and the Deputy Commissioners, Chamba & Sirmaur have filed the affidavits. The other Superintendents of Police and the Deputy Commissioners have not filed any affidavits, are directed to remain present before this Court on the next date of hearing and show cause as to why they have not filed the affidavits. They are also directed to file affidavits.

23. All the Deputy Commissioners are directed to file affidavits in compliance to the directions contained in paras 45 and 46 of the order (supra). In addition to the directions contained in paras 45 and 46, all the District Magistrates and the Superintendents of Police are directed to make the people in the remote areas aware about the jaundice outbreak by beat of drum also.

24. The Principal Secretary (Education) to the Government of Himachal Pradesh has not filed any affidavit in compliance to the directions contained in para 47 of the order (supra), is directed to appear in person before this court on the next date and explain his position. He is also directed to file affidavit/status report in terms of the directions contained in para 47.

25. It is made clear that the words 'pure mineral water' recorded in para 47 of the order (supra) be read as 'pure and safe drinking water'.

26. The Director, Public Relations, has not filed any affidavit. However, it is stated that the public was made aware about the jaundice outbreak in the publication of the Information and Public Relations Department, namely “Giriraj weekly” on 17th February, 2016.

27. The Director, Public Relations is directed to appear in person before this Court on the next date of hearing and to explain as to why he has not taken any steps to comply with the directions contained in para 48 of the order (supra) and is directed to comply with the same and file the compliance/status report.

28. The Chief Medical Officers have not filed the reports, are directed to file the same in terms of para 49 of the order (supra). In default, they are directed to appear in person before this Court on the next date.

29. The officer concerned is directed to file compliance report by way of affidavit in terms of para 52 of the order (supra).

30. Er. Sunil Justa is present in the Court, but Er.Suman Vikrant is not present, are directed to remain present before the Court on the next date of hearing and file affidavits explaining their position.

31. Both these Engineers have, *prima facie,* violated the Court directions and are directed to show cause as to why proceedings be not initiated against them in terms of the Contempt of the Courts Act read with the order (supra). Registry to frame contempt petitions against both of them.

32. These Engineers have also not filed any affidavit as to why prosecution should not be launched against them for filing false affidavits in terms of para 55 of the order (supra).

33. Mr. Naresh K. Sood, learned Senior Counsel, assisted by Mr. T.S. Chauhan, Advocate, sought time to file affidavit on behalf of Mr. Vineet Kumar, Member Secretary, Pollution Control Board, in compliance to the directions contained in para 56 of the order (supra). Mr. Vineet Kumar is directed to remain present in the Court on the next date of hearing and to show cause, as directed in terms of para 56.

34. The respondents-State is directed to deposit the amount of compensation awarded in terms of order (supra) within the time frame.

35. Director, PGI, Chandigarh, is directed to furnish details as to whether any death has occurred of any person relating to the State of Himachal Pradesh due to jaundice outbreak after 23rd February, 2016. Registrar (Judicial) to convey the order by fax.

36. SIT is directed to investigate jaundice outbreak in District Solan also and submit the report.

37. The District Magistrate, Solan and the other authorities concerned are directed to report as to how many deaths have occurred so far in District Solan due to the said disease.

38. Learned Amicus Curiae stated at the Bar that Er. Suman Vikrant has filed the preliminary report on assessment of STPs in Shimla (Annexure-10) and he be excluded from associating the Committee.

39. Secretary (I&PH) is directed to examine this issue and in case she is of the view that the report prepared by Er. Suman Vikrant is helpful and his assistance is required, he be allowed to continue. But, it does not mean that he has been absolved or discharged from his omissions and commissions, as discussed hereinabove read with the order (supra).

40. The Secretariat of Chief Justice has received a complaint from Mr. Raujif, in black and white, rather suggestions, containing 12 pages, which is at page 256 of the paper book, relating to the subject matter of the lis. Learned Advocate General, the Committee headed by the Additional Chief Secretary (Health), Secretary (I&PH), Deputy Commissioner, Mandi and the Superintendent of Police, Mandi, are directed to file response to the same.

41. Mr. Ramakant Sharma, learned Amicus Curiae, Mr. Bipin C. Negi, learned Senior Counsel and Mr. Ajay Mohan Goel, Advocate, are also requested to submit the response to the said complaint as well as the status reports filed by the official respondents.

42. Registry is directed to furnish copy of the same to the learned counsel for the parties.

43. Registry to frame Rule against the officers in terms of order, dated 25th February, 2016, whose particulars and details have been given by the present Secretary (I&PH) by the medium of affidavit, which are at pages No. 324 to 343 (Annexure-6).

44. All the respondents and the other persons/ authorities, as mentioned in the order hereinabove, are directed to file affidavits/status reports with all details within three weeks.

45. List on **28th March, 2016.** Copy **dasti.**

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

Mastu Devi & others .....Appellants

Versus

Chet Ram & others .....Respondents.

RSA No.505 of 2002.
Decided on: 3rd March, 2016

Specific Relief Act, 1996- Section 34- Plaintiffs filed a civil suit claiming themselves to be exclusive owners in possession of the suit land – they further pleaded that they had become owners by way of adverse possession- defendants started interfering with the suit land taking advantage of wrong revenue entries– hence, relief of injunction was also sought- trial Court decreed the suit- an appeal was preferred- Appellate Court accepted the appeal and dismissed the suit- held, that suit cannot be filed on the basis of adverse possession- adverse possession can be made a ground to defend the suit- further, on merits adverse possession was not established- Appellate Court had rightly reversed the decree of the trial Court- appeal dismissed. (Para-12 to 22)

Cases referred:

Gurdwara Sahib Vs. Gram Panchayat Village Sirthala, (2014) 1 SCC 669

Shri Sonam Angroop Vs. Sh. Khub Ram and others, Latest HLJ 2016 (HP),

Maharajadhiraj of Burdwan, Udaychand Mahatab Chand Vs. Subodh Gopal Bose and others, AIR 1971 SC 376

Balkrishan Vs. Satyaprakash and others, AIR 2001 SC 700

For the appellants: Mr. Sunil Mohan Goel, Advocate.

For the respondents: Mr. G.R. Palsra, Advocate, for respondents No.1 to 3, 5 & 7 to 14.
Names of respondents No.4 and 15 stand deleted.
Respondents No.6(a) to 6(d) *ex parte*.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. (Oral)

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree dated 5.9.2002, passed by learned District Judge, Mandi, in Civil Appeal No.21 of 2000. Learned District Judge on reversal of the judgment and decree passed by learned Sub Judge, 1st Class, Court No.1, Mandi, in Civil Suit No.323/1996, has allowed the appeal and did not incline to grant the declaration that the plaintiffs are owners in possession of the suit land and also that the entries in the revenue record showing the respondents, hereinafter referred to as 'the defendants', as co-owners in possession thereof are wrong and illegal, hence not binding upon them. The suit as such was dismissed. The plaintiffs were also not held entitled to the decree for injunction against the defendants.

2. The subject matter of dispute in the present ***lis*** is land entered in Khewat No.49, Khatauni No.85, Khasra Nos. 699, 705, 711, 707, 715, 716, 724, 726, 730, 737, 743, 747, 782, 787, 790, 792, 794, 797, 800, 805, 809, 804, 814, 816, 819, 821, 823, 825, 827, 830, 836, 838, 840, 841, 843, 848, 852, 875, 884, Kitas 39, measuring 15-1-18 Bighas and land entered in Khewat No.49, Khatauni No.87 min, Khasra No. 822, measuring 0-8-19

Bighas, situate in village Tikkri, Hadbast No.40, Illaqua Movi Seri, Tehsil Chachiot, District Mandi.

3. The plaintiffs claim themselves to be exclusive owners in possession of the suit land. The entries in the Jamabandi for the year 1991-92 Ext.PA, have been relied upon to substantiate this part of their case. The case of the plaintiffs is that they are in exclusive, open, peaceful, continuous, hostile, uninterrupted and notorious possession of the suit land since October, 1982 to the knowledge and notice of the defendants and their predecessors-in-interest. Therefore, while pleading complete ouster of the defendants from the suit land, it has been claimed that they have acquired title therein by way of adverse possession. The entries in the Jamabandi for the year 1995-96 Exts. DW1/A to Ext.DW1/G, showing the defendants to be co-owners in possession of the suit land are stated to be wrong illegal, hence null and void. According to plaintiffs, the defendants taking undue advantage of such entries in the revenue record have started causing interference in the suit land. Hence, the suit for declaration to the effect that the plaintiffs have acquired title in the suit land by way of adverse possession and as such have now become absolute owners thereof. The entries to the contrary in the revenue record are wrong, illegal, incorrect and void ***ab initio***. Additionally, a decree for permanent prohibitory injunction, restraining the defendants from causing interference with the peaceful possession of the plaintiffs over the suit land has also been sought.

4. The defendants, in preliminary, have raised objections qua jurisdiction of the Civil Court to try and entertain the suit, maintainability thereof and that the plaintiffs have no enforceable cause of action and locus-standi to file the suit. On merits, it is denied that the plaintiffs are exclusive owners in possession of the suit land since October, 1982. It is submitted that since the suit land was in possession of the plaintiffs in the capacity of co-sharers, therefore, their possession over the same was on behalf of each and every co-sharer. Now, on partition during the consolidation operation carried out in the area, where the suit land is situated, each and every co-sharer has been given the possession of land allotted to him in partition. The entries in the revenue record showing the plaintiffs and defendants as joint owners of the suit land are correct, hence need not be changed. The suit has, therefore, been sought to be dismissed.

5 On the pleadings of the parties, the following issues were framed:

1. Whether the plaintiffs have become absolute owners of the suit land by virtue of adverse possession, as alleged? OPP.
2. If issue No.1 is proved, whether revenue entries contrary to this fact are liable to be corrected? OPP.
3. Whether the plaintiffs are entitled to the relief of injunction, as prayed for? OPP.
4. Whether this Court has no jurisdiction to entertain and try the suit? OPD.
5. Whether the suit is not legally competent and maintainable? OPD.
6. Whether the plaintiffs have no locus-standi to file the present suit? OPD.
7. Whether the plaintiffs have no enforceable cause of action to file the present suit? OPD.
8. Relief."

6. The plaintiffs in order to prove their case have examined PW-2 Khima Ram. One of the plaintiffs, Shri Lal Chand, the legal representative of deceased plaintiff No.1Almu has also stepped into the witness box as PW-1. On behalf of the plaintiffs, copy of ***Khatauni Istemal*** for the year 1991-92 Ext.PA and copy of Jamabandi for the year 1983-84 Ext.PB were also relied upon.

7. The defendants, on the other hand, have also examined one Shri Devi Ram DW-2. Defendant No.3 Shri Mohar Singh has also stepped into the witness box as DW-1. Besides, reliance on their behalf has been placed on the copy of Jamabandi for the year 1995-96 Exts. DW1/A to Ext.DW1/G.

8. Learned trial Court on appreciation of the evidence, while answering issues No.1 to 3 in favour of the plaintiffs, has concluded that the plaintiffs have become absolute owners of the suit land by way of adverse possession. While holding that the Civil Court has jurisdiction to entertain and try the suit and that the plaintiffs have enforceable cause of action and locus-standi to file the suit, issues No. 4 to 7 were answered against the defendants. Therefore, in view of findings on issues No.1 to 3, the suit was decreed not only for the relief of declaration as sought, but injunction also.

9. The defendants aggrieved by the judgment and decree passed by learned trial Court, however, filed an appeal in the Court of learned District Judge, Mandi. Learned lower appellate Court on re-appraisal of the evidence available on record and also the given facts and circumstances of the case, has accepted the appeal and dismissed the suit as pointed out at the very outset.

10. It is the judgment and decree so passed by learned District Judge under challenge before this Court in the present appeal, on the grounds, inter alia, that the evidence produced by the plaintiffs has erroneously been brushed aside and the findings to the contrary recorded are based on conjectures and surmises. The evidence as has come on record by way of Jamabandies Ext.DW1/A to DW1/G is stated to be misread and misinterpreted. On the other hand, the revenue entries in Jamabandi Exts. PA and PB have erroneously been ignored. According to the plaintiffs, there was sufficient evidence on record to substantiate that they had acquired title in the suit land by way of adverse possession, however, the same has erroneously been brushed aside as pointed out at the very outset.

11. This appeal has been admitted on the following substantial questions of law:

> "1. Whether the learned lower appellate Court while reversing the judgment and decree of learned trial court, has rightly come to the conclusion that the appellants had failed to prove adverse possession, especially when one of the witnesses of the defendants, viz. DW2, had admitted the possession of the appellants over the disputed land for the last 15-16 years?
>
> 2. Whether the learned lower appellate Court was right in not considering the pleadings in respect of adverse possession and erred in holding that the appellants had failed to prove complete ouster of the defendants and their adverse possession over the suit land nor there were any pleadings tot hat effect?

12. Mr. Sunil Mohan Goel, learned counsel for the appellants has strenuously contended that the plaintiffs have successfully pleaded and proved that they are in possession of the suit land since the year 1982 in complete ouster of the defendants. Also that irrespective of the defendants being joint owners of the suit land, their rights, title and

interest therein stood extinguished on account of the plaintiffs having remained in continuous, uninterrupted and peaceful possession thereof throughout. Therefore, learned trial Court has rightly decreed the suit. Learned lower appellate Court, has allegedly erred legally and also factually in reversing the well reasoned judgment passed by learned trial Court. Therefore, according to Mr. Goel, judgment and decree under challenge in this appeal is not legally and factually sustainable.

13. On the other hand, Mr. G.R. Palsra, learned counsel for the defendants has urged that in view of the judgment of Hon'ble Court in ***Gurdwara Sahib*** *Vs.* ***Gram Panchayat Village Sirthala***, ***(2014) 1 SCC 669***, the plaintiffs cannot raise the plea of adverse possession and it is rather the defendants who can raise such plea in his defence. According to Mr. Palsra, otherwise also, the plaintiffs being joint owners in possession of the suit land cannot be allowed to claim that they are owners in possession of the suit land in exclusion of the defendants, as according to Mr. Palsra, in view of the settled legal proposition, the possession of a co-sharer in the joint land is on behalf of each and every co-sharer. While placing reliance on the entries in the Jamabandies Exts. DW1/A to DW1/E and DW1/G, Mr. Palsra has urged that the parties to the suit are in possession of the suit land to the extent of their share allotted to them in the partition having taken place during the settlement operations carried out in the area where the suit land is situated. The appeal, therefore, has been sought to be dismissed.

14. On the face of the substantial questions of law aforesaid, it is crystal clear that the same pertains to the legality and validity of the judgment under challenge to the extent the same deals with the plea of adverse possession raised by the plaintiffs, because learned lower appellate Court has disbelieved the plea so raised; firstly, for want of cogent, legal and acceptable evidence to prove that their possession over the suit land has been actual, notorious, exclusive and continuous for a period over 12 years and also as to from what point of time the period of 12 years starts running and, secondly, that the plaintiffs being in possession of the suit land in the capacity of co-sharers cannot claim their exclusive possession over the suit land, as their possession was on behalf of each and every co-sharer.

15. Before coming to the controversy on merits, as per the legal principles settled at this stage, the plaintiff cannot seek declaration to the effect that he has acquired title in the suit land by way of adverse possession. In case he or she is in possession of the suit land, may raise such plea in defence in the event of the suit for the decree of possession of the land in question is filed against him by the true owner. This Court draws support in this regard from the judgment of Hon'ble the Apex Court in ***Gurdwara Singh*** *Vs.* ***Gram Panchayat village Sirthala***, ***(2014) 1 SCC 669***. It has been held in the judgment that the plea of adverse possession can not be used as a sword but only as a shield.

16. The plaintiffs, therefore, are not entitled to raise the plea of adverse possession. Even if they are entitled to raise such plea, in the considered opinion of this Court, the same is not at all proved. This Court in ***Shri Sonam Angroop*** *Vs.* ***Sh. Khub Ram and others***, ***Latest HLJ 2016 (HP)***, after taking note of various judicial pronouncements by the Apex Court and also various High Courts, has held that the elements which convert the peaceful possession into adverse possession i.e., the possession is actual, open notorious, exclusive and continuous for a period of 12 years should be successfully pleaded and proved on record with the help of cogent and reliable evidence.

17. Now, if coming to the case in hand, the suit land was recorded in the joint ownership of the parties on both sides. Jamabandies for the years 1983-84 Ext.PB and 1991-92 Ext.PA, produced in evidence by the plaintiffs themselves, can be taken into

consideration in this regard. No doubt in these Jamabandies, the plaintiffs have been shown in possession of the suit land. The statutory period of 12 years, however, is not complete, because the entries in these documents only establish that they were in possession of the suit land for about 8-9 years. In the pleadings also, they claim themselves to be in excusive possession of the suit land right from the year 1982. If this period is also believed to be true as per the entries in the revenue record, they were in possession thereof till 1991-1992 i.e. for about 10 years. After that the entries underwent change during the consolidation operation and the suit land was allotted to the respective shareholders. They were also delivered possession by the consolidation staff and the entries came to be recorded accordingly in the record-of-rights i.e. Jamabandies for the year 1995-96. The copies of Jamabandies Exts. DW1/A to Ext.DW1/E and Ext.DW1/G have been produced in evidence by the defendants to substantiate this aspect of the matter.

18. Therefore, the revenue record produced by the plaintiffs in evidence does not substantiate their plea of adverse possession. True it is that Shri Lal Chand, one of the plaintiffs while in the witness box as PW-1 has stated that they are in possession of the suit land since October, 1982 and similar is the version of PW-2 Shri Khima Ram, however, it is difficult to believe that till the institution of the suit it is the plaintiffs who were in possession of the suit land.

19. As per the evidence, as has come on record by way of the testimony of DW-1 Mohar Singh, one of the defendants, the suit land was partitioned during the consolidation operation carried out in the area where the same is situated and allotted to each co-sharer to the extent of his/her share and since 1995 they are in possession of their respective shares allotted to them during the consolidation operation. DW-1 also tells us that he even had filed an application before the staff carrying out settlement operations for separation of his share in the suit land and it is on that application, the suit land was partitioned. No doubt at one stage he has stated that the plaintiffs were dispossessed by the revenue staff from the suit land and its possession was delivered to him, however, in the same breath stated that whatever land was in possession of the co-sharers, the possession thereof was delivered to them by the revenue staff. The fact, however, remains that his testimony establishes the partition of the suit land during the settlement operation carried out in the area and on its partition, the delivery of possession of the suit land to the respective co-sharers.

20. DW-2 Devi Ram also substantiates the plea of the defendants that the suit land was partitioned during the consolidation proceedings and its possession given to the co-sharers. True it is that this witness in his cross-examination has admitted the possession of the plaintiffs over the suit land from 15-16 years, however, in view of the consolidation proceedings having taken place in the year 1995 coupled with the entries in the revenue record showing the parties on both sides in possession of the suit land, it would not be improper to conclude that the plaintiffs have failed to prove that they being in exclusive possession of the suit land for a period over 12 years, had become owners thereof. Therefore, the ratio of the judgment of Hon'ble the Apex Court in ***Maharajadhiraj of Burdwan, Udaychand Mahatab Chand*** *Vs.* ***Subodh Gopal Bose and others***, ***AIR 1971 SC 376*** is of no help to the case of the plaintiffs. Reliance has also been placed on a decision again that of Hon'ble the Apex Court in ***Balkrishan*** *Vs.* ***Satyaprakash and others***, ***AIR 2001 SC 700***. However, the ratio of this judgment is also not applicable in this case.

21. The re-appraisal of the evidence available on record thus leads to the only conclusion that the parties to the suit are co-sharers of the suit land. The same no doubt was in possession of the plaintiffs well before the consolidation operation having taken place

in the year 1995, however, there is no legal and acceptable evidence that their possession was hostile and had ripened into their title in the suit land. The present, therefore, is a case where it would not be improper to conclude that their possession over the suit land was on behalf of each and every co-sharer. Hence, they cannot seek the declaration to the effect that they have become owners of the suit land by way of adverse possession.

22. Consequently, the plaintiffs are not entitled to seek declaration to the effect that they are in possession of the suit land and have acquired title therein by way adverse possession. Hence, they are also not entitled to the decree for injunction. Learned lower appellate Court, therefore, has rightly dismissed the suit while arriving at a conclusion that the plaintiffs have failed to prove the plea of adverse possession raised in the plaint.

23. Both substantial questions of law stand answered accordingly.

24. In view of what has been said herein above, there is no merit in this appeal and the same is accordingly dismissed. Consequently, the judgment and decree passed by learned lower appellate Court is affirmed. The parties, however, are left to bear their own costs.

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

Ajay Mahajan .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CMP No.177 of 2016 in
Review Petition No.26 of 2014
Decided on: 4th March, 2016

Code of Civil Procedure, 1908- Section 114- Earlier review petition was disposed of as Special Review Petition was pending before the Hon'ble Supreme Court- present review petition was filed after disposal of Special Review Petition by the Hon'ble Supreme Court- judgment sought to be reviewed has attained the finality on the dismissal of the petition for special leave to appeal- judgment or order can be reviewed only if it is established that the Court acted without any jurisdiction or in violation of inherent powers while passing such orders- the judgment sought to be reviewed cannot be said to be without any jurisdiction – it can also not be said that the Court had acted in violation of its inherent jurisdiction- review cannot be an appeal in disguise, entitling the party to be reheard, simply because the party wants the decision to be otherwise. (Para- 5 to 8)

Case referred:
Kamlesh Verma Vs. Mayawati and others, (2013) 8 SCC 320

For the petitioner: Mr. M.R. Qureshi, Mr. Naveen Awasthi and Mr. Shailendra Surajvanshi, Advocates

For the respondents: Mr. D.S. Nainta and Mr. Virender Verma, Addl. AGs with Mr. Pushpinder Jaswal, Dy. AG for the respondent-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge(Oral)

In this application, order dated 10.4.2014, passed by a Co-ordinate Bench of this Court in Review Petition No 26 of 2014 has been sought to be reviewed/recalled. The order reads as follows:-

> "Review petition is taken on Board. It is stated by Mr. Deepak Kaushal, learned counsel for the petitioner that Special Leave Petition subject matter of the present review petition, is pending before the Apex Court.
>
> In view of the above peculiar circumstances, the Review Petition is disposed of, subject to the outcome of the Special Leave Petition pending before the Apex Court."

2. The Apex Court has now disposed of the petition for Special Leave to appeal (C) No.409 of 2014, vide order dated 24.2.2015 (Annexure A-2), which reads as follows:

> " The only question which was canvassed before us on behalf of the petitioner was that the State could not have compounded the alleged offence without the consent of the petitioner. It transpires that a Show Cause Notice dated 23rd February, 2015 has been issued to the petitioner. In these circumstances, the present proceedings have been rendered infructuous and are dismissed as such.
>
> The respondents are free to proceed against the petitioner on the basis of the Show Cause Notice dated 23rd February, 2015 and in accordance with law, as also keeping in view the judgment dated 11th May, 2010 of the High Court of Himachal Pradesh in CWP No.2632 of 2009.
>
> We clarify that the Demand Notice dated 2nd February 2011 (Annexure P-18) issued by the Respondent No.1-State Geologist, Department of Industries, Himachal Pradesh, to the petitioner, will not be enforced in view of the issuance of the Show Cause Notice dated 23rd February, 2015.
>
> Special Leave Petition stands dismissed as infructuous."

3. It is seen that the Hon'ble Apex Court has dismissed the petition for special leave to appeal (C), preferred by one Harbhajan Singh, petitioner in CWP No.1064 of 2011, against the judgment dated 2.7.2013, delivered by a Co-ordinate Bench of this Court in this writ petition and its connected matters, including CWP No.32/2011 in which Sh. Ajay Mahajan (review petitioner-applicant herein) was petitioner. It is this judgment which was sought to be reviewed by the review-petitioner aforesaid.

4. As noticed at the outset, the review petition has been disposed of by a Co-ordinate Bench of this Court on 10.4.2014, of course subject to the outcome of petition for special leave to appeal. The order so passed has been reproduced in para supra. The petition for special leave to appeal now also stands dismissed vide order dated 24.2.2015. The said order has also been reproduced in para supra. True it is that the petition for special leave to appeal was filed by one Harbhajan Singh, the petitioner in CWP No.1064/2011, against the judgment dated 2.7.2013, passed by a Co-ordinate Bench of this Court in the said writ petition and its connected matters, which was sought to be reviewed by filing the main petition (Review Petition No.26/2014), however, review petitioner-applicant Ajay Mahajan, aforesaid is not justified in saying that on the dismissal of the petition for special leave to appeal filed in the Apex Court by a co-petitioner, the judgment passed by this Court in CWP No.1064/2011 and its connected matters is liable to be

reviewed for the reason that all the writ petitions, decided by the Co-ordinate Bench of this Court, vide judgment which has now been sought to be reviewed, were involving similar points for adjudication and as such decided together by a common judgment, rendered in the lead case i.e. CWP No.1064/2011. The Apex Court has dismissed the petition for Special Leave to Appeal filed by Harbhajan Singh, petitioner in the lead case. The judgment sought to be reviewed, therefore, has attained the finality on the dismissal of the petition for special leave to appeal. Thus, there is no question of review of the judgment in question.

5. No doubt the Apex Court has dismissed the petition for special leave to appeal taking into consideration that the respondent-State has issued fresh show cause notice dated 23.2.2015 to Harbhajan Singh aforesaid, however, no ground for reviewing the judgment is made out and if the order passed by Hon'ble the Apex Court in the petition for Special Leave to appeal is of any help to the case of the review-petitioner-applicant, he may avail the remedy available to him in accordance with law. Otherwise also, the Co-ordinate Bench of this Court has relied upon the judgment passed in CWP No.2632/2009, to which each of the petitioners were parties, while passing the judgment now sought to be reviewed.

6. The judgment or order, no doubt, can be reviewed by the Court, which has delivered the same. However, only if it is established that the Court acted without any jurisdiction or in violation of inherent powers while passing such orders. The present is not a case where the judgment sought to be reviewed can be said to be without any jurisdiction or that this Court acted in violation of its inherent jurisdiction.

7. In our considered opinion, there is neither any mistake nor error apparent on the face of record or sufficient reason so as to take in its sweep, a ground analogous to those specified in Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. There is no material or manifest error on the face of the record, resulting into miscarriage of justice. Review cannot be an appeal in disguise, entitling the party to be reheard, simply because the party wants a decision to be otherwise**.** In this regard, we are drawing support from the judgment of Apex Court in ***Kamlesh Verma*** *Vs.* ***Mayawati and others***, ***(2013) 8 SCC 320***.

8. The judgment sought to be reviewed has now attained the finality. Therefore, on merits also, we do not find any reason to interfere with the well considered judgment rendered in the writ petition by a Co-ordinate Bench of this Court. The application, therefore, is dismissed. Pending application(s), if any, shall also stand disposed of.

****

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

Sh. Hari Prakash Abbi .....Petitioner.

Versus

State of H.P. & others. .....Respondents.

CMP No. 1250/2016 in
Review Petition No.25 of 2014
Decided on: 4th March, 2016

Code of Civil Procedure, 1908- Section 114- Earlier review petition was disposed of as Special Review Petition was pending before the Hon'ble Supreme Court- present review

petition was filed after disposal of Special Review Petition by the Hon'ble Supreme Court- judgment sought to be reviewed has attained the finality on the dismissal of the petition for special leave to appeal- judgment or order can be reviewed only if it is established that the Court acted without any jurisdiction or in violation of inherent powers while passing such orders- the judgment sought to be reviewed cannot be said to be without any jurisdiction – it can also not be said that the Court had acted in violation of its inherent jurisdiction- review cannot be an appeal in disguise, entitling the party to be reheard, simply because the party wants the decision to be otherwise. (Para- 5 to 8)

Case referred:
Kamlesh Verma Vs. Mayawati and others, (2013) 8 SCC 320

For the petitioner	:Mr. M.R. Qureshi, Mr. Naveen Awasthi and Mr. Shailendra Sur ajvanshi, Advocates
For the respondents:	Mr.D.S. Nainta and Mr. Virender Verma, Addl. AGs with Mr. Pushpinder Jaswal, Dy. AG for the respondent-State.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge(Oral)

In this application, order dated 10.4.2014, passed by a Co-ordinate Bench of this Court in Review Petition No 25 of 2014 has been sought to be reviewed/recalled. The order reads as follows:-

> "Review petition is taken on Board. It is stated by Mr. Deepak Kaushal, learned counsel for the petitioner that Special Leave Petition subject matter of the present review petition, is pending before the Apex Court.
>
> In view of the above peculiar circumstances, the Review Petition is disposed of, subject to the outcome of the Special Leave Petition pending before the Apex Court."

2. The Apex Court has now disposed of the petition for Special Leave to appeal (C) No.409 of 2014, vide order dated 24.2.2015 (Annexure A-3), which reads as follows:

> " The only question which was canvassed before us on behalf of the petitioner was that the State could not have compounded the alleged offence without the consent of the petitioner. It transpires that a Show Cause Notice dated 23rd February, 2015 has been issued to the petitioner. In these circumstances, the present proceedings have been rendered infructuous and are dismissed as such.
>
> The respondents are free to proceed against the petitioner on the basis of the Show Cause Notice dated 23rd February, 2015 and in accordance with law, as also keeping in view the judgment dated 11th May, 2010 of the High Court of Himachal Pradesh in CWP No.2632 of 2009.
>
> We clarify that the Demand Notice dated 2nd February 2011 (Annexure P-18) issued by the Respondent No.1-State Geologist, Department of Industries, Himachal Pradesh, to the petitioner, will not be enforced in view of the issuance of the Show Cause Notice dated 23rd February, 2015.
>
> Special Leave Petition stands dismissed as infructuous."

3. It is seen that the Hon'ble Apex Court has dismissed the petition for special leave to appeal (C), preferred by one Harbhajan Singh, petitioner in CWP No.1064 of 2011, against the judgment dated 2.7.2013, delivered by a Co-ordinate Bench of this Court in this writ petition and its connected matters, including CWP No.31/2011 in which Sh. Hari Prakash Abbi (review petitioner-applicant herein), was petitioner. It is this judgment which was sought to be reviewed by the review petitioner aforesaid.

4. As noticed at the outset, the review petition has been disposed of by a Co-ordinate Bench of this Court on 10.4.2014, of course subject to the outcome of petition for special leave to appeal. The order so passed has been reproduced in para supra. The petition for special leave to appeal now also stands dismissed vide order dated 24.2.2015. The said order has also been reproduced in para supra. True it is that the petition for special leave to appeal was filed by one Harbhajan Singh, the petitioner in CWP No.1064/2011, alongwith the judgment dated 2.7.2013, passed by a Co-ordinate Bench of this Court in the said writ petition and its connected matters, which was sought to be reviewed by filing the main petition (Review Petition No.25/2014), however, review petitioner-applicant Hari Prakash Abbi, aforesaid, is not justified in saying that on the dismissal of the petition for special leave to appeal filed in the Apex Court by a co-petitioner, the judgment passed by this Court in CWP No.1064/2011 and its connected matters is liable to be reviewed, for the reason that all the writ petitions, decided by the Co-ordinate Bench of this Court vide judgment which has now been sought to be reviewed, were involving similar points for adjudication and as such decided together by a common judgment, rendered in the lead case i.e. CWP No.1064/2011. The Apex Court has dismissed the petition for Special Leave to Appeal filed by Harbhajan Singh, petitioner in the lead case. The judgment sought to be reviewed, therefore, has attained the finality on the dismissal of the petition for special leave to appeal. Thus, there is no question of review of the judgment in question.

5. No doubt the Apex Court has dismissed the petition for special leave to appeal taking into consideration that the respondent-State has issued fresh show cause notice dated 23.2.2015 to Harbhajan Singh aforesaid, however, no ground for reviewing the judgment is made out and if the order passed by Hon'ble the Apex Court in the petition for Special Leave to appeal is of any help to the case of the review petitioner-applicant, he may avail the remedy available to him in accordance with law. Otherwise also, the Co-ordinate Bench of this Court has relied upon the judgment passed in CWP No.2632/2009, to which each of the petitioners were parties while passing the judgment now sought to be reviewed.

6. The judgment or order, no doubt, can be reviewed by the Court, which has delivered the same. However, only if it is established that the Court acted without any jurisdiction or in violation of inherent powers while passing such orders. The present is not a case where the judgment sought to be reviewed can be said to be without any jurisdiction or that this Court acted in violation of its inherent jurisdiction.

7. In our considered opinion, there is neither any mistake nor error apparent on the face of record or sufficient reason so as to take in its sweep, a ground analogous to those specified in Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure. There is no material or manifest error on the face of the record, resulting into miscarriage of justice. Review cannot be an appeal in disguise, entitling the party to be reheard, simply because the party wants a decision to be otherwise**.** In this regard, we are drawing support from the judgment of Apex Court in ***Kamlesh Verma*** *Vs.* ***Mayawati and others***, ***(2013) 8 SCC 320***.

8. The judgment sought to be reviewed has now attained the finality. Therefore, on merits also, we do not find any reason to interfere with the well considered judgment rendered in the writ petition by a Co-ordinate Bench of this Court. The application, therefore, is dismissed. Pending application(s), if any, shall also stand disposed of.

****

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

Jagmohan Singh and another .....Appellants

Versus

The Oriental Insurance Company Ltd. and others .....Respondents

FAO No.515 of 2009.
Decided on :04.03.2016

Motor Vehicles Act, 1988- Section 149- Insurance policy shows that passenger carrying capacity of the vehicle was 4+1- Registration Certificate also shows that sitting capacity of the vehicle was 4+1- deceased was travelling in the vehicle at the time of accident- thus, insurer cannot escape from the liability to pay compensation to the claimants- Insurer had not pleaded and proved that owner had committed any willful breach of the terms and conditions of the policy- appeal allowed and insurer saddled with liability. (Para-3 to 6)

For the appellants: Mr.Romesh Verma, Advocate.
For the respondents: Mr.Deepak Bhasin, Advocate, for respondent No.1.
Neemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 3rd August, 2009, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, (for short, the Tribunal), in Claim Petition No.46-R/2 of 2008/05, titled Sumitra Devi and others vs. Amrit and others, whereby compensation to the tune of Rs.3,57,000/- with interest at the rate of 9% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insured came to be saddled with the liability, (for short, the impugned award).

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

3. Feeling aggrieved, the owner/insured has questioned the impugned award on the ground that the Tribunal has fallen in an error in discharging the insurer from its liability.

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

5. Insurance Policy of the offending vehicle has been proved on record as Ext.RW-1/A, which discloses that the "Passenger Carrying Capacity" of the offending vehicle was "4+1". The Registration Certificate of the vehicle is Ext.RE-1/B, wherein also the seating capacity of the offending vehicle, including the driver, has been mentioned as "4+1".

6. It is an admitted fact that the deceased was traveling in the offending vehicle at the time of accident. Once the offending vehicle was duly insured and the 'passenger carrying capacity' of the vehicle, as is discussed above, has been mentioned to be "4+1" in the insurance policy i.e. Ext.RW-1/A, the insurer cannot escape from its liability.

7. The insurer has not pleaded and proved that the insured/owner had committed any willful breach of the terms and conditions contained in the insurance policy or the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988.

8. As a sequel of the above discussion, the appeal succeeds and the impugned award is modified to the extent that the insurer is saddled with the liability. The insurer is directed to deposit the amount alongwith up-to-date 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 amount in favour of the claimants, strictly in terms of the impugned award. The amount alongwith interest accrued thereon, deposited by the insured/appellant be paid to the claimants as costs.

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

National Insurance Co. Ltd. . .....Appellant.

Versus

Suresh Chand Sharma and others ...Respondents

FAO (MVA) No. 547 of 2009.
Date of decision: 4th March, 2016.

Motor Vehicles Act, 1988- Section 166- Deceased was aged 26 years old at the time of accident- he was student of MCAM- his career and budding age have been taken away by the accident- he would have been earning not less than Rs. 10,000/- per month after the completion of this studies- he would have spent one half on his parents being bachelor- thus, the parents have lost source of dependency to the tune of Rs. 5000/- per month- his age was 26 years, multiplier of '15' was applicable- thus, compensation of Rs. 4 lacs awarded by the Tribunal cannot be said to be excessive in any way- appeal dismissed.

(Para-4 and 5)

For the appellant: Ms. Devyani Sharma, Advocate.

For the respondents: Mr.Aman Sood, Advocate, for respondent No.4.
Nemo for other respondents.

The following judgment of the Court was delivered:

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

This appeal is directed against the judgment and award dated 12.8.2009, made by the Motor Accident Claims Tribunal Hamirpur, H.P. in MAC Petition No. 5 of 2007, titled *Suresh Chand Sharma and others versus Harsh Vardhan and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,00,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Claimant, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

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

4. The factum of insurance is admitted. The deceased is 3rd party. I wonder why the insurance has filed the appeal. The deceased was 26 years of age at the time of the accident and the claimants are the father, mother and sister of the deceased. Claimants have specifically pleaded and proved that the deceased was a student of MCAM and was hope and help for the parents in their old age. His career and budding age has been taken away by the said accident. Keeping in view the latest judgments of the Supreme Court and other things, an amount of Rs.4,00,000/- is at a lower side. Unfortunately, the claimants have not questioned the same, is reluctantly maintained. Even otherwise, the deceased was 26 years of age. He would have been earning not less than Rs.10,000/- per month after completion of his study course and being a bachelor, at least, he would have spent one half towards his parents. Thus, the parents have lost source of dependency to the tune of Rs.5000/- per month. His age was 26 years of age and multiplier of "15" was applicable.

5. Having said so, the amount awarded is at a lower side, cannot be said to be excessive in any way. Accordingly, the appeal is dismissed and the impugned award is upheld.

6. The insurer is directed to deposit the amount, if not already deposited, in this Registry within six weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees cheque account, or by depositing the same in their bank accounts.

7. The appeal stands disposed of accordingly.

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. Kushla Devi & others ...Respondents

FAO No. 429 of 2009
Decided on : 04.03.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver was not having valid and effective driving licence at the time of accident- however, no evidence was led to prove this fact- claimants had pleaded that deceased was loading and unloading the fuel wood in the offending vehicle- this was not denied by the respondent- hence, risk was duly covered- appeal dismissed. (Para-6 and 7)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

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

For the appellant : Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.

For the respondents: Mr. Ajay Sharma, Advocate, for respondents No. 1 to 5.
Mr. Ajay Chandel, Advocate, for respondent No 6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Subject matter of this appeal is the award dated 25th April, 2009, passed by the Motor Accident Claims Tribunal (I) Kangra at Dharamshala (hereinafter referred to as 'the Tribunal'), in M.A.C.P No. 48-G/II-2004, whereby compensation to the tune of Rs.3,62,000/-with interest @ 9% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants-respondents No. 1 to 5 herein and the insurer--National Insurance Company-appellant herein, was saddled with liability, (hereinafter referred to as 'the impugned award').

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

3. Appellant-insurer has questioned the impugned award on the following four grounds:

(i) That the driver of the offending vehicle was not having a valid and effective driving licence;

(ii) That the deceased was traveling as a gratuitous passenger in the offending vehicle;

(iii) That the owner- insured of the offending vehicle has committed willful breach; and

(iv) That the amount awarded is excessive.

4. All the four grounds are not tenable and are rejected for the following reasons:

5. The Tribunal, after examining the pleadings of the parties, framed the following issues:-

"1. Whether on 22.5.2004 the respondent No. 2 was driving vehicle No. HP-38-6207 rashly and negligently as a result of which the vehicle fell down in a deep gorge and Jaswant Singh sustained injuries and later on succumbed to the injuries? …OPP

2. If Issue No. 1 is proved, what amount of compensation, the petitioners are entitled to and from whom?...OP Parties

3. Whether the respondent No. 2 was not holding a valid and effective driving licence at the time of alleged accident? …OPR-3.

4. Whether the vehicle was not insured at the time of alleged accident? ….OPR-3

5. Whether the deceased was traveling as a gratuitous passenger as alleged? ….OPR-3.

6. Relief."

6. The parties have led evidence. The insurer has failed to prove that the driver was not having a valid and effective driving licence at the time of accident. The Tribunal has discussed the said issue in para-22 of the impugned award. However, I have gone through the entire record. The insurer has not led any evidence to prove the said fact. Thus, the evidence led by the claimants has remained unrebutted.

7. Learned Counsel for the insurer argued that the deceased was a mason. The claimants in their claim petitions have averred that the deceased, in addition to the mason, was also loading and unloading the fuel wood in the offending vehicle. The said fact is not denied by the respondents in their replies. However, the Tribunal has discussed the said issue in paras 8 to 18 of the impugned award, needs no interference. Even otherwise, the risk was covered. Accordingly, the findings returned by the Tribunal on issues No. 1 & 2 are upheld.

8. The amount of compensation is inadequate for the reason that the Tribunal has deducted 1/3rd towards the personal expenses of the deceased, whereas 1/5th was to be deducted, in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.** But the claimants have not questioned the quantum of compensation. Accordingly, the amount of compensation is reluctantly upheld.

9. The Registry is directed to release the award amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing in their accounts.

10. Viewed thus, the impugned award is upheld and the appeal is dismissed.

11. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

Neeraj Sharma .....Appellant.
Versus
Brij Mohan Gautam .....Respondent.

RSA No. 503 of 2004
Reserved on: 3.3.2016.
Decided on: 4.3.2016.

Torts - Plaintiff filed a suit for recovery of damages against the defendant pleading that he was the owner of the bus which was stopped by the defendant- defendant snatched the route permit and ran away with the same- plaintiff requested the defendant to return the permit but the permit was not returned -bus could not be plied for want of permit- defendant stated that he had asked the plaintiff to show the route permit on which the plaintiff had handed over the permit to the defendant- defendant warned the plaintiff not to ply the bus on the route other than the allotted one- he wanted to return the permit but plaintiff refused to accept the same- suit was dismissed by the trial Court- an appeal was

preferred which was allowed- defendant did not state as to when he returned the permit to the plaintiff- he also admitted that route permit could not be renewed and he undertook the responsibility to renew it and to pay the damages- plaintiff had led satisfactory evidence to show that income from the bus was Rs.1650/- per day- Appellate Court had rightly appreciated the evidence- appeal dismissed. (Para- 16 and 17)

For the appellant(s): Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Ashwani K. Sharma, Sr. Advocate with Ms. Monika Shukla, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kangra at Dharamshala, H.P. dated 1.9.2004, passed in Civil Appeal No. 79-G/XIII/03.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for recovery of damages against the appellant-defendant (hereinafter referred to as the defendant). According to the plaintiff, he was owner of the bus No. HP-36-1941, registered with the registering Authority Dehra. The defendant Neeraj Sharma had forcibly and with malafide intention stopped the bus of the plaintiff from plying on its route on March 10, 1997 at about 5:45 PM when the bus reached at village Kaloha. The defendant asked the plaintiff to show the route permit of the bus. The plaintiff produced the route permit and the defendant snatched the same from him and ran away with the intention to get financial benefit because he was also owner of another vehicle having the same route. The plaintiff asked the defendant to return the document but in vain. On 12.3.1997, the plaintiff reported the matter to the police. The defendant admitted his fault on March 21, 1997 and undertook to compensate the plaintiff. The plaintiff made request to the RTA Dharamshala for the renewal of the route permit who refused to do so and demanded the original route permit which was in possession of the defendant. The plaintiff served a legal notice on March 13, 1997 for the damages and loss sustained by him to the tune of Rs. 1650/- per day. The defendant replied the notice and admitted that he had been in possession of the route permit. The bus could not be plied between March 11, 1997 to March 25, 1997. It is, in these circumstances, the plaintiff claimed the damages.

3. The suit was contested by the defendant. According to him, the plaintiff was plying his bus on the route allotted to the defendant. The defendant asked the plaintiff to show his route permit. Thereafter, the plaintiff handed over the route permit to the defendant. The defendant warned the plaintiff not to ply the bus on the route other than the allotted route. The defendant asked the plaintiff to give photocopy of the same. The plaintiff handed over the original by saying that the defendant could get the photocopy of the same. The defendant obtained the photocopy of the original permit on March 11, 1997 and got the same attested from the Sub Divisional Magistrate, Dehra. When the defendant went to return the permit to the plaintiff, the latter refused to receive the same. He has never admitted his fault or agreed to give compensation to the plaintiff.

4. The replication was filed. The learned Sub Judge (I), Dehra, H.P., framed the issues on 20.2.2001 and suit was dismissed on 8.5.2003. Feeling aggrieved, the plaintiff preferred an appeal before the learned District Judge, Kangra at Dharamshala. The learned

District Judge, Kangra at Dharamshala, allowed the same on 1.9.2004. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial question of law on 23.11.2004:

> "1. Whether the findings of the District Judge are dehors the evidence on record?"

6. Mr. Ajay Sharma, Advocate, for the appellant, on the basis of substantial question of law, has vehemently argued that the first appellate Court has not correctly appreciated the oral as well as documentary evidence. On the other hand, Mr. Ashwani K. Sharma, Sr. Advocate, has supported the judgment and decree of the learned first appellate Court dated 1.9.2004.

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

8 PW-1 Brij Mohan Gautam deposed that the defendant demanded the route permit of the bus of the plaintiff on March 10, 1997 at Kaloha. The route permit was shown to the defendant but he snatched it and retained the same. The route permit expired on March 13, 1997 and it could not be renewed because the original route permit was retained by the defendant. Notice was issued to the defendant vide Ext. DW-1/A. The defendant replied vide Ext. DW-1/B. The bus remained stranded w.e.f. March 11,1997 to March 25, 1997 due to non-availability of route permit with the plaintiff and thereby plaintiff suffered loss to the tune of Rs. 1650/- per day. The matter was reported to the police on March 12, 1997 and thereafter a compromise was arrived at in between the parties vide Ext. PW-1/B. The defendant has agreed to pay the entire damages to the plaintiff. The plaintiff has denied in his cross-examination that on the next day the defendant came to return the permit to the plaintiff but the latter declined to take it.

9. PW-2 Gurbachan Singh is the scribe of the agreement Ext. PW-1/B. He scribed the agreement at the instance of the parties. The parties signed it after admitting the contents of the same to be correct.

10. The plaintiff has placed on record copy of daily diary report Ext. PW-1/A and copy of agreement Ext. PW-1/B dated March 21, 1997, entered into between the parties.

11. The defendant has appeared as DW-1. He led his evidence by filing affidavit Ext. D-1. According to him, he had only asked for the photocopy of the route permit but the plaintiff gave original to him. He went to return the original permit but the plaintiff refused to take it. The bus of the plaintiff did not remain stranded w.e.f. March 11,1997 to March 25, 1997. He admitted that his own income from bus was Rs. 2,000/- per day.

12. DW-2 Rajesh Kumar has also led his evidence by filing affidavit Ext. D-2. According to him, he was running a shop from the year 1994 to 1998 at Bus Stand Dada Siba and the bus service of Brij Gautam used to ply from Dada Siba in the morning at 10:15 AM and 3:30 PM, which continued plying in the month of March, 1997 throughout. It was not off the road even for a single day. In his cross-examination, he deposed that now he is running STD booth at Dada Siba.

13. DW-3 Dharam Chand has also led his evidence by filing affidavit Ext. D-3. According to him, he used to sell newspapers at Bus Stand Dada Siba. The bus of Brij Mohan Gautam used to ply throughout the month and it was not off the road for any single day. He issued certificate Ext. DW-3/X in the capacity of Pardhan Gram Panchayat Dada Siba. In his cross-examination, he deposed that he used to distribute the newspapers in the

school and also in the offices. He used to go to Nangal Chowk at 10:00 AM to distribute the newspapers and it took about 1 or 1 ½ hours.

14. DW-4 Ramesh Kumar has also led his evidence by filing affidavit Ext. D-4. According to him, he has a shop in Chaunor bazaar. In the month of March, 1997, the Gautam Bus service plied throughout the month.

15. The defendant has placed on record the copy of route permit of the bus of plaintiff Ext. DW-1/X (PW-1/C).

16. The permit in question was valid w.e.f. March 14, 1996 to March 13, 1997. Even, as per the agreement, Ext. PW-1/B, the permit was snatched by defendant on March 10, 1997 from the plaintiff. The defendant in his statement has not categorically stated as to when he has returned the permit to the plaintiff. It has come in the statement of PW-1 Brij Mohan Gautam that his bus remained stranded for want of route permit w.e.f. March 11, 1997 to March 25, 1997. The agreement was entered into between the parties vide Ext. PW-1/B on March 21, 1997. It was signed by both the parties. PW-2 Gurcharan Singh has deposed that he had read over the contents of the document and thereafter, the parties had signed the same. The defendant has admitted that since he has snatched the route permit of the bus of the plaintiff on March 10, 1997, the route permit could not be renewed thereafter and that he undertook the responsibility to renew it and to pay the damages and expenses for the renewal etc.

17. The plaintiff had also served legal notice upon the defendant. It was replied to by the defendant. The route permit was not renewed till March 21, 1997, as per the contents of Ext. PW-1/B. Neither DW-2 Rajesh Kumar nor DW-3 Dharam Chand and DW-4 Ramesh Kumar have mentioned the registration number of the bus of the plaintiff. The defendant could not lead negative evidence by calling the evidence from toll tax barrier and the bus stand concerned. It was not necessary to produce Hans Raj, Pradhan by the plaintiff, as argued by Mr. Ajay Sharma, Advocate. The defendant himself has admitted that he snatched the permit in his statement and as per the contents of Ext. PW-1/B, agreement. The defendant has admitted that his income from his own bus was Rs. 2000/- per day. The plaintiff has led tangible evidence that his income from the bus was Rs. 1650/- per day. The learned first appellate Court has correctly appreciated the oral as well as documentary evidence available on record. The substantial question of law is answered accordingly.

18. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

FAO (MVA) Nos. 17 and 358 of 2009.
Date of decision: 4th March, 2016.

FAO No. 17/2009.	
Oriental Insurance Co.	.....Appellant.
Versus	
Usha Kumari and others	.....Respondents
FAO No. 358/2009.	
Usha Kumari and others	.....Appellants.
Versus	
Oriental Insurance Co. and others	.....Respondents.

Motor Vehicles Act, 1988- Section 166- Deceased was Assistant Manager with M/s Global Agri System Private Limited- his monthly income was Rs.12,000/- per month- after deduction loss of dependency is Rs.8,000/- per month- Tribunal had applied multiplier of '16', whereas, multiplier of '15' was applicable- thus, claimants have lost source of dependency to the extent of Rs.14,40,000/- (Rs.8000/-x12x15)- they are entitled to Rs.25,000/- under the head 'conventional charges' and Rs.10,000/- each under the heads 'loss of consortium', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 14,95,000/-, with interest. (Para-10 to 14)

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. G.C. Gupta, Sr. Advocate with Ms. Meera, Advocate for the appellant in FAO No. 17/2009 and Mr. K.S. Banyal, Sr. Advocate, with Mr. Jivender Katoch, Advocate, for the appellant in FAO No. 358 of 2009.
For the respondents:	Mr.K.S. Banyal, Sr. Advocate with Mr. Jivender Katoch, Advocate, for respondents No. 1 to 4 in FAO No. 17 of 2009 and Mr. Ajay Chandel, Advocate, for respondent No. 1 in FAO No. 358 of 2009. Nemo for other respondents.

The following judgment of the Court was delivered:

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

These appeals are directed against the judgment and award dated 19.8.2008, made by the Motor Accident Claims Tribunal Hamirpur, H.P. in MAC Petition No. 8 of 2007, titled *Usha Kumari and others versus Vinay Kumar and others*, for short "the Tribunal", whereby compensation to the tune of Rs.15,81,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimants, by the medium of FAO No. 358 of 2009, have questioned the impugned award on the ground that the Tribunal has fallen in an error in assessing the compensation and have sought enhancement of compensation.

4. The insurer, by the medium of FAO No. 17 of 2009, has sought exoneration and in the alternative the amount awarded is on the higher side.

5. The claimants had approached the Motor Accident Claims Tribunal, Hamirpur by filing claim petition for the grant of compensation to the tune of Rs.25 lacs, as per the break-ups given in he claim petition.

6. Respondents No. 2 and 3 have filed objections and *ex parte* proceedings were drawn against respondent No.1.

7. The owner has admitted paras 8 and 9 of the claim petition. It is apt to reproduce paras 8 and 9 of the reply filed by respondent No. 2-owner.

"8 & 9. admitted to be correct."

8. This clinches the issue, so far as it relates to the question of negligence. However, the Tribunal has framed the issues. The claimants have led evidence. Owner and insurer have not led any evidence.

9. Keeping in view the admission made by the owner reproduced hereinabove, read with the evidence led by the claimants, there is sufficient evidence to hold that the driver, namely, Vinay Kumar has driven the vehicle rashly and negligently on the date of the accident and caused the accident in which Pawan Kumar lost his life. Thus, the findings returned on issue No. 1 are upheld.

10. Before I deal with issue No. 2, I deem it proper to deal with issue No. 3, at the first instance. It was for the insurer to lead evidence, has not led any evidence. However, the driving licence has been produced on the record, which do disclose that the driver was having a valid and effective driving licence, as recorded in para 20 of the impugned award. Thus, the insurer has failed to discharge the onus. Accordingly, the findings returned on this issue are upheld.

11. Admittedly, the deceased was Assistant Manager with M/s Global Agri System Private Limited in New Delhi. The appointment order Ext. PW1/A is on the record. PW2 Sukh Ram stated that the monthly income of the deceased was Rs.12000/-. The Tribunal has rightly held that the deceased was earning Rs.12,000/- per month and after deductions held that the claimants have lost source of dependency to the tune of Rs.8000/- but has fallen in an error in applying the multiplier of "16" whereas multiplier of "15" is applicable as per the 2nd Schedule of the Motor Vehicles 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.***

12. The Tribunal has awarded a sum of Rs.25000/- under the head "conventional charges", Rs.10,000/- under the head "loss of consortium" and Rs.10,000/- under the head "love and affection" but has not awarded any amount under the head funeral expenses. Thus, I deem it proper to award Rs.10,000/- under the head funeral expenses.

13. Thus, the claimants have lost source of dependency to the tune of Rs.8000/- x12x15= Rs.14,40,000/- plus Rs.25000/- under the head "conventional charges", Rs.10,000/- under the head "loss of consortium" Rs.10,000/- under the head "love and affection" and Rs.10,000/- under the head funeral expenses. Total a sum of Rs.14,95,000/, with interest as awarded by the Tribunal.

14. Having- said so, the impugned award is modified as indicated hereinabove.

15. The insurer is directed to deposit the amount, if not already deposited, in this Registry within six weeks from today. The Registry is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award, and excess amount, if any, with interest, if accrued, be released in favour of the insurer, through payees cheque account.

16. Both the appeals are disposed of accordingly.

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

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

Oriental Insurance Company Ltd. ...Appellant.

Versus

Veena Devi and others ...Respondents.

FAO No. 489 of 2009
Decided on: 04.03.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that Tribunal had fallen in error in saddling it with liability- risk of the deceased was not covered in terms of insurance policy- offending vehicle was tractor whose seating capacity was one- Insurance policy also covered the risk of driver- risk of labourer or any other persons was not covered- it was specifically held by Tribunal that deceased was travelling in the vehicle at the time of accident as employee of the owner/insured- thus, vehicle was being driven in contravention of the terms and conditions of the insurance policy and the owner had committed willful breach- hence, insurer directed to satisfy the award with the right of recovery. (Para-5 to 13)

For the appellant: Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. Anup Rattan, Advocate, for respondents No. 1 to 4.
Mr. Nimish Gupta, Advocate, for respondents No. 5 and 6.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to the judgment and award, dated 26th August, 2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Chamba (H.P.) (for short "the Tribunal") in M.A.C. No. 36/08/07, titled as Smt. Veena and others versus Smt. Urmila Devi and others, whereby compensation to the tune of ₹ 4,25,000/- with interest @ 7% per annum from the date of filing of the claim petition till its deposition came to be awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants, driver and owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Appellant-insurer has questioned the impugned award only on the ground that the Tribunal has fallen in an error in saddling it with liability for the reason that risk of the deceased was not covered in terms of the insurance policy.

4. I have gone through the impugned award read with the record and am of the considered view that the Tribunal has fallen in an error in saddling the appellant-insurer with liability for the following reasons:

5. Admittedly, the offending vehicle was a tractor, bearing registration No. HP-48 A-9305. The registration certificate is on the record as Ext. RW-1/B, in terms of which the seating capacity of the offending vehicle is only 'one'.

6. The perusal of the insurance policy, which is on the record as Ext. RW-1/C, does also disclose that only the risk of the driver was covered and the risk of the labourer or any other person was not covered.

7. Learned counsel appearing on behalf of the owner-insured and the driver of the offending vehicle was asked to show how the insurer can be saddled with liability when the risk is not covered.

8. In reply, he argued that they have taken specific plea before the Tribunal that the deceased was not travelling in the offending vehicle as labourer at the time of the accident.

9. But, the findings of the Tribunal in paras 11 and 19 of the impugned award are not supporting them. Moreover, the owner-insured and the driver of the offending vehicle has not questioned the said findings.

10. The Tribunal, in paras 11 and 19 of the impugned award has made discussion and held that the deceased was travelling in the offending vehicle at the time of the accident as the employee of the owner-insured, which is also pleaded and proved by the claimants.

11. Having said so, the Tribunal has fallen in an error in deciding issues No. 5 to 7 and coming to the conclusion that the offending vehicle was not being driven in contravention of the terms and conditions of the insurance policy and the risk of the deceased was covered.

12. Having glance of the above discussions, it is held that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy at the relevant point of time and the owner-insured has committed a willful breach.

13. Keeping in view the fact that the claimants are third party, the insurer is directed to satisfy the award with a right to recover the same from the owner-insured.

14. Viewed thus, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

15. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

16. The appellant-insurer is at liberty to lay a motion before the Tribunal for recovery.

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

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

Shri Sohan Lal .....Appellant

Versus

Shri Om Prakash Sharma & others .....Respondents

FAO No. 458 of 2009
Decided on : 04.03.2016

Motor Vehicles Act, 1988- Section 169- Owner had taken a specific plea in the reply to the claim petition that the claimant had filed MACT Case before the Motor Accident Claims

Tribunal, Panchkula which was dismissed- the Tribunal had not disclosed this plea in the award- a certified copy of the award passed by MACT, Panchkula was produced- held, that the second claim petition filed by the claimants before the Tribunal on the same cause of action was hit by the principle of res judicata- appeal allowed and award set aside.

(Para-2 to 5)

For the appellant : Mr. Romesh Verma, Advocate.

For the respondents: Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate.
Mr. H.C. Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 10th January, 2005, passed by the Motor Accident Claims Tribunal (II), Solan, District Solan, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 2-NL/2 of 2004, whereby compensation to the tune of Rs.1,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimant-respondent No. 1 herein and against the owner and driver (hereinafter referred to as 'the impugned award').

2. At the very outset, learned Counsel for the appellant-owner argued that the owner has taken specific plea in reply to the claim petition that the claimant had filed MACT Case No. 198 of 14.11.2003, titled Om Parkash Sharma versus Parkash & others, before the Motor Accident Claims Tribunal, Panchkula, which was dismissed, on merits, vide award dated 1.4.2005. The Tribunal has not discussed the said fact in the impugned award.

3. The learned Counsel for the appellant has produced a certified copy of the award passed by the Motor Accident Claims Tribunal, Panchkula, in the aforesaid claim petition, made part of the file.

4. The second claim petition filed by the claimant before the Tribunal, on the same cause of action, was hit by the principle of resjudicata and was to be dismissed.

5. Having said so, the impugned award is set aside, the claim petition is dismissed and the appeal is disposed of.

6. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Shri Sumit Sareen & another .....Appellants

Versus

Rano Devi ....Respondent

FAO No. 561 of 2009
Decided on : 04.03.2016

Motor Vehicles Act, 1988- Section 166- Owner and driver questioned the award on the ground that claimants had failed to prove the rash and negligent driving by driver- a criminal case was filed against the driver before the competent Court which is still pending- it is prima facie proved that driver has driven the offending vehicle rashly and negligently at the time of accident- appeal dismissed. (Para-3 to 6)

For the appellants : Mr. Naresh Kaul, Advocate.
For the respondents: Mr. Ashok Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 10th July, 2009, passed by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (hereinafter referred to as 'the Tribunal'), in M.A.C.P. No. 47-N/II-2006, whereby compensation to the tune of Rs.76,145/- with interest @ 9% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant-respondent herein and against the owner and driver–appellants herein (hereinafter referred to as 'the impugned award').

2. The claimant has not questioned the impugned award, on any count. Thus, it has attained finality, so far it relates to her.

3. The owner and driver have questioned the impugned award on the ground that the claimant has failed to prove the rash and negligent driving by the driver, which is *sine qua non* for maintaining the claim petition under Section 166 of the Motor Vehicles Act, hereinafter referred to as 'the MV Act".

4. The FIR No. 30 of 2006, dated 20.1.2006 (Ext. PW-1/A), under Sections 279, 337 & 338 of the Indian Penal Code and Sections 184 and 187 of the MV Act was registered in Police Station Nurpur, District Kangra and final charge sheet, as stated by the learned Counsel for the appellants, was presented against the driver before the Court of competent jurisdiction, which is still pending.

5. It is *prima-facie* proved that the driver has driven the offending vehicle, rashly and negligently, at the time of accident. I have gone through the impugned award. The Tribunal has discussed this aspect from para 7 to 14 of the impugned award, needs no interference.

6. Having said so, it is proved that the driver, namely, Sumit Sareen, has driven the offending vehicle, on 20.01.2006, at about 8.00 a.m., at Raja Ka Talab, Tehsil and Police Station Nurpur, caused the accident, in which claimant-injured sustained injuries.

7. The amount of compensation is meager, cannot be said to be excessive, in any way.

8. The Registry is directed to release the compensation amount in favour of the claimant, strictly as per the terms and conditions, contained in the impugned award through payee's cheque, or by depositing the same in her account,

9. Having said so, the impugned award is upheld and the appeal is dismissed.

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

Triveni Prasad .....Appellant
Versus
Kanwal Jeet and others .....Respondents

FAO No.424 of 2009.
Reserved on: 26.02.2016.
Pronounced on : 04.03.2016

Motor Vehicles Act, 1988- Section 166- Insurer contended that claim petition was not maintainable as another claim petition had been filed before Motor Accident Claims Tribunal, Ambala, which was dismissed in default on 2.6.1994 – perusal of record shows that claimant had filed a claim petition before MACT, Ambala which was dismissed in default- copy of order was proved before the Tribunal- State of Himachal Pradesh has framed the Rules providing that the provisions of Order 9 of the CPC are applicable to the proceedings before MACT- Order 9 Rule 9 CPC bars the plaintiff from instituting a fresh suit on the same cause of action where a suit is wholly or partly dismissed under Rule 8- hence, when a claim petition is dismissed in default, the claimant can not file a fresh claim petition- MACT had rightly dismissed the petition- appeal dismissed. (Para 2 to 14)

For the appellant: Mr.Rupinder Singh, Advocate.
For the respondents: Neemo for respondent No.1.
Ms.Shilpa Sood, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 27th July, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the Tribunal), in Claim Petition No.91-MAC/2 of 2006, titled Triveni Prasad vs. Kanwal Jeet and others, whereby the Claim Petition filed by the claimant (appellant herein) came to be dismissed, (for short, the impugned award).

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

3. Ms.Shilpa Sood, learned counsel appearing for the insurer, vehemently argued that the Claim Petition was not maintainable for the reason that the claimant had already filed a Claim Petition before the Motor Accident Claims Tribunal, Ambala, Haryana, for the same cause of action and the said Claim Petition came to be dismissed in default, vide order dated 2nd June, 1994. Thus, it was submitted by the learned counsel that the instant Claim Petition is hit by the principles of res judicata. Ms.Sood further submitted that in terms of Order 9 Rule 9 of the Code of Civil Procedure (for short, CPC), the Claim Petition ought to be dismissed.

4. A perusal of the record reveals that the Claimant had filed a Claim Petition before the Motor Accident Claims Tribunal, Ambala, which was dismissed in default by the said Tribunal vide order dated 2nd June, 1994. Copy of the said order has been proved on record before the Tribunal as Ext.PW-2/A. It is apt to reproduce the said order hereunder:

"Present: None for the petitioner.

Shri S.P. Chawla, counsel for respondents No.1,2.

Shri Ravinder Chawla counsel for respondent no.3.

Case called several times since morning. None has turned up on behalf of the petitioner. Waited sufficiently. It is already 12.35 P.M. Hence, present petition is dismissed in default. File be consigned to record room.

Sd/-

Motor Accident Claims Tribunal,

Ambala, 2.6.94."

5. Thus, the moot question to be determined in this appeal is – Whether the fresh claim petition is maintainable in the event of dismissal in default in the presence of respondents/defendants, of the earlier instituted Claim Petition?

6. In order to determine the issue, a reference may be made to Section 169 of the Motor Vehicles Act, 1988, (for short, the MV Act), hereunder:

"**169. Procedure and powers of Claims Tribunals.**

1. In holding any inquiry under section 168, the Claims Tribunal may, subject to any rules that may be made in this behalf, follow such summary procedure as it thinks fit.
2. The Claims Tribunal shall have all the powers of a Civil Court for the purpose of taking evidence on oath and of enforcing the attendance of witnesses and of compelling the discovery and production of documents and material objects and for such other purposes as may be prescribed; and the Claims Tribunal shall be deemed to be a Civil Court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973. (2 of 1974.)
3. Subject to any rules that may be made in this behalf, the Claims Tribunal may, for the purpose of adjudicating upon any claim for compensation, choose one or more persons possessing special knowledge of any matter relevant to the inquiry to assist it in holding the inquiry."

7. Section 176 of the MV Act empowers the State Government to make rules for the purpose of implementing the provisions contained in Sections 165 to 174 of the MV Act. It is apt to reproduce Section 176 of the Act, hereunder:

"176. Power of State Government to make rules.

A State Government may make rules for the purpose of carrying into effect the provisions of sections 165 to 174, and in particular, such rules may provide for all or any of the following matters, namely:--

a. The form of application for claims for compensation and the particulars it may contain, and the fees, if any, to be paid in respect of such applications;
b. The procedure to be followed by a Claims Tribunal in holding an inquiry under this Chapter;
c. The powers vested in a Civil Court which may be exercised by a Claims Tribunal;

d. The form and the manner in which and the fees (if any) on payment of which an appeal may be preferred against an award of a Claims Tribunal; and

e. Any other matter which is to be, or may be, prescribed."

8. The Central and the State Governments have framed their own rules. State of Himachal Pradesh has also 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)."

9. Thus, it is clear from the above quoted Rule that the provisions of Order 9 of the CPC have been made applicable to the proceedings under the MV Act.

10. Order 9 Rule 9 of the CPC bars the plaintiff from instituting a fresh suit on the same cause of action where a suit is wholly or partly dismissed under Rule 8. However, the plaintiff is provided liberty to apply for setting aside the order of dismissal. It is apt to reproduce Order 9 Rule 9 of the CPC hereunder:

*"**9.Decree against plaintiff by default bars fresh suit.- (1)** Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.*

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

11. Thus, from the above it is clear that since the provisions of Order 9 Rule 9 of the CPC are applicable to the proceedings under the MV Act, therefore, in case a Claim Petition is dismissed in default under Order 9 of the CPC, the claimant has to file an application for recalling of the order of dismissal, which procedure, in the instant case, was never adopted by the Claimant. Rather, the claimant chose to file a fresh claim petition, that too, in the State of Himachal Pradesh, which is not permissible under Rule 9 of the CPC.

12. Nothing was brought to the notice of the Court that the claimant ever applied for the recalling of the said order or the said order, at any point of time, was set aside by appropriate court of law. Thus, the said order of dismissal in default has attained finality.

13. In view of the above discussion, one comes to the inescapable conclusion that the second claim petition was barred.

14. Having said so, the claim petition was liable to be dismissed on this count alone.

15. As a consequence of the above discussion, I am of the considered view that the claim petition merits to be dismissed and the same is dismissed. Consequently, the appeal is also dismissed.

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

Urmila Devi & another .....Appellants

Versus

Managing Director, HRTC & others .....Respondents

FAO No. 557 of 2009
Decided on : 04.03.2016

Motor Vehicles Act, 1988- Section 166- Deceased was an employee and his salary was Rs.12,909/- per month at the time of accident- claimants are more than five in number- Tribunal had wrongly deducted 1/3rd towards personal expenses- hence, claimants have lost of source of dependency to the extent of Rs.10,000/- per month- deceased was aged 52 years at the time of accident- Tribunal has fallen in error in applying multiplier of '7', whereas, multiplier of '9' is applicable- thus, claimants are entitled to Rs.10,000x 12 x 9= Rs.10,80,000/- claimants are entitled to Rs.10,000/- each under the heads 'loss of consortium', 'loss of estate', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs.11,20,000/- along with interest from the date of filing of the claim petition till its realization. (Para-6 to 11)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104,

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

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

For the appellants : Mr. J.R. Poswal, Advocate.

For the respondents: Mr. N.K. Thakur, Senior Advocate with Mr. Jagdish Thakur, Advocate, for respondents No. 1 & 2.
Mr. Anil Kumar God, Advocate Mr. Surender Verma, Advocate, for respondents No. 3 & 4.
Nemo for the other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 7th October, 2009, passed by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. No. 49 of 2005/04, whereby compensation to the tune of Rs.7,42,904/- with interest @ 7% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants and against the respondents (hereinafter referred to as 'the impugned award').

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

3. Claimants No. 1 & 2 in the claim petition have questioned the impugned award on the ground of adequacy of compensation.

4. Heard. Perused.

5. The amount awarded is meager for the following reasons.

6. Admittedly, the deceased was an employee and his salary was Rs.12,909/- per month, at the time of accident, as per the salary certificate Ext. PW-2/A. The claimants are more than five in number.

7. The Tribunal has fallen in an error in deducting 1/3rd towards the personal expenses of the deceased. 1/5th was to be deducted towards his personal expenses keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.** Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.10,000/- per month.

8. The deceased was 52 years of age at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '7'. The multiplier of '9' is applicable in this case, as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in ***Sarla Verma's, Reshma Kumari's and Munna Lal Jain's,*** cases, *supra.*

9. Viewed thus, the claimants are held entitled to the tune of Rs.10,000/- x 12 = Rs.1,20,000/- x 9 = Rs.10,80,000/- under the head 'loss of dependency'.

10. Keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each, is also awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses' in favour of the claimants.

11. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs.10,80,000/- + Rs.40,000/- total amounting to Rs.11,20,000/- with interest as awarded by the Tribunal from the date of filing of the claim petition till its realization.

12. Accordingly, the amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

13. Respondents No. 1 & 2 are directed to deposit the enhanced amount alongwith interest, within a period of eight weeks from today before the Registry. On deposit, the Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing in their accounts.

14. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Viyasan Devi and others ...Appellants.

Versus

Ashok Kumar and others ...Respondents.

FAO No. 491 of 2009
Decided on: 04.03.2016

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs.13,583/- as per the salary certificate- hence, monthly income of the deceased cannot be less than Rs.13,600/-- claimants have pleaded and proved that age of the deceased was 50 years at the time of accident –report of the post mortem and statement of PW-5 also show that age of the deceased was 50 years- Tribunal has fallen in error in holding that age of the deceased was 52 years- 1/5th of the amount was to be deducted towards personal expenses of the deceased, thus, claimants have lost source of income to the extent of Rs.11,000/- per month- Tribunal had applied multiplier of '8', whereas, multiplier of '11' was to be applied- thus, claimants have lost source of income/dependency to the extent of Rs.14,52,000/- (11,000 x 12 x 11)- claimants are entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'love and affection' and 'funeral expenses'- thus, claimants are entitled to Rs. 14,92,000/- along with interest. (Para-6 to 12)

Cases referred:
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant:	Mr. N.K. Thakur, Senior Advocate, with Mr. Jagdish Thakur, Advocate.
For the respondents:	Nemo for respondents No. 1 and 2. Mr. Lalit K. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to the judgment and award, dated 12th June, 2009, made by the Motor Accident Claims Tribunal (II), Una (H.P.) (for short "the Tribunal") in MAC Petition No. 15 of 2007, titled as Smt. Viyasan Devi and others versus Ashok Kumar and others, whereby compensation to the tune of ₹ 9,14,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till its realization came to be awarded in favour of the claimants and against the respondents (for short "the impugned award").

2. The owner-insured, driver and the insurer of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The appellants-claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded is adequate or inadequate?

5. I have gone through the impugned award as well as the record and am of the considered view that the amount awarded is inadequate for the following reasons:

6. Admittedly, as the Tribunal has held that the monthly income of the deceased was ₹ 13,583/-, as per the salary certificate, Ext. PW-3/A. Accordingly, it is held that the monthly income of the deceased was not less than ₹ 13,600/-.

7. The Tribunal has fallen in an error in holding that the age of the deceased was 52 years. The claimants have pleaded and proved that the age of the deceased was 50

years at the time of the accident. The averments contained in the claim petition have remained unrebutted. However, in view of the post mortem report, Ext. PW-1/A, and the statement of PW-5, Mahinder Kumar, it can be safely held that the age of the deceased was 50 years at the time of the accident. Accordingly, it is held that the age of the deceased was 50 years at the time of the accident.

8. The Tribunal has also fallen in an error in deducting one-third towards the personal expenses of the deceased, one-fifth was to be deducted in terms of the Apex Court judgments. Thus, the claimants have lost source of income to the tune of ₹ 11,000/- per month.

9. The Tribunal has wrongly applied the multiplier of '8'. In view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the Motor Vehicles Act, multiplier of '11' is just and proper.

10. Viewed thus, it is held that the claimants have lost source of income/dependency to the tune of ₹ 11,000 x 12 x 11 = ₹ 14,52,000/-.

11. The claimants are also held entitled to compensation to the tune of ₹ 10,000/- each under the head 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

12. Having said so, the claimants are held entitled to compensation to the tune of ₹ 14,52,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 14,92,000/- with interest as awarded by the Tribunal.

13. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

14. The enhanced awarded amount be deposited before the Registry of this Court within six weeks. On deposition, the awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

15. 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.

Rakesh Mohindra .....Petitioner.

Versus

Union of India and others ....Respondents.

CMPMO No. 71 of 2015.
Decided on: 8th March, 2016.

Code of Civil Procedure, 1908- Order 1 Rule 10- Application for impleadment was filed by respondent No. 3 which was allowed by the trial Court- subsequently, an application for striking out the name of respondent No. 3 was filed which was rejected- earlier respondent

no. 3 had filed a civil suit for seeking estate of the deceased by way of Will- suit was decreed by the Court- decree was reversed by the Appellate Court- judgment of Appellate Court was affirmed by Hon'ble High Court and Supreme Court- trial Court held while rejecting the application that question of estate of the deceased was earlier decided by the Hon'ble Supreme Court- held, that earlier order, impleading respondent No. 3 as party, had attained finality and could not have been reviewed in an application for striking out the name of respondent No. 3. (Para-2 and 3)

For the Petitioner: Mr. P.S. Goverdhan, Advocate.
For Respondents No.1 & 2: Mr. Ashok Sharma, ASGI with Mr. Angrez Kapoor, Advocate
For Respondent No.3: Mr. Som Dutt Vasudeva, Senior Advocate with Mr. Sanjay Dutt Vasudeva, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

The petitioner herein/plaintiff in the civil suit and respondent No.3 herein are real brothers. Initially, respondent No.3 herein staked a claim to the estate of his deceased mother under a testamentary disposition executed by her in his favour. The claim was reared in the suit instituted by respondent No.3 herein before the Civil Court concerned. The learned trial Court decreed the suit of respondent No.3 herein. The first Appellate Court allowed the appeal and reversed the decree of the learned trial Court. Respondent No.3 herein assailed the decision of the first Appellate Court by instituting a Regular Second Appeal before the High Court concerned whereat the decision of the first appellate Court stood affirmed. In an appeal preferred before the Hon'ble Apex Court, the decree of the first appellate Court dismissing the suit of respondent No.3, wherein he claimed a right to succeed to the estate of his deceased mother under a testamentary disposition executed by her in his favour, stood affirmed by the Hon'ble Apex Court. In sequel, both the petitioner herein and respondent No.3 herein have as heirs of their deceased mother a right to succeed to her estate besides a right stood invested in other siblings to succeed to the estate of their deceased mother.

2. During the pendency of the civil suit before the learned trial Court, an application under Order 1, Rule 10 of the CPC was preferred by respondent No.3 herein claiming his impleadment in the array of defendants. The application aforesaid stood allowed by the learned trial Court on 16.04.2013. However, subsequently an application under Order 1, Rule 10 CPC stood instituted at the instance of the petitioner herein before the learned trial Court for striking out the name of respondent No.3 from the array of the defendants. The said application stood rejected by the learned trial Court hence the instant petition before this Court.

3. The gravamen of the reasoning afforded by the learned trial Court for rejecting the application aforesaid instituted by the petitioner herein before it stands squarely harboured upon the factum of the Hon'ble Apex Court affirming the decree rendered by the first Appellate Court whereby the latter Court dismissed the suit of respondent No.3 herein wherein he staked a solitary claim to the ouster of the other legal heirs of his deceased mother to the latter's estate, claim whereto solely rested on the strength of a testamentary disposition executed by her in his favour. The discountenancing of the right of respondent No.3 to stake an exclusive claim to succeed to the estate of his deceased mother on her demise on the anvill of a testamentary disposition executed by her qua her estate in his favour on the score of it suffering legal effacement, obviously forestalled

the exclusive rights of respondent No.3 herein to succeed to the estate of his deceased mother on the latter's demise, yet it would not oust his right to, given the pre-eminent factum of his while being the son of the deceased, who for reasons aforestated died intestate besides he being her heir in the order of succession along with the plaintiff/petitioner herein, assert a right along with other siblings of their deceased mother to succeed to her estate on her demise. Consequently, the order of impleadment rendered on 16.04.2013 by the learned trial Court which was sought to be reopened by the plaintiff/petitioner by way of his instituting an application under Order 1, Rule 10 of the CPC claiming therein a relief of striking off the name of respondent No.3 from the array of defendants, was on the strength of the verdict of the Hon'ble Apex Court neither reviewable nor any relief claimed therein was open to be afforded to the petitioner herein/plaintiff in the civil suit, preponderantly for the reasons aforesaid of the rendition of the Hon'ble Apex Court neither impinging upon nor baulking the right of respondent No.3 herein to succeed to the estate of his mother on her demise jointly along with his brother besides alongwith other siblings. Moreover, the order of the learned trial Court rendered previous to the order impugned before this Court wherein the prayer of respondent No.3 for his being added in the array of defendants stood allowed acquired finality, finality whereof would not suffer dissipation unless it was concerted to be set aside by an appeal/revision standing preferred against it before the appropriate Court. However, the conclusivity and finality imbuing it was neither reopenable besides unreviewable at the instance of the petitioner/plaintiff by his subsequently instituting an application at hand before the learned trial Court, more so, when the said resort to by the petitioner herein tantamounted to it exercising a revisional jurisdiction thereto. Consequently, the impugned order is not liable for interference. Moreover, given the prayer canvassed in the plaint of the order bearing No. BC/9/154/K/DEO/95 OF 29.8.2011 being liable to be declared to be wrong, illegal, null and void besides its being set aside which relief/prayer being decreed would to the derogation or prejudice of the rights of other siblings of the plaintiff/petitioner herein vest in him an exclusive right to succeed to the estate of his deceased mother, who for the reasons hereinabove died intestate. As a sequitur, the impleadment of respondent No.3 as a defendant in the civil suit is just as well as fair. Even if, any right which respondent No.3 herein holds in the suit property stands as submitted by the counsel for the plaintiff/petitioner herein abandoned or foregone by him under an affidavit executed during the lifetime of their mother, nonetheless, the apposite fact in consonance therewith is enjoined to be pleaded in the plaint for facilitating an appropriate opposition or denial thereto at the instance of respondent No.3. Resultantly a mere submission anvilled upon the factum aforesaid would not suffice at this stage for barring or baulking respondent No.3 to seek his impleadment as a party to the suit.

4. For the foregoing reasons, the instant petition is dismissed and the impugned order is affirmed and maintained. All pending applications stand disposed of.

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

Shri Ram Sukh .....Appellant.

Versus

Sh. Mast Ram .....Respondent.

RSA No. 538 of 2004
Reserved on: 27.2.2016.
Decided on: 8.3.2016.

Specific Relief Act, 1963- Section 5- Father of the plaintiff died on 29.9.1994- he was owner in possession of the suit land- he had never executed sale deed in favour of the defendant- defendant forcibly occupied the suit land on the basis of forged sale deed- plaintiff prayed for decree for cancellation of the sale deed being fraudulent and for delivery of the possession – defendant pleaded that he had become owner by way of sale deed- suit was dismissed by the trial Court – an appeal was preferred which was allowed- 'D' was 95 years of age at the time of execution of the sale deed – Sub Registrar had visited the house of the Executant for registration as per endorsement, which carried with it a presumption of correctness- this belies the case of the defendant that sale deed was scribed and registered in the office of Sub Registrar, Bhoranj- witnesses had also deposed falsely that the document was scribed and registered at Bhoranj- sale deed was surrounded by suspicious circumstances- Appellate Court had rightly appreciated the evidence – appeal dismissed.

(Para- 16 to 19)

For the appellant(s):	Mr. Bhupinder Gupta Sr. Advocate with Mr. Neeraj Gupta, Advocate.
For the respondent:	Mr. K.D.Sood, Sr. Advocate with Mr. Rajnish K. Lall, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Hamirpur, H.P. dated 1.11.2004, passed in Civil Appeal No. 58 of 2002.

2. Key facts, necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff) has filed a suit against the appellant-defendant (hereinafter referred to as the defendant) for possession and cancellation of sale deed dated 8.4.1994 Ext. DW-1/A. The plaintiff's father Sh. Durga died on 29.9.1994. He was owner-in-possession of the suit land as detailed in the plaint. The plaintiff Sh. Mast Ram, Smt. Shankru and Smt. Soma Devi are the legal heirs of late Sh. Durga. He was about 95 years of age. His father never executed any sale deed in favour of the defendant. He was neither in disposing state of mind nor he could put thumb impression on any document. The defendant forcibly occupied the suit land on the basis of forged sale deed. It is, in these circumstances, the plaintiff has prayed for decree that the alleged sale deed dated 8.4.1994, in the custody of the defendant in respect of the suit land, was never executed by the deceased Durga and in the alternative the plaintiff sought the relief that the sale deed be adjudged fraudulent and void and the possession of the suit land be delivered to the plaintiff.

3. The suit was contested by the defendant. According to him, he became owner of the suit land by way of sale deed dated 8.4.1994 executed by late Sh. Durga in favour of defendant for consideration of Rs. 17,000/-.

4. The learned Sub Judge (I), Hamirpur, H.P., framed the issues on 12.11.1999 and suit was dismissed on 27.2.2002. Feeling aggrieved, the plaintiff preferred an appeal before the learned District Judge, Hamirpur. The learned District Judge, Hamirpur, allowed the same on 1.11.2004. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 6.12.2004:

> "1. Whether the Lower Appellate Court has taken erroneous view of law and facts by holding the Exhibit DW-1/A, a suspicious document by putting reliance on such evidence which was in variance of the pleadings? Has not the Lower Appellate Court ignored the basic principle of law that the plaintiff is supposed to stand on his own legs to prove the case and not to rely on the weaknesses of the defence, are not the findings of the Lower Appellate Court erroneous and perverse by ignoring such principles of law?
>
> 2. Whether the Lower Appellate Court has committed grave error of jurisdiction in holding the deceased Shri Durga to be incompetent to execute the document on account of alleged impairment of his mental faculty without there being any cogent, proper and legal medical evidence, are not the findings of the Lower Appellate Court illegal, erroneous, arbitrary and perverse?
>
> 3. Whether the Lower Appellate Court has ignored the provisions of Transfer Property Act (Section 54 of said Act) when the Sale Deed became final during the life time of late Shri Durga, who did not challenge the same on insufficiency of the passing of the consideration of the sale transactions during his life time?"

6. Mr. Bhupinder Gupta, learned Sr. Advocate, on the basis of substantial questions of law framed, has vehemently argued that sale deed Ext. DW-1/A was a valid document. He has supported the judgment and decree passed by the learned Sub Judge (I), Hamirpur dated 27.2.2002. He then contended that deceased Durga was competent to execute the document. He has also referred to Section 54 of the Transfer of Property Act. On the other hand, Mr. K.D.Sood, Sr. Advocate, has supported the judgment and decree of the learned first appellate Court dated 1.11.2004.

7. I have heard the learned Senior Advocates for the parties and gone through the judgments and records of the case carefully.

8 Plaintiff has appeared as PW-1. According to him, his father was not able to speak. His father died in the year 1994. He remained ill for 2 ½ to 3 years prior to his death. He could not recognize any person. He was not able to execute the sale deed. He denied the suggestion in his cross-examination that the defendant has paid Rs. 10,000/- to his father before Sub Registrar and he had also given statement before him.

9. Sh. Ram Lal, PW-2 deposed that he knew the parties to the suit whose father died in the year 1994. Late Sh. Durga lost his senses two years prior to his death. He was unable to talk or understand the matter. He was not able to execute the registered sale deed.

10. Sh. Amar Nath, PW-3 deposed that late Sh. Durga died in the year 1994. Two years prior to his death, he lost his senses and was unable to execute any document.

11. Sh. Partap Chand PW-4 has supported the versions of PW-1 to PW-3. He has also testified that late Sh. Durga was neither in his senses nor he was able to go to Bhoranj. He had gone to village Dalalar to collect money from his debtors when he saw late Sh. Durga senseless.

12. DW-1 Ram Sukh testified that he has purchased the suit land from late Sh. Durga vide registered sale deed for consideration of Rs. 17,000/-. The sale deed was scribed

by Krishan Chand Shehja, Petition-writer on the request of late Sh. Durga in the presence of witnesses Dile Ram, retired Tehsildar and Balbir Singh, Lambardar. After scribing the same, the deed was read over and explained to late Sh. Durga, who after admitting the contents of the same to be correct put his thumb impression on the same. Thereafter the witnesses put their signatures on the same. He identified his signatures at point 'A' and endorsement Ext. DW-1/A. He further stated that he had paid Rs. 10,000/- in the presence of Tehsildar to the father of the plaintiff. After the sale deed was presented before Tehsildar (Sub Registrar) Bhoranj for attestation, he recorded the statements of Durga Dass and witnesses. Late Sh. Durga was in good senses. He was able to distinguish between right and wrong. He was not ill. He was having injury on his leg. He voluntarily gave statement before the Tehsildar. The plaintiff did not participate in the last rites of late Sh. Durga. The sale deed was executed by late Sh. Durga in Tehsil Complex at about 11:00 AM. The sale deed was presented before the Tehsildar at 4:30 PM. The Tehsildar was sitting in the Court at that time. The stamp papers were purchased by him for payment of Rs. 22/-. Late Sh. Durga was taken to the office of Tehsildar in a Jeep and in the same jeep he was also taken back to his residence after the execution of the registered sale deed. He also deposed that at the time of execution of sale deed the age of the executant was about 90/95 years. He denied that late Sh. Durga was not having good health for the last two years before his death. He has denied that the sale deed Ext. DW-1/A was not executed by late Sh. Durga.

13. Sh. Onkar Thakur DW-2 deposed that he is practicing Advocate at Hamirpur since 1963. He knew Sh. Krishan Chand, Petition-writer since 1963. He is well conversant with his hand writing. He identified his hand writing on the sale deed Ext. DW-1/A. It was scribed by Krishan Chand Petition Writer.

14. Sh. Balbir Singh DW-3, Lamberdar is witness to the sale deed Ext. DW-1/A. According to him, he knew the parties. The suit land is situated within the jurisdiction of his Lambardari. He deposed that late Sh. Durga had executed a registered sale deed in the month of April, 1994 in favour of the defendant. The deed was scribed by Krishan Chand Petition-writer. He identified his signatures on sale deed Ext. DW-1/A. After scribing the deed, it was read over and explained to late Sh. Durga in the presence of witnesses and late Sh. Durga put his thumb impression after admitting the contents of the same to be correct. He further stated that the registration of the sale deed was also done qua 2 kanals of land for consideration of Rs. 17,000/-, out of which, Rs. 10,000/- was paid by the defendant to Sh. Durga in the presence of Tehsildar and remaining Rs. 7,000/- were agreed to be paid to Sh. Durga at his residence. He deposed that he put his signatures on the sale deed alongwith the signatures of other witnesses before the Tehsildar. Sh. Ram Sukh also put his signatures on the same. He also deposed that at the time of execution of the deed, the health of late Sh. Durga was good and he was able to distinguish between right and wrong. Late Sh. Durga put his signatures on the sale deed in his presence.

15. Sh. Dile Ram DW-4 deposed that he knew the parties. Sh. Durga executed the sale deed Ext. DW-1/A on 8.4.1994 qua 2 kanals of land for consideration of Rs. 17,000/-. It was scribed and executed in his presence by late Sh. Durga. It was scribed by Sh. Krishan Chand at Bhoranj and the same was also registered in his presence by Sub Registrar, Bhoranj. He identified his signatures on the sale deed Ext. DW-1/A. After scribing the sale deed, the same was read over and explained to late Sh. Durga who after admitting the contents of the same to be correct put his thumb impression over the same. He also signed the document as a witness. At that time, witness Balbir Singh Lamberdar was also present. Rs. 17,000/- were paid by the defendant to the father of the plaintiff in the presence of Tehsildar and after that the sale deed was got registered by the Tehsildar. Their statements were also recorded by the Tehsildar. Rs. 10,000/ were paid in the

presence of Tehsildar and remaining payment was to be made later on. Mast Ram used to live separately from late Sh. Durga. Late Sh. Durga voluntarily executed the sale deed.

16. What emerges from the evidence discussed hereinabove is that late Sh. Durga was 95 years of age at the time of execution of the sale deed. He was not in senses. According to the case of the defendant, the sale deed Ext. DW-1/A dated 8.4.1994 was scribed by Sh. Krishan Chand Deed-writer. It was executed at Bhoranj. The endorsement made on the back of the sale deed made by the Sub Registrar reflects that Tehsildar himself had visited the house of the executant, late Sh. Durga in Village Dalalar for the purpose of registration. It is recorded in the endorsement on sale deed Ext. DW-1/A that the deed was presented at 3-4:00 PM by late Sh. Durga in his house at village Dalalar. This endorsement was made by Sub Registrar, Bhoranj during discharge of his official functions as a public servant being Sub Registrar. The presumption of truth is attached to all public functions of the public servants which are presumed to be done in regular manner unless contrary is established. Thus, it belies the case of the defendant that sale deed was scribed and registered in the office of Sub Registrar, Bhoranj.

17. Mr. Bhupinder Gupta, learned Sr. Advocate, has vehemently argued that the plea of fraud and forgery has not been pleaded in the plaint. The Court has gone through the plaint. It is specifically averred in para 3 of the plaint that the relinquishment deed was fraudulent and forged document.

18. Late Sh. Durga was 95 years of age at the time of execution of the alleged sale deed Ext. DW-1/A dated 8.4.1994. All the witnesses of the defendant have deposed falsely and incorrectly that the document was scribed and registered at Bhoranj. Late Sh. Durga was sick. He was not in a position to sign or put thumb impression on the document. Thus, Ext. DW-1/A sale deed, is the outcome of fraud. It is surrounded by suspicious circumstances which could not be removed by the defendant. Late Sh. Durga was incompetent to execute this document, being sick and old age.

19. Now, as far as the issue as to whether late Sh. Durga could challenge the sale during his life time or not has never been canvassed before the Courts' below. This question, in the absence of the pleadings and evidence cannot be permitted to be raised at this stage. The substantial questions of law are answered accordingly.

20. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J

Bachitar Singh and others ....Appellant.
versus
Smt. Sandhya Devi and others ....Respondents.

RSA No.513 of 2003 alongwith
Cross Objection No.366/2014
Date of Decision: 9.3.2016

Specific Relief Act, 1963- Section 5- Suit land was owned by one 'S' who sold it to 'P' predecessor-in-interest of plaintiffs- plaintiffs filed a civil suit against the defendant claiming the possession of the suit land pleading that suit land had been forcibly occupied by the defendant- defendant pleaded that he was put in possession by 'P' pursuant to an

agreement- suit was decreed by the trial Court- in appeal, the appellate court reversed the decree passed by the trial court - the agreement was duly proved- a power of attorney was also executed in favour of the defendant by means of which the defendant was authorized to manage/sell/mortgage the suit land- no steps were taken for cancelling the agreement/power of attorney- defendant was put in possession by means of agreement to sale and he cannot be dispossessed- Appellate Court had rightly reversed the decree passed by the trial Court- appeal dismissed. (Para-8 to 21)

Cases referred:
Shrimant Shamrao Suryavanshi & another v. Pralhad Bhairoba Suryavanshi (Dead by LRs & others, (2002) 3 SCC 676
Saraswati Devi (Dead) by LR v. Delhi D evelopment Authority & others, (2013) 3 SCC 571
Ramesh Chand Ardawatiya v. Anil Anil Panjwani, (2003) 7 SCC 350
Mahadeva & others v. Tanabai, (2004) 5 SCC 88
Lakshmi alias Bhagyalakshmi & another v. E. Jayaram (Dead) by LR, (2013) 9 SCC 311

For the Appellants : Mr. V.S. Rathore, Advocate.
For the Respondents And Cross-Objectors : Mr. B.C. Verma, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Plaintiffs-appellants have filed the present appeal under the provisions of Section 100 of the Code of Civil Procedure, assailing the judgment and decree dated 1.9.2003, passed by the learned District Judge, Kangra at Dharamshala, in Civil Appeal No.127-N/XIII/2001, titled *Smt. Sandhya Devi & others v. Bachitar Singh & others,* whereby judgment and decree dated 22.11.2000, passed by the Sub Judge (II), Nurpur, District Kangra, Himachal Pradesh, in Civil Suit No.311/93, titled as *Bachittar Singh & others v. Daljit Singh,* stands reversed.

2. From the revenue record (Ex.P-1), it is quite apparent that the land in question, situate in village Sanour, was owned by one Sudama, who sold it to Pratap Singh, predecessor-in-interest of the plaintiffs-appellants. With the death of Pratap Singh, his Legal Representatives filed a suit against original defendant Daljit Singh, claiming possession of the land, alleged to have been forcibly occupied by him. Present respondents are the successors-in-interest of said Daljit Singh.

3. For the sake of convenience, appellants are referred to as plaintiffs and successors-in-interest of Daljit Singh are referred to as the defendants.

4. On the strength of the pleadings of the parties, trial Court framed the following issues:

5. Whether plaintiff is entitled for vacant possession of the suit land as alleged? OPP
6. Whether the suit is not maintainable in the present form? OPD
7. Whether the plaintiff has no locus standi to file the present suit?OPD
8. Whether the defendant No.1 is in possession of the suit land on the basis of alleged agreement since the year 1978, if so, its effect?OPD

4(a) If issue No.4 is proved, whether the defendant is in possession of the suit land in part performance of the alleged agreement dated 26.5.1979, if so, its effect? OPD

4(b) Whether the defendants have become owners of the suit land by way of adverse possession? OPD

4(c) Whether the predecessor-in-interest of plaintiffs received full and final consideration as alleged, if so, its effect? OPD

9. Relief.

5. Defendants' plea of having been put in possession of the suit land by Pratap Singh, pursuant to agreement dated 26.5.1979 (Ex.DW-3/A), did not find favour with the trial Court and as such the suit came to be decreed, in the following terms:

> "In view of decision on issues No.1,4 & 4(a) to 4(c)especially, the suit of the plaintiffs is decreed. The plaintiffs are entitled for vacant possession of the land comprised in Khata No.96 min, khatauni No.364, khasra No.1981, measuring 0-39-39 HM, situated in Mohal and Mauza Sanour Mand, Tehsil Indora, District Kangra, H.P. by way of demolition of structure if any, raised on the above mentioned land. Keeping in view the facts and circumstances of the case, the parties are left to bear their own costs. Decree sheet be drawn accordingly and file after completion be consigned to record room."

6. Such findings of fact, judgment and decree, so passed by the trial Court, stand reversed by the lower appellate Court. The Court has held the defendant to be in possession of the suit land, pursuant to agreement (Ex. DW-3/A). His plea of adverse possession rightly stands rejected.

7. Present appeal stands admitted on the following substantial question of law:

> Whether the lower appellate Court misconstrued and misapplied the provisions of Section 53-A of the Transfer of Property Act to the case without any foundation/evidence therefor?

8. Ex. P-1 is the Jamabandi (revenue record), which reveals that the land in question stood sold by the original owner Sudama to Pratap Singh.

9. Plaintiffs pleaded that the entry of mutation, recording the defendant to be in possession (*Kabiz*) is incorrect, for having been prepared behind their back. Such contention needs to be rejected.

10. In order to prove agreement (Ex. DW-3/A), defendant has examined attesting witness Dilabar Singh (DW-3). Perusal of his testimony reveals that Pratap Singh had agreed to sell entire land, comprising 15 Kanals 15 Marlas in favour of Daljit Singh. Since Pratap Singh was in possession of only half of the land, possession thereof, was handed over to Daljit Singh and the remaining half remained in possession of one Joginder Singh, who was occupying the same as a non-occupancy tenant. With the execution of the agreement to sell, Pratap Singh received Rs.4,000/- as earnest money. The land was to be sold for a consideration of Rs.3,200/- per Kila. Sale deed was to be executed on or before 15.6.1980.

11. Possession of the defendant also stands proved by Dev Raj (DW-2), who further states that the defendant cultivated the land and planted Orange trees, which fact was to the knowledge of Pratap Singh.

12. It is a matter of record that no sale deed could be executed, in terms of the agreement (Ex. DW-3/A). The reason is not far to seek. Physical possession of the land in

possession of Joginder Singh could not be handed over to defendant Daljit Singh, resultantly Pratap Singh executed Power of Attorney (Ex. DW-1/A) dated 19.6.1980 in favour of the defendant, in terms whereof he was authorized to manage/sell/mortgage the land. Thus, Pratap Singh had intended to transfer the entire property in favour of the defendant.

13. There is nothing on record to establish that during his life time, Pratap Singh or for that matter his successors-in-interest took any action of either cancelling the agreement to sell/power of attorney or informing the defendant of having committed breach of any of the terms of the agreement. Non-performance of the terms of the agreement on the part of the defendant was never any issue, either with Pratap Singh or his successors, which came to be reflected only with the presentation of plaint on 14.5.1993.

14. Defendant was put in possession of the suit land pursuant to and in terms of the agreement (Ex. DW-3/A).

15. The Apex Court in *Shrimant Shamrao Suryavanshi & another v. Pralhad Bhairoba Suryavanshi (Dead by LRs & others,* (2002) 3 SCC 676, has observed as under:

> "Section 53-A was inserted in the Transfer of Property Act on the basis of recommendations of the Special Committee set up by the government of India. The Special Committee's report which is reflected in the aims and objects of Amending Act, 1929 shows that one of the purposes of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. Therefore, Section 53-A is required to be interpreted in the light of the recommendation of Special Committee's report and aims, objects contained in Amending Act, 1929 of the Act and specially when Section 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under Section 53-A even if the period of limitation to bring a suit for specific performance has expired.
>
> But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under S. 53-A of the Act. The necessary conditions are-
>
> (1) there must be a contract to transfer for consideration any immovable property;
>
> (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
>
> (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
>
> (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
>
> (5) the transferee must have done some act in furtherance of the contract; and
>
> (6) the transferee must have performed or be willing to perform his part of the contract.
>
> If the conditions enumerated above are complied with, the law of limitation does not come in the way of a defendant taking plea under Section 53-A of the Act to protect his possession of the suit property even though a suit for specific performance of a contract is barred by limitation."

16. Subsequently, the Apex Court in *Saraswati Devi (Dead) by LR v. Delhi Development Authority & others,* (2013) 3 SCC 571, has held that transfer of possession, in terms of a contract to sell, creates encumbrance of property upon such transferee in possession.

17. Also, in *Ramesh Chand Ardawatiya v. Anil Anil Panjwani,* (2003) 7 SCC 350, the Court has held that if a person has entered into possession over immovable property under a contract for sale and is in peaceful and settled possession thereof, with the consent of the person in whom the title vests, he is entitled to protect his possession against the whole world, except a person having a title better than what he or his vendor possesses. Further, if he is in possession of the property in part performance of the contract for sale and the requirements of Section 53-A of the Transfer of Property Act (hereinafter referred to as the Act) are satisfied, he may protect his possession even against the true owner.

18. In *Mahadeva & others v. Tanabai,* (2004) 5 SCC 88, the Court has dilated on the object behind the enactment of Section 53-A, clarifying the same to also provide protection to a transferee, who in part-performance of the contract, had taken possession of the property, even if limitation for filing a suit for specific performance stands expired.

19. The aforesaid principle stands reiterated in *Lakshmi alias Bhagyalakshmi & another v. E. Jayaram (Dead) by LR,* (2013) 9 SCC 311.

20. Evidence led by the defendant establishes fulfillment of the essential conditions so as to constitute a defence under the provisions of Section 53-A of the Act. Transfer, of an immoveable property, in writing and consent of the vendor, was for a valuable consideration. In part-performance thereof the defendant was put into possession by the vendor. In furtherance thereof, the defendant has tilled the land and put it to his personal use by planting Orange trees and reaping fruits thereof. He had been willing and ready to perform all conditions of the agreement and at no point in time, denied the same. Also, no obligation to be performed by him remained unfulfilled.

21. Significantly, defendant continued to remain in possession of the suit land since the year 1979 and none objected to the same till the year 1993.

22. As such, it cannot be held that findings returned by the first Appellate Court are illegal, perverse and erroneous, warranting interference by this Court. Substantial question of law is answered accordingly. For all the aforesaid reasons, the appeal is dismissed. Cross-Objections and pending application(s), if any, also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Sh. Ashok Kumar Thakur ...Petitioner

Versus

The State of Himachal Pradesh through Secretary HP PWD & another ...Respondents.

Arb. Case No. 60 of 2015

Date of Decision : March 09, 2016

Arbitration and Conciliation Act, 1996- Section 34- Arbitrator had allowed the claim of the contractor, however, contractor was not satisfied with the award - he filed a petition for assailing the same- held, that award can be set aside only within the exceptions provided under Section 34- Court cannot adjudicate upon the merit of the decision but has to see

whether the award is in conflict with the Public Policy of India- Award which is ex facie and patently in violation of the statutory provisions cannot be said to be in public interest- contract was awarded to the claimant, but the work could not be completed within stipulated period of time- final bill for work was prepared and balance amount was paid- claimant had raised the claim for price escalation after a period of three years and six months- hence, it was rightly held to be barred by limitation - the case does not fall within any of the exceptions provided under Section 34 of the Act - award cannot be said to be perverse, erroneous, illegal or opposed to public policy- petition dismissed. (Para- 2 to 14)

Cases referred:
Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705
Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644
McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181
Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. (2006) 11 SCC 245
DDA vs. R. S. Sharma and Co. (2008) 13 SCC 80
Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49
Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312
Kuldeep Singh vs. Commr. of Police, (1999) 2 SCC 10
P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594

For the petitioner : Mr. Sumeet Raj Sharma, Advocate, for the petitioner.
For the respondent : Mr. R. S. Verma, Addl. Advocate General with Mr. Ram Murti Bisht and Mr. Puneet Rajta, Dy. A.Gs. for the respondents.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

In this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), Contractor who is the claimant, has assailed the Award dated 17.3.2015 passed by the Arbitrator-cum-Superintending Engineer, Arbitration Circle, H.P. PWD, Solan in Case No. PW-SE-ARB-34/09, arising out of works contract for "C/O road under Package No. HP-03-07 including C.D. Structure pavement side drain and parapets C/o Sour Dain road km. 0/0 to 3/00. Agreement No. 6 of 2002-2003".

2. The Arbitrator allowed the claims of the Contractor in the following manner:-

Award in favour of the claimant/contractor:

Sr. No.	Description of claim	Amount claimed	Amount awarded	Remarks.
1.	Claim No. 1: Claim under clause 10CC on account of escalation.	Rs. 2,44,908/-	Nil	Claim is time barred
2.	Claim No. 2: Extra work for raising of road by earth	Rs. 3,53,171/-	Nil	Withdrawn

	filling.			
3.	Claim No. 3: Shifting of slips, clearance of site and removal of blasting material.	Rs. 42,000/-	Nil	Withdrawn
4.	Claim No. 4: Claim on account of blockage of machinery skilled and unskilled labour.	Rs. 7,33,360/-	Nil	Withdrawn
5.	Claim No. 5: Interest @ 18%	18%	Nil	
6.	Claim No. 6: Claim on account of cost of Arbitration.	Rs. 1,00,000/-	Nil.	-
7.	Counter Claim No. 1: Repair of Asphaltic work.	Rs. 1,00,000/-	Nil	Withdrawn
8.	Counter Claim No. 2: General maintenance of the road for five year.	Rs. 1,50,000/-	Nil.	Withdrawn
9.	Counter Claim No. 3: Claim on account of Arbitration.	Rs.1.00lacs.	Nil	Withdrawn

3. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part – I of the Act, wherein Section 34 also finds place.

4. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the Public Policy of India. Merits are to be looked into only under certain specified circumstances i.e. being against the Public

Policy of India, which connotes public good and public interest. Award which is *ex facie* and patently in violation of the statutory provisions cannot be said to be in public interest.

5. In *Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd.* (2003) 5 SCC 705 the Court reiterated the principle laid down in *Renusagar Power Co. Ltd. vs. General Electric Co.,* 1994 Supp (1) SCC 644 holding that the award can be set aside if it is contrary to: (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. However, such illegality must go to the root of the matter and if it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.

6. The principles continued to be reiterated by the apex Court in *McDermott International Inc. vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181 and *Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd.* (2006) 11 SCC 245.

7. Eventually in *DDA vs. R. S. Sharma and Co.* (2008) 13 SCC 80 the Court culled out the following principles:

> "21. From the above decisions, the following principles emerge:
>
> (a) An award, which is
>
> (i) contrary to substantive provisions of law; or
>
> (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
>
> (iii) against the terms of the respective contract; or
>
> (iv) patently illegal; or
>
> (v) prejudicial to the rights of the parties;
>
> is open to interference by the court under Section 34(2) of the Act.
>
> (b) The award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
>
> (b) the interest of India; or
>
> (c) justice or morality.
>
> (c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.
>
> (d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in *Associate Builders vs. Delhi Development Authority* (2015) 3 SCC 49 has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The court observed that:-

> "29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:

> "18. *Equal treatment of parties.* – The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
>
> * * *
>
> 34. *Application for setting aside arbitral award.* – (1) * * *
>
> (2) An arbitral award may be set aside by the court only if –
>
> (a) the party making the application furnishes proof that –
>
> * * *
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

> (i) a finding is based on no evidence, or
>
> (ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
>
> (iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse."

9. Further, in the very same decision, while relying upon *Excise and Taxation Officer-cum-Assessing Authority vs. Gopi Nath & Sons,* 1992 Supp (2) SCC 312; *Kuldeep Singh vs. Commr. of Police,* (1999) 2 SCC 10; and *P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd.,* (2012) 1 SCC 594, the Court clarified the meaning of the expression 'perverse' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-

> **"**42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:
>
> 42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:
>
> > "28. *Rules applicable to substance of dispute*. – (1) Where the place of arbitration is situated in India –
> >
> > (a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"

42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.

42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:

> "28. *Rules applicable to substance of dispute*. – (1) - (2) * * *
>
> (3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In *McDermott International Inc. vs. Burn Standard Co. Ltd.* (2006) 11 SCC 181, this Court held as under:

> "112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See: *Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission*, (2003) 8 SCC 593 and *D.D. Sharma v. Union of India*, (2004) 5 SCC 325].
>
> 113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."

44. In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*, (2011) 10 SCC 573, the Court held:

> "17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of

what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: *Gobardhan Das v. Lachhmi Ram*, AIR 1954 (SC) 689, *Thawardas Pherumal v. Union of India*, AIR 1955 (SC) 468, *Union of India v. Kishorilal Gupta & Bros.*, AIR 1959 (SC) 1362, *Alopi Parshad & Sons Ltd. v. Union of India*, AIR 1960 (SC) 588, *Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji*, AIR 1965 (SC) 214 and *Renusagar Power Co. Ltd. v. General Electric Co.*, (1984) 4 SCC 679.]"

45. In *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*, (2012) 5 SCC 306, the Court held:

"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.

44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in *SAIL v. Gupta Brother Steel Tubes Ltd.*, (2009) 10 SCC 63 and which has been referred to above. Similar view has been taken later in *Sumitomo Heavy Industries Ltd. v. ONGC Ltd.*, (2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (*Sumitomo case*, (2010) 11 SCC 296, SCC p. 313)

'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in *Kwality Mfg. Corpn. v. Central Warehousing Corpn.*, (2009) 5 SCC 142 the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so, the decision of the umpire has to be accepted as final and binding.' " **"**

10. While deciding the present case, the aforesaid propositions of law are required to be considered and applied.

11. Noticeably claims No. 2 to 4 and counter claim No. 1 to 3 stand withdrawn. Only claims No. 1, 5 and 6 require adjudication by this Court.

12. It is not in dispute that vide letter dated 29.5.2002, the works in question stood awarded to the claimant for a sum of Rs.80,03,705/-. The work could not be completed within the stipulated period of eight months. It is also not in dispute that the final bill for the work was prepared and the balance amount paid to the claimant vide cheque dated 23.3.2006. Significantly it has not come on record that such payments stood received under protest. Noticeably the claim for price escalation was raised by the claimant only after a period of three years and six months from the closure of the work; preparation of the final bill and disbursement of the amount in terms thereof. Thus the claim of the claimant has been rightly held to be barred by limitation. Sub section (1) of Section 43 specifically makes the provisions of the Limitation Act, 1963 applicable to the arbitral proceedings.

13. Resultantly, the question of payment of interest as also cost of arbitration would not have arisen. In fact, litigation was fastened upon the State without any justifiable reason.

14. The case does not fall within any one of the exceptions provided under Section 34 of the Act. The award passed by the Arbitrator cannot be said to be perverse, erroneous, illegal or opposed to public policy. Hence for all the aforesaid reasons, objections preferred by the Claimant under Section 34 of the Act are dismissed. Pending applications, if any, also stand disposed of accordingly.

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

Goverdhan Dass son of Shri Maya Ram ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 109 of 2016
Order Reserved on 2nd March 2016
Date of Order 9th March 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 18 and 29 of N.D.P.S. Act- as per police version, 500 grams of opium was recovered from the petitioner- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and the petitioner is not required for custodial interrogation- the contraband found from the possession of the petitioner is not commercial quantity- trial will be concluded in due course of time- hence, petitioner released on bail subject to conditions. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. B.S. Thakur, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 13 of 2016 dated 22.1.2016 registered under Sections 18, 29 and 61 of NDPS Act 1985 at P.S. Rampur Bushehr District Shimla (H.P.)

2. It is pleaded that petitioner has not committed any offence and petitioner has been falsely implicated in present case. It is pleaded that quantity recovered from possession of petitioner is not commercial quantity and petitioner is entitled to be released on bail. It is pleaded that bail petitioner is the only bread earner of his family. It is pleaded that investigation is completed and no recovery is to be effected from petitioner and further pleaded that custodial interrogation is not required by investigating agency. It is pleaded that petitioner would not tamper with prosecution witensses in any manner and petitioner undertakes that he would abide by directions of Court.

3. Per contra police report filed. As per police report on 22.1.2016 HC Janak Raj along with HC Lal Chand and Rajesh were on patrolling duty at about 4 PM in the evening and when police officials were present at NH-05 near Nirath then Prem Singh Chauhan Up-Pardhan G.P. Nirath came and started conversation with police officials. There is recital in police report that two persons came from NH-05 and one of persons was in possession of a bag. There is recital in police report that one of co-accused when saw the police officials he handed over the bag to other co-accused and tried to run away. There is recital in police report that accused persons were caught and accused persons disclosed their names as Goverdhan Dass and Vicky Thakur. There is recital in police report that when bag was checked then polythene bag was recovered and in polythene bag 500 grams of opium was found. There is also recital in police report that NCB form in triplicate was prepared and contraband was sealed and seizure memo was prepared. There is recital in police report that site plan was prepared and photographs also taken and statements of prosecution witnesses under Section 161 Cr.P.C. also recorded. There is recital in police report that contraband sent to chemical examination in office of FSL Junga and as per chemical analyst report sample was of opium. There is recital in police report that investigation stood completed and petitioner is in judicial custody. There is recital in police report that petitioner is spoiling life of youth persons by way of supplying opium. There is further recital in police report that if petitioner is released on bail then petitioner would threat the prosecution witnesses.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency cannot be decided at this stage. Same fact will be decided when case

shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and custodial interrorgation of petitioner is not required in present case and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) Character of evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. In view of the fact that investigation is completed and in view of the fact that petitioner is not required for custodial interrogation and in view of the fact that there is no allegation of recovery of commercial quantity of contraband and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail at this stage of case.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will commit similar offence and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner. Court is of the opinion that if petitioner will flout the terms and conditions of conditional bail order then non-petitioner will be at liberty to file application for cancellation of bail in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 5 lac (Rupees five lacs only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That petitioner will not leave India without the prior permission of the Court. (v) That petitioner will give his residential address in written manner to the Investigating Officer and Court so that petitioner can be located in short notice. (vi) That petitioner will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Vicky Thakur son of Shri Bhagwan Dass ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 108 of 2016
Order Reserved on: 2nd March 2016
Date of Order: 9th March 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 18 and 29 of N.D.P.S. Act- as per police version, 500 grams of opium was recovered from the petitioner- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete and the petitioner is not required for custodial interrogation- the contraband found from the possession of the petitioner is not commercial quantity- trial will be concluded in due course of time- hence, petitioner released on bail subject to conditions. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702

For the Petitioner: Mr. B.S. Thakur, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 13 of 2016 dated 22.1.2016 registered under Sections 18, 29 and 61 of NDPS Act 1985 at P.S. Rampur Bushehr District Shimla (H.P.)

2. It is pleaded that petitioner has not committed any offence and petitioner has been falsely implicated in present case. It is pleaded that quantity recovered from possession of petitioner is not commercial quantity and petitioner is entitled to be released on bail. It is pleaded that bail petitioner is the only bread earner of his family. It is pleaded that investigation is completed and no recovery is to be effected from petitioner and further pleaded that custodial interrogation is not required by investigating agency. It is pleaded that petitioner would not tamper with prosecution witensses in any manner and petitioner undertakes that he would abide by directions of Court.

3. Per contra police report filed. As per police report on 22.1.2016 HC Janak Raj along with HC Lal Chand and Rajesh were on patrolling duty at about 4 PM in the evening and when police officials were present at NH-05 near Nirath then Prem Singh

Chauhan Up-Pardhan G.P. Nirath came and started conversation with police officials. There is recital in police report that two persons came from NH-05 and one of persons was in possession of a bag. There is recital in police report that one of co-accused when saw the police officials he handed over the bag to other co-accused and tried to run away. There is recital in police report that accused persons were caught and accused persons disclosed their names as Goverdhan Dass and Vicky Thakur. There is recital in police report that when bag was checked then polythene bag was recovered and in polythene bag 500 grams of opium was found. There is also recital in police report that NCB form in triplicate was prepared and contraband was sealed and seizure memo was prepared. There is recital in police report that site plan was prepared and photographs also taken and statements of prosecution witnesses under Section 161 Cr.P.C. also recorded. There is recital in police report that contraband sent to chemical examination in office of FSL Junga and as per chemical analyst report sample was of opium. There is recital in police report that investigation stood completed and petitioner is in judicial custody. There is recital in police report that petitioner is spoiling life of youth persons by way of supplying opium. There is further recital in police report that if petitioner is released on bail then petitioner would threat the prosecution witnesses.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and custodial interrorgation of petitioner is not required in present case and on this ground bail application be allowed is accepted for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. In view of the fact that investigation is completed and in view of the fact that petitioner is not required for

custodial interrogation and in view of the fact that there is no allegation of recovery of commercial quantity of contraband and in view of the fact that trial will be concluded in due course of time Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail at this stage of case.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will commit similar offence and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner. Court is of the opinion that if petitioner will flout the terms and conditions of bail order then non-petitioner will be at liberty to file application for cancellation of bail in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 5 lac (Rupees five lacs only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That petitioner will not leave India without the prior permission of the Court. (v) That petitioner will give his residential address in written manner to the Investigating Officer and Court so that petitioner can be located in short notice. (vi) That petitioner will not commit similar offence qua which he is accused. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of.

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

Roop Lal Gautam. ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr.M.P. (M) No. 258 of 2016
Decided on: 10.3.2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 269, 270, 277, 336, 326, 420, 120-B of the Indian Penal Code read with sections 43 and 44 of Water (Prevention & Control of Pollution) Act- petitioner was working as Junior Engineer- he was assigned his duties of Ashwani Khad water lifting scheme- petitioner was to check the treatment plant but had neglected to do so- he had failed to comply with the direction of the High Court- he had a knowledge that untreated sewage water was being mixed with the drinking water – his negligence led to the outbreak of jaundice in various parts of Shimla - no recovery is to be effected from the petitioner – it was collective responsibility of all the officers to maintain the treatment plants and to ensure supply of potable water to the citizens- FIR was not registered against the officials of MC, Shimla- officials of H.P. State Pollution Control Board

had also not performed their duties/responsibilities- petition allowed and the petitioner ordered to be released on bail subject to condition- direction issued to the State not to post the officials against whom FIR have been registered in the same capacity- further, direction issued to the State to ensure that all the treatment plants are run by the officers/officials of the I&PH Department to ensure quality/safety of drinking water- samples be lifted every 48 hours to maintain its quality- State also directed to set up the State of Art facilities to analyze water samples within 12 hours. (Para- 5 to 10)

For the Petitioner : Mr. N.S. Chandel, Advocate.
For the Respondent :Mr. Shrawan Dogra, Advocate General with Mr. Parmod Thakur, Addl. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

Report produced and perused.

2. The petitioner is seeking bail in FIR No.3/2016 dated 6.1.2016 for offences punishable under sections 269, 270, 277, 336, 326, 420, 120-B of the Indian Penal Code read with sections 43 and 44 of Water (Prevention & Control of Pollution) Act registered at Police Station Dhalli. The petitioner was working as Junior Engineer in I&PH Department, Kasumpati. He was also assigned the duties of Ashwani Khad water lifting scheme.

3. On 5.1.2016, a complaint was filed by the Deputy Mayor Sh. Tikender Singh Panwar of Shimla for registration of FIR against the contractor of sewerage treatment plant, Dhalli and Malyana.

4. Mr. N.S. Chandel, learned counsel for the petitioner, has argued that one of the co-accused, namely, Hem Chand Chauhan, in the same FIR has been released by this Court.

5. Mr. Shrawan Dogra, learned Advocate General has vehemently argued that the petitioner alongwith other superior officers of I&PH Department was duty bound to check the treatment plant. However, they have neglected their duties. They have not taken any preventive/remedial measures. The superior officers should have taken stern action against the contractor for not running the treatment plants properly. Statements of workers were also recorded. The officers used to pressurize the workers to register false reports in the official registers. The directions issued by this Court from time to time have not been complied with by the petitioner. The petitioner had the knowledge that untreated sewage water was being mixed with the drinking water. They were also aware that due to failure of electricity untreated water was released in the supply of drinking water. Their negligence has led to breaking jaundice in various parts of Shimla town. The petitioner used to visit the sewerage treatment plant, but he has not performed his duties in accordance with law. He was supposed to check the laboratory tests, chemicals and machinery of the sewerage treatment plant. It is also contended that the petitioner is holding a good position in I&PH Department and in case he is released on bail, he would threaten the prosecution witnesses.

6. In the present case, investigation is complete. No recovery is to be effected from the petitioner. No useful purpose would be served by keeping the petitioner behind the bars. It was the collective responsibility of all the officers such as Additional Chief Secretary (I&PH), Engineer-in-Chief and Superintending Engineer of I&PH Department to maintain the treatment plants and to ensure potable water to the citizens. It is also intriguing to note that

the police has only registered FIR against the officers/officials of I&PH Department. It is the constitutional/statutory duty of the Municipal Corporation, Shimla to provide potable water to the inhabitants of Shimla, but no arrest of its technical officers/officials has been made. It was expected from the State to take action against the technical senior most officers/officials of the Municipal Corporation, Shimla taking into consideration the epidemic situation prevailing in the town, which has led to loss of valuable human lives. It is expected from the State to apply the law uniformly. Thousands of persons have contacted jaundice due to sheer negligence act of the technical officer/officials, who were responsible to maintain water supply to the town. The officers/officials of the H.P. State Pollution Control Board are also remiss in the discharge of their duties. It is the prime responsibility of the officers/officials of the H.P. State Pollution Control Board to ensure strict compliance of the mandatory provisions of the Water (Prevention & Control of Pollution) Act, 1974 and Environment Protection Act, 1986. It was also expected from the State to take stern action against the officers/officials of the H.P. State Pollution Control Board. The Court has gathered impression that lower officials are being booked and made scapegoat under the various penal laws but the highest officers are dealt with leniently for the reasons best known to the functionaries of the State.

7. The petitioner is a permanent Government employee and resident of Gautam Niwas Dhalli, Tehsil and District Shimla and there are no chances of his jumping the bail.

8. Accordingly, the petition is allowed and the petitioner, who has been arrested in connection with case FIR No. 3/2016 dated 6.1.2016 registered at Police Station, Dhalli, Shimla under sections 269, 270, 277, 326, 336, 420, 120-B of the Indian Penal Code is ordered to be released on bail subject to his furnishing personal bond in the sum of Rs. 20,000/- with one surety in the like amount to the satisfaction of the learned Chief Judicial Magistrate, Shimla with the following conditions:

a) He shall make himself available for the purpose of interrogation, if so required, and regularly attend the trial court on each and every date of hearing and if prevented by any reason to do so, seek exemption from appearance by filing appropriate application;

b) He shall not make any inducement, threat or promises to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the court of the Police Officer;

c) He shall not leave the territory of India without the prior permission of the court.

9. It is clarified that if the petitioner misuses his liberty or violates any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

10. Before parting with the order, the respondent-State is directed to ensure that the persons against whom FIR(s) has/have been registered in this case are not posted back in the same capacity taking into consideration the sensitivity of the matter. The State may also consider not to post them on supervisory posts till they are exonerated in the cases instituted against them. Henceforth the State Government is directed to ensure that all the treatment plants throughout the State of Himachal Pradesh are run by the officers/officials of the I&PH Department alone in order to ensure quality/safety of water. The samples of water supplied to all the towns throughout the State of Himachal Pradesh should be lifted every 48 hours to maintain its quality. In order to ensure that there is no recurrence of jaundice throughout the State of Himachal Pradesh, the Chief Secretary Government of Himachal Pradesh, Addl. Chief Secretary (I&PH), Secretary (I&PH), Engineer-in-Chief (I&PH),

all the Superintending Engineers (I&PH), Commissioners of Municipal Corporations, Executive Officers of Municipal Councils and Nagar Panchayats shall be personally responsible to ensure the potable water supply throughout the State of Himachal Pradesh. Every person has a right to potable water under Article 21 of the Constitution of India. It is expected from the State at least to provide potable water if not other basic amenities to say the least. Since every 3rd person in the family residing in Shimla town is seriously affected with jaundice, it is the prime duty of the State Government that the patients are treated free of cost in all the State run District level hospitals, Community Health Centres/Primary Health Centres and to maintain their record properly. The figures given by the State is on the lower side since most of the patients have got their blood samples analyzed from private laboratories. The Court can take judicial notice of the fact that the State Government is sending water samples to distant places like Pune and adjoining States. The State Government should ensure setting up of State of Art facilities to analyze water samples within 12 hours. Sending of sample to Pune is also time consuming which further delays preventive and remedial measures. Necessary steps for setting up the State of Art Laboratory be taken within a period of three months. These directions have been issued in larger public interest since it is a sensitive and delicate issue.

11. Any observation made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this application alone. Copy Dasti.

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

Sandeep Anand s/o Sh. Nand Kishore ...Revisionist.

Versus

Namrata w/o Sh. Sandeep Anand ...Non-revisionist

Civil Revision No. 134/2014
Date of Decision: March 10, 2016

Code of Civil Procedure, 1908- Section 115- Learned Counsel for the Revisionist states that he does not want to continue with the present Civil Revision Petition- hence, same is dismissed as withdrawn.

For the revisionist: Mr. Lovneesh Kanwar, Advocate
For non-revisionist: None

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Learned Advocate appearing on behalf of revisionist submitted before the Court that revisionist does not want to continue with the present Civil Revision Petition No. 134/2014 because the compromise is under process inter se parties and the same be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of revisionist present Civil Revision Petition No. 134/2014 is dismissed as withdrawn. Record of learned trial Court alongwith certified copy of the order be sent back forthwith. Be

listed before learned trial Court on 31.03.2016. Civil Revision Petition No.134/2014 is disposed of. Pending applications if any also disposed of.

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

Harbans Lal .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 531 of 2015
Reserved on: March 09, 2016.
Decided on: March 11, 2016.

Indian Penal Code, 1860- Section 302 and 201- Deceased was found lying in Nallah near liquor vend with injuries on his person - brother of the deceased made a statement that a telephonic call was received after which the deceased had left the house- he suspected that the person who made the call had murdered the deceased- it was found on investigation that accused was consuming alcohol and he had called the deceased and some other persons- on inquiry, accused disclosed specifically that he had dropped the deceased at Ganoh Bus Stand- accused was convicted by the Court – held in appeal that chemical analysis report revealed that the blood alcohol level in the blood of the deceased was 172.50 mg% - there was no enmity between the deceased and the accused- the call detail report was not proved in accordance with the Section 65(b) of Indian Evidence Act- no witness had deposed that accused and deceased were left alone in the house- motive to kill the deceased was not established- recoveries of scooter and pair of shoes of the accused were also not established satisfactorily- chain of circumstances is incomplete – theory of last seen was also not proved- thus, in these circumstances, Learned Trial Court had erred in convicting the accused- accused acquitted. (Para- 18 to 36)

Cases referred:
Anvar P.V. vrs. P.K. Basheer and others, (2014) 10 SCC 473
Dandu Jaggaraju vrs. State of Andhra Pradesh, (2011) 14 SCC 674
Sathya Narayan vrs. State rep. by Inspector of Police, (2012) 12 SCC 627,
Majenderan Langeswaran vrs. State (NCT of Delhi) and another, (2013) 7 SCC 192
Rishipal vrs. State of Uttarakhand, (2013) 12 SCC 551

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 17.10.2015, rendered by the learned Addl. Sessions Judge(I), Kangra at Dharamshala, H.P. in Sessions Case No. 1-N/VII/2013, whereby the appellant-accused (hereinafter referred to as accused), who was charged with and tried for offences punishable under Sections 302 & 201 IPC, has been

convicted and sentenced to rigorous imprisonment for life and to pay fine of Rs. 10,000/- and in default of payment of fine to further undergo rigorous imprisonment for one year under Section 302 IPC. He was also convicted and sentenced to undergo rigorous imprisonment for two years for the offence punishable under Section 201 IPC and to pay fine of Rs. 1000/-. In default of payment of fine he was further sentenced to undergo rigorous imprisonment for a period of three months.

2. The case of the prosecution, in a nut shell, is that on 30.10.2012 at about 7:30 AM, Mahinder Pal, Pradhan, Gram Panchayat, Panjahra, telephonically informed the police of PS Nurpur that a person was lying unconscious in a Nallah near the liquor vend, Ganoh. The police party headed by Insp. Brij Mohan Sharma rushed to the spot alongwith other police officials and found the dead body of Shashi Pal Sharma (deceased) lying in the Nallah near liquor vend Ganoh. The dead body was brought to Civil Hospital, Nurpur for post mortem. The brother of the deceased, Ram Pal Sharma (complainant) made statement under Section 154 Cr.P.C. that Shashi Pal Sharma (deceased) was his younger brother. The complainant received a telephonic message on 30.10.2012 at about 8:30 AM that dead body of his brother was lying at Ganoh. The complainant identified the dead body of his brother at Civil Hospital, Nurpur. There were injuries on his chest, private part and both legs. On 29.10.2012 at about 4:00-4:30 PM, the deceased left the house on his scooter on receiving a telephone call on his mobile. The complainant suspected that the person who called the deceased murdered his brother. On this statement of the complainant, FIR was registered. During investigation, the post mortem of the deceased was got conducted at Civil Hospital Nurpur and after expert opinion, it was opined by the Medical Officer that the deceased died due to blunt chest trauma. During the investigation, it also surfaced that on 29.10.2012, when the accused was consuming liquor with Kuldeep Singh, Shyam Kumar and Milkhi Ram in his quarter, he called the deceased, Vijay Kumar, Ajeet Singh and Onkar Singh to his quarter through his mobile phone. They came to the quarter of the accused on their scooters and consumed liquor. After consuming liquor, Ajeet Singh, Onkar Singh, Vijay Kumar and Kuldeep Singh left the quarter of the accused and went to Dhaba of Jaswinder Singh at Ganoh to consume liquor. Accused also came to the spot on his motorcycle. Kuldeep Singh asked as to where deceased had gone. The accused disclosed that he has dropped him at Ganoh bus stand. On 30.10.2012, the dead body of deceased was recovered. The accused telephonically asked Ashok Kumar, Onkar Singh and Milkhi Ram to conceal the scooter of the deceased. Even wife of the deceased Arpana Devi called the deceased on 29.10.2012 between 6 to 7:00 PM but the call went unanswered. The accused was arrested. 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 25 witnesses. The accused was also examined under Section 313 Cr.P.C. He has denied the prosecution case and pleaded innocence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Anup Chitkara, Advocate has vehemently argued that the prosecution has failed to prove the case against the accused beyond reasonable doubt. On the other hand, Mr. M.A.Khan, Addl. AG for the State has supported the judgment of the learned trial Court dated 17.10.2015.

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

6. PW-1 Ram Pal is the brother of the deceased. According to him, on 30.10.2012 he went to his office at Rurpur to perform his duties. At about 8:30 AM, he

received telephone call from someone informing that the dead body of his brother Shashi Pal was lying at Village Ganoh in a pit of dirty water. He came to know that the dead body was being brought to CH, Nurpur. He inspected the dead body of his brother which was naked and having injuries on his ribs and private parts. The dead body was brought to the hospital at about 8:45 AM. Thereafter, the dead body was referred to RPGMC, Tanda. His statement was recorded vide Ext. PW-1/A by the police. On the basis of his statement, FIR was recorded by the police. He came to know that his brother Shashi Pal was called by the accused on 29.10.2012 at about 4:00 PM. He also received the telephone call from the wife of Shashi Pal deceased to the effect that his brother Shashi Pal has not received at home. He also inquired from her regarding telephone call from deceased and she stated that his telephone was switched off. His brother was killed by accused person and thereafter thrown into dirty pit in a naked position. The scooter of his brother was also lying in front of the house of accused. In his cross-examination, he deposed that the murder of his brother was not committed in his presence. There were about 4-5 persons who killed his brother. He did not know as to who were those 4-5 persons.

7. PW-2 Pankaj Bhardwaj deposed that on 30.10.2012 at about 6-6:30 AM, he received a call from his sister that his brother-in-law has not reached at home since 4:00 PM yesterday and his mobile was switched off and that the deceased went on the scooter. He came to know at about 7:45/8 AM that the dead body of his brother-in-law was lying in a pit of dirty water at Ganoh. He visited the spot and saw the dead body sunk upto chest and only his face was visible. The police was also present on the spot. The clothes of deceased were also thrown in Chapper in bundle. The articles were taken into possession vide memo Ext. PW-2/A by the police. The accused also remained absconded after registration of FIR for 4-5 days. There were about 4-5 persons alongwith the accused on the date of occurrence. When his sister telephoned to accused Harbans, he switched off his phone. In his cross-examination, he admitted that it has come in the investigation that there were 4 to 5 persons but he did not know them. This fact he came to know from the I.O. At the time of occurrence he was not present. His brother-in-law Shashi Pal was taking liquor occasionally.

8. PW-3 Purshotam Singh deposed that on 31.10.2012 the police recovered a scooter bearing No. HP-38-A-4270 from the courtyard of Harbans Lal accused from village Ganoh. It was taken into possession vide memo Ext. PW-3/A.

9. PW-4 Aparna Sharma is the wife of the deceased. According to her, on 29.10.2012, her husband was at home. At about 3/3:15 PM, a telephone call was received to him from accused Harbans Lal. He called her husband and her husband stated to her that accused Harbans was calling and he would come back after 10-15 minutes. Thereafter, her husband never came up to 4-5:00 PM on the same day. Thereafter, she tried to contact her husband on telephone and the ring was going up to 6:30 PM and then it went switched off. At about 12 midnight, she tried to contact accused Harbans Lal on his phone but he did not attend her call. On 30.10.2012, she rang her brother and Jeth (Ram Pal) and informed them about the incident. Her brother was informed by some one that dead body of her husbabnd was lying in village Ganoh. Thereafter, she contacted accused Harbasn Lal 4/5 times on phone but he did not attend. Her brother and Jeth went to the spot. The personal belongings of her husband were missing. She knew accused person Harbans. He was friend of her husband for the last 4-5 years. She believed that her husband was killed by accused Harbans. The scooter was recovered from the courtyard of the accused. In her cross-examination, she deposed that initially she had suspicion towards accused Harbans Lal Forest Guard of investigation. In the statement recorded on 6.11.2012 it was recorded

that Vijay Kumar, Milkhi Ram, his son Shyam Kumar, Parvinder and Harbans Lal took liquor together and she suspected that it is they who must have murdered her husband.

10. PW-5 HC Tarsem Singh deposed that on 16.11.2012, the accused Harbans Lal presented his shoes to the I.O. which were used for beating deceased by the accused.

11. PW-8 Onkar Singh did not remember the date but deposed that at about 2-2:30 PM, he was present at Brick kiln. Harbans called him at his quarter to meet him. After 15 minutes Kuldeep made call to him and also invited him in the quarter of accused. At about 3:00 PM, he reached in the quarter of Harbans where accused alongwith Shyam Kumar and Kuldeep were drinking wine. The accused demanded money from him for wine and on his demand he handed over Rs. 200/- to Shyam Kumar alias Bhola. Shyam Kumar went somewhere to bring the bottle of wine and came back with bottle of Rum after 15-20 minutes. They were already having half bottle of OC from which they were drinking. After some time Shashi Pal (deceased) came there who was in drunken condition. Shashi Pal and accused embraced each other. Thereafter, he went to his house and remained there during night. On the next day, at 8:00 AM he came to know that a man had died at Ganoh. In his cross-examination, he admitted that Shashi Pal and accused Harbans were on friendly terms for the last 4-5 years. He did not see any quarrel taking place between them. As per his knowledge, there was no enmity between accused and deceased. Deceased reached the quarter of accused at about 3:00 PM. He also admitted that he did not see any quarrel between accused and deceased during his presence at the residence of accused.

12. PW-9 Ashok Kumar deposed that when he reached at Kutlahar, a call was made by Harbans accused on his mobile at about 10:00 AM. The accused asked him as to where he was. The accused again made a call to see whether any scooter was parked there or not. He went to the quarter of Harbans and found a scooter parked there. He did not remember the number of the scooter. He told to hide the scooter somewhere. He told the accused that it is not within his control to hide the same. Later on he came to know that the scooter belonged to deceased Shashi Pal.

13. PW-11 Ajeet Singh deposed that accused met him on the way when he was going to Jassore. Accused was known to him for the last 6-7 years. He visited the room of accused. At that time, Vijay Kumar Patwari, Kuldeep, Milkhi Ram, Shyam Kumar alias Bhola were sitting and consuming liquor. Half bottle was consumed and half was remaining. In the meantime deceased Shashi pal came in the room of accused. The remaining liquor was served in five glasses. Deceased Shashi Pal was not served wine at that time. Volunteered that it was appearing that he had already consumed liquor. The scooter of Shashi Pal was parked on the road and he was requesting Harbans Lal to park his scooter in the courtyard of his house. In the meantime, he went away to his home. In his cross-examination, he deposed that he did not see Onkar in the room of accused when Shashi Pal was requesting accused to park his scooter in his residence. He remained in the residence of the accused for about 10-15 minutes. No quarrel or arguments took place between the accused and deceased in his presence.

14. PW-13 Milkhi Ram deposed that he had rented out the house to accused Harbans Lal on monthly rent of Rs. 300/-. Accused Harbans remained in the house for about 6 years. Accused had vacated the house about six months ago. On 29.10.2012, he visited the house of accused where Harbans, Vijay, Kuldeep and Shyam Kumar alias Bhola were standing and Shashi Pal was there in the courtyard of the house. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that he visited the house of accused at 4:45 PM where Harbans, Vijay, Kuldeep and Shyam Kumar alias Bhola were taking liquor. He also consumed one peg of liquor. He admitted that when

bottle of liquor was empty after consumption, he went to his house. He denied that accused and deceased remained there. Volunteered that all of them left the house of accused together.

15. PW- 16 Dr. Mukesh Bhardwaj conducted the post mortem examination. He could not give the opinion regarding the cause of death after going through the post mortem examination of the body and considering the injuries. Thus, the case was referred to Tanda for forensic opinion to ascertain the cause of death. Thereafter, the post mortem was conducted at RPGMC by PW-15 Dr. Rahul Gupta and PW-22 Dr. Vijay Arora. According to them, the deceased died due to blunt trauma of the chest. The probable time that elapsed between death and post mortem was around 36 to 48 hours prior to second post mortem examination. According to PW-22 Dr. Vijay Arora at the time of death urine (sic. blood) alcohol level was 172.50 mg% and according to PW-16 Dr. Mukesh Bhardwaj as per the chemical analysis report of viscera from RFSL, Dharamshala, the ethyl alcohol 43.42 mg% was observed. According to PW-22 Dr. Vijay Arora, the injuries mentioned in the post mortem report sustained with the kick of shoes shown to him in the court could not be ruled out. He admitted in his cross-examination that in the case of homicide, the injuries on private parts may be caused on account of sexual jealousy if the assailant believes or suspects that the deceased might be carrying on sexual relationship.

16. PW-24 SI Brij Mohan is the I.O. He recorded the statement of complainant Ram Pal Sharma under Section 154 Cr.P.C vide Ext. PW-1/A. He prepared rukka and sent the same to the Police Station Nurpur for registration of FIR on 30.10.2012 at 1:25 PM through HC Swaroop Singh, on the basis of which FIR Ext. PW-24/A was registered. He took into possession the case property including shoes. In his cross-examination, he admitted that five persons, namely, Harbans lal, Vijay Kumar, Kuldeep Singh, Milkhi Ram and Shyam Kumar alias Bhola were arrested by him on 6.11.2012. He further admitted that as per the prosecution story, deceased was enjoying drinks with the alleged accused and others in the afternoon on 29.10.2012 at about 3:30 to 4:00 PM and the body of the deceased was discovered in the morning at about 8:00 to 8:30 AM at Ganoh Chapper on 30.10.2012. He admitted that the time gap between the two events was too long. He admitted that no witness under Section 161 Cr.P.C or under Section 164 Cr.P.C. has said that he saw the deceased alone in the company of accused on 29.10.2012 in the evening. He also admitted that during investigation it was found that the relations between the alleged accused and deceased were not strained. He also admitted that no evidence was found in the investigation that the deceased had extra marital relations with the wife or girl friend of the accused. He further admitted that the place was surrounded by many shops and liquor vend. He also admitted that in his investigation no motive for committing the alleged crime was noticed.

17. PW-25 Vivek Panwar has proved call details of Harbans Lal's mobile No. 94595 75305, call details of mobile of Onkar Singh vide Ext. PW-25/C, the call details of mobile of Rohit son of Kuldeep Singh vide Ext. PW-25/D, call details of Shashi Pal vide Ext. PW-25/E, call details of Vijay Kumar Patwari vide Ext. PW-25/F and call details of Ajeet Singh vide Ext. PW-25/G.

18. The prosecution, in order to prove its case, as per the trial Court, has mainly relied upon the following circumstances:

> "(i) The death of Shashi Pal Sharma was homicidal.
>
> (ii) On 29.10.2012 at about 3:15 PM the accused called Shashi Pal Sharma on his mobile phone to his quarter at Ganoh.

(iii) Shashi Pal Sharma was last seen with the accused on the evening of the occurrence.

(iv) Subsequent conduct of the accused.

(v) Recovery of scooter of the deceased from the courtyard of the accused.

(vi) Recovery of a pair of shoes of the accused."

19. The Court will advert to the circumstances in the same sequence in which these have been discussed by the learned trial Court. The first circumstance is that the death of Shashi Pal Sharma was homicidal. The dead body was seen in the morning of 30.10.2012. PW-1 Ram Pal visited the spot and identified the body of his brother. The dead body was lying in village Ganoh in a pit of dirty water. He inspected the dead body of his brother. It was naked and having injuries on his lips and private parts. The post mortem was conducted by PW-16 Dr. Mukesh Bhardwaj. He could not give final opinion regarding the cause of death. He referred the matter to RPGMC for expert forensic opinion, however, in his statement it has come that as per the chemical analysis report of viscera the ethyl alcohol 43.42 mg was observed. Thereafter, post mortem examination was again conducted by PW-15 Dr. Rahul Gupta with PW-22 Dr. Vijay Arora. According to them, the deceased died due to blunt trauma of the chest. The probable time that elapsed between death and post mortem was around 36 to 48 hours prior to second post mortem examination. According to PW-22 Dr. Vijay Arora at the time of death urine (sic. blood) alcohol level was 172.50 mg% and according to PW-16 Dr. Mukesh Bhardwaj as per the chemical analysis report of viscera from RFSL, Dharamshala, the ethyl alcohol 43.42 mg% was observed. PW-22 Dr. Vijay Arora, admitted in his cross-examination that in the case of homicide, the injuries on private parts could be caused on account of sexual jealousy if the assailant believes or suspects that the deceased might be carrying on sexual relationship. There is variance in the quantity of ethyl alcohol found in blood alcohol i.e. 172.50 mg% and 43.42 mg%. PW-16 Dr. Mukesh Bhardwaj deposed that ethyl alcohol was found in the viscera but as per reports Ext. PW-23/A and PW-23/C, ethyl alcohol was found in the blood of the deceased.

20. According to the chemical analysis report Ext. PW-23/A, the blood alcohol level was 172.50 mg%. It was on higher side. A person with blood alcohol concentration of 150-300 mg% would be intoxicated, as per Lyon's Medical Jurisprudence and Toxicology, 11th Edition, page 626. Similarly in Medical Jurisprudence and Toxicology by Dr. K.S.Narayan Reddy, Edition 2004 (Reprint), at page 590, a person who has consumed 150-300 mg %, would be drunk. In Parikh's Text book of Medical Jurisprudence and Toxicology at page 855, it is stated that at a concentration of 0.15 per cent (150 mg %), some are under the influence of alcohol and others decidedly would be drunk. With increasing concentrations the symptoms become more intense.

21. It has come in the report that the injuries were noticed on the private parts of the deceased. It has also come on record that there was no enmity between the deceased and the accused.

22. Now, the Court will advert to second circumstance i.e. whether the accused called Shashi Pal Sharma on mobile on 29.10.2012 at 3:15 PM. According to PW-4 Aparna Sharma, on 29.10.2012 at about 3/3:15 PM, accused had called her husband and her husband stated to her that accused Harbans was calling and he would come back after 10-15 minutes. Thereafter, her husband never came up to 4-5:00 PM on the same day. Thereafter, she tried to contact her husband on telephone and the ring was going up to 6:30 PM and then it went switched off. At about 12 midnight, she tried to contact accused

Harbans Lal on his phone but he did not attend her call. In the morning on 30.10.2012, she rang her brother and Jeth (Ram Pal) and informed them about the incident. Her conduct is unusual. In case her husband had not come home in the evening, she should have immediately contacted her brother and Jeth. She has contacted them only in the morning.

23. The prosecution has placed on record the call details of Harbans Lal's mobile No. 94595 75305, call details of mobile of Onkar Singh vide Ext. PW-25/C, the call details of mobile of Rohit son of Kuldeep Singh vide Ext. PW-25/D, call details of Shashi Pal vide Ext. PW-25/E, call details of Vijay Kumar Patwari vide Ext. PW-25/F and call details of Ajeet Singh vide Ext. PW-25/G. In order to duly prove the call detail records, the prosecution was required to prove that provisions of Section 65 B of the Indian Evidence Act, 1872 have been complied with in letter and spirit. It was required to be proved that the computer output containing the information was produced by the computer during the period over which the computer was used regularly and the information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of the said activities and the computer was operating properly. The certificate was also required to be given as per Section 65B(4) containing the statement and describing the manner in which it was produced, giving details of device involved in the production of that electronic record, as may be appropriate. It is to be signed by the person holding responsible position.

24. Their lordships of the Hon'ble Supreme Court in the case of ***Anvar P.V. vrs. P.K. Basheer and others,*** reported in ***(2014) 10 SCC 473***, have held that production of copy of statement pertaining to electronic record in evidence not being the original electronic record, such statement has to be accompanied by a certificate as specified in S. 65-B(4) and such certificate must accompany electronic record like CD, VCD, pen drive etc. Their lordships have further held that under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the conditions are satisfied. It has been held as follows:

> "15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (a) There must be a certificate which identifies the electronic record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;
>
> (c) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
>
> (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.
>
> 16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc.

without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

25. The third circumstance relied upon by the learned trial Court is that Shashi Pal Sharma (deceased) was last seen together with the accused on the evening of 29.10.2012. The prosecution has relied upon the statements of PW-8 Onkar Singh, PW-11 Ajeet Singh and PW-13 Milkhi Ram. PW-8 Onkar Singh deposed that Harbans called him at his quarter to meet him. After 15 minutes Kuldeep made call to him and also invited him in the quarter of accused. At about 3:00 PM, he reached in the quarter of Harbans where accused alongwith Shyam Kumar and Kuldeep were drinking wine. The accused demanded money from him for wine and on his demand he handed over Rs. 200/- to Shyam Kumar alias Bhola. Shyam Kumar went somewhere to bring the bottle of wine and came back with bottle of Rum after 15-20 minutes. They were already having half bottle of OC from which they were drinking. After some time Shashi Pal came there who was in drunken condition. Shashi Pal and accused embraced and met each other. Thereafter, he went to his house and remained there during night. In his cross-examination, he admitted that Shashi Pal and accused Harbans were on friendly terms for the last 4-5 years. Even on that fateful day, he did not notice any quarrel taking place between them. PW-11 Ajeet Singh deposed that he reached village Ganoh. He visited the room of accused. At that time, Vijay Kumar Patwari, Kuldeep, Milkhi Ram, Shyam Kumar alias Bhola were sitting and consuming liquor. They had already consumed half bottle and half was remaining. In the meantime, deceased Shashi pal came in the room of accused. The remaining liquor was served in five glasses. Deceased Shashi Pal was not served wine at that time. Volunteered that it was appearing that he had already consumed liquor. The scooter of Shashi Pal was parked on the road and he was requesting Harbans Lal to park his scooter in the courtyard of his house. No quarrel or arguments took place between the accused and deceased in his presence. PW-13 Milkhi Ram deposed that he had rented out the house to accused Harbans Lal on monthly rent of Rs. 300/-. Accused Harbans remained in the house for about 6 years. Accused had vacated the house about six months ago. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that he visited the house of accused at 4:45 PM where Harbans, Vijay, Kuldeep and Shyam Kumar alias Bhola were taking liquor. He also consumed one peg of liquor. He denied that accused and deceased remained there. Volunteered that all of them left the house of accused together. He denied the suggestion that at about 9:00 PM, he received a telephonic call from Harbans Lal asking him to conceal the scooter of Shashi Pal deceased.

26. It has also come in the statement of PW-13 Milkhi Ram that all of them had left the house of accused Harbans Lal together. PW-8 Onkar Singh has stated that the deceased appeared to be in drunken condition. PW-11 Ajeet Singh deposed that the deceased was not served wine at that time and volunteered that it appeared that he had already consumed liquor. Thus, the deceased was in the company of PW-8 Onkar Singh, PW-11 Ajeet Singh and PW-13 Milkhi Ram and they had consumed liquor together. No witness has deposed that accused and deceased were left alone in the house. The dead body was recovered early in the morning on 30.10.2012.

27. I.O. PW-24 SI Brij Mohan denied the suggestion in his cross-examination that there was no evidence of last seen together of the deceased, being alone in the company of accused, in the evening on 29.10.2012 at Ganoh or any place around it. He further admitted that as per the prosecution story, deceased was enjoying drinks with the alleged accused and others in the afternoon on 29.10.2012 at about 3:30 to 4:00 PM and the body of the deceased was discovered in the morning at about 8:00 to 8:30 AM at Ganoh Chapper on 30.10.2012. He admitted that the time gap between the two events was too long. He also admitted that no witness under Section 161 Cr.P.C or under Section 164 Cr.P.C. has deposed that he saw the deceased alone in the company of accused on 29.10.2012 in the evening. He also admitted that during investigation it was found that the relations between the alleged accused and deceased were not strained. Thus, it cannot be said that the deceased was seen with the accused last time before the death.

28. In cases pertaining to circumstantial evidence, the prosecution has to prove the entire link. All the circumstances must point exclusively towards the guilt of the accused. In the cases based on circumstantial evidence, motive plays an important role. The prosecution, in the present case has not attributed any motive to the accused for killing the deceased. PW-24 SI Brij Mohan, in his cross-examination, has admitted that during investigation no motive for committing the alleged crime was noticed. The relations between the accused and deceased as per PW-8 Onkar Singh, PW-11 Ajeet Singh, PW-13 Milkhi Ram and PW-24 SI Brij Mohan were cordial. PW-24 SI Brij Mohan has also deposed that no evidence was found in the investigation that deceased had extra marital relations with the wife or girl friend of the accused. He also admitted that the rented house was on the State Highway. He also admitted that the place where the body was recovered was surrounded by many shops, including the liquor vend.

29. Their lordships of the Hon'ble Supreme Court in the case of ***Dandu Jaggaraju vrs. State of Andhra Pradesh,*** reported in ***(2011) 14 SCC 674,*** have held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. It is this circumstance which often forms the fulcrum of prosecution story. It has been held as follows:

> "9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story."

30. Their lordships of the Hon'ble Supreme Court in the case of ***Sathya Narayan vrs. State rep. by Inspector of Police,*** reported in ***(2012) 12 SCC 627,*** have held that in the case of circumstantial evidence, motive also assumes significance since absence of motive would put Court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omissions or conjectures do not take place of proof. It has been held as follows:

> "42) In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure

that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust."

31. Their lordships of the Hon'ble Supreme Court in the case of ***Majenderan Langeswaran vrs. State (NCT of Delhi) and another,*** reported in ***(2013) 7 SCC 192,*** have held that onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court and all the circumstances must lead to the conclusion that accused is the only one who has committed crime and none else. It has been held as follows:

"3. On 30th November, 1996, an altercation is stated to have taken place between the accused and the deceased L. Shivaraman. As the accused had sustained some cut injuries on his hands, he reported the matter to the officials. On 1st December, 1996 when the ship was on high seas, the appellant took off from his duty as helmsman on the ground of pain in his hands due to cut injuries and another helmsman Baria was asked to do the duty as replacement. As the accused and the deceased were staying in Cabin No. 25, the accused was temporarily shifted from that cabin to Cabin No. 23 due to the above incident of assault. At about 1510 hours, the accused allegedly approached IInd Officer Kalyan Singh (PW-6) with a blood- stained knife in his hand and his hands smearing in blood and is alleged to have confessed before him that he had killed L. Shivaraman. On being asked by Kalyan Singh (PW-6), the appellant handed over the blood-stained knife to him which he placed in a cloth piece without touching the same. Kalyan Singh (PW-6) then intimated the Captain and other officers. The body of L. Shivaraman was found lying in Cabin No. 23 in such a way that half of it was inside the cabin and half of it outside. The officials of Shipping Corporation of India were informed. On incident being reported, pursuant to an instruction from concerned quarter, the ship was diverted to Hongkong. On being so directed by the Captain of the ship (PW-5), Kalyan Singh (PW-6) got the body of the deceased cleaned up for being preserved in the fish room with the help of Manjeet Singh Bhupal (PW-4) and Chief Officer V.V. Muralidharan (PW-18) took photographs. The blood-stained knife was kept in the safe custody of PW-5. The accused was then apprehended, tied and disarmed before being shifted to the hospital on board. Since the ship was having Indian Flag, as per the International Treaty of which India was a signatory, the act of the accused was subject to Indian laws. Accordingly, a case bearing R.C. No. 10(S) of 1996 was registered by the Central Bureau of Investigation (CBI) against the accused on 6th December, 1996.

16. Now, we have to consider whether the judgment of conviction passed by the trial court and affirmed by the High court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would

mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court.

17. In the case of Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, this Court observed as under:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. …."

18. In the case of Padala Veera Reddy vs. State of A.P., 1989 Supp (2) SCC 706, this Court opined as under:

"10. Before adverting to the arguments advanced by the learned Counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, (1982) 2 SCC 351)"

19. In the case of C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193, this Court while considering a case of conviction based on the circumstantial evidence, held as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

20. In the case of Ramreddy Rajesh Khanna Reddy vs. State of A.P., (2006) 10 SCC 172, this Court again considered the case of conviction based on circumstantial evidence and held as under:

"26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See Anil Kumar Singh v. State of Bihar, (2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P., (2005) 7 SCC 603)."

21. In the case of Sattatiya vs. State of Maharashtra, (2008) 3 SCC 210, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances." This Court further observed in the aforesaid decision that:

"17. At this stage, we also deem it proper to observe that in exercise of power underArticle 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court—Bharat v. State of M.P., (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

22. In the case of State of Goa vs. Pandurang Mohite, (2008) 16 SCC 714, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

23. It would be appropriate to consider some of the recent decisions of this Court in cases where conviction was based on the circumstantial evidence. In the case of G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593, this Court elaborately dealt with the subject and held as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

24. In the case of Rajendra Pralhadrao Wasnik vs. State of Maharashtra, (2012) 4 SCC 37, while dealing with the case based on circumstantial evidence, this Court observed as under:

"12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

25. Last but not least, in the case of Brajendrasingh vs. State of M.P., (2012) 4 SCC 289, this Court while reiterating the above principles further added that:

"28. Furthermore, the rule which needs to be observed by the court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. (Ref. Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Shivu v. High Court of Karnataka, (2007) 4 SCC 713 and Shivaji v. State of Maharashtra, (2008) 15 SCC 269)"

26. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else."

32. Their lordships of the Hon'ble Supreme Court in the case of ***Rishipal vrs. State of Uttarakhand,*** reported in ***(2013) 12 SCC 551,*** have held that motive does not have a major role to play in cases based on eye witnesses account of incident but it assumes importance in cases that rest entirely on circumstantial evidence. Their lordships have further held that circumstances sought to be proved against accused be established beyond reasonable doubt, but also that such circumstances form so complete a chain, as leaves no option for court, except to hold that accused is guilty of offences with which he is charged. It has been held as follows:

"15. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The

> appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See Sukhram v. State of Maharashtra (2007) 7 SCC 502, Sunil Clifford Daniel (Dr.) v. State of Punjab (2012) 8 SCALE 670, Pannayar v. State of Tamil Nadu by Inspector of Police (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.
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> 19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered."

33. The fourth circumstance relied upon by the learned trial Court is the subsequent conduct of the accused. According to the learned trial Court the accused did not pick up the mobile phone of PW-4 Aparna Sharma. According to her, the deceased was called by the accused around 3:15 PM. He told her that he would come back within 10-15 minutes. Thereafter, her husband never turned up. She tried to contact her husband on telephone and the ring was going up to 6:30 PM and then it went switched off. At about 12 midnight, she tried to contact accused Harbans Lal on his phone but he did not attend her call. It is unusual conduct of PW-4 Aparna Sharma. She should have immediately contacted her husband's brother PW-1 Ram Pal or PW-2 Pankaj Bhardwaj. She has contacted them only in the morning of 30.10.2012. The prosecution has not linked the telephone number of Aparna Sharma (wife of the deceased) to that of accused Harbans Lal. The police has taken into possession only the call details of telephone numbers of Harbans

Lal, Onkar Singh, Rohit, Shashi Pal, Vijay Kumar and Ajeet Singh. Thus, it cannot be said that Harbans Lal intentionally did not pick up the phone of Aparna Sharma.

34. The fifth and sixth circumstance(s) relied upon by the learned trial Court is recovery of scooter of deceased from the courtyard of the accused and recovery of pair of shoes of the accused. PW-8 Onkar Singh deposed that at about 9:00 AM, accused made a telephone call and told him to hide the scooter somewhere which was parked outside his quarter. He refused to do so. PW-11 Ajeet Singh deposed that the scooter of Shashi Pal was parked on the road and that he was requesting Harbans Lal to park his scooter in the courtyard of his house. In the meantime, he went away to his house. In his cross-examination, he admitted that he did not see Onkar Singh in the room of accused when Shashi Pal was requesting accused to park his scooter in his residence. According to him also, no quarrel or arguments took place between the accused and deceased in his presence. PW-13 Milkhi Ram was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that at about 9:00 PM, he received a call from Harbans Lal asking him to conceal the scooter of Shashi Pal deceased. PW-9 Ashok Kumar deposed that a call was made by Harbans accused on his mobile at about 10:00 AM. The accused asked him as to where he was. The accused again made a call to see whether any scooter was parked there or not. He went to the quarter of Harbans and found a scooter parked there. He did not remember the number of the scooter. In case he visited the house of accused and found the scooter parked there, he would have definitely remembered the registration number of the scooter. Moreover, the presence of scooter in the house of accused is of no consequence because as per the prosecution case, the deceased had gone to the house of deceased to consume liquor on scooter.

35. According to PW-5 HC Tarsem Singh, accused handed over his shoes to the I.O. on 16.11.2012 which were allegedly used for beating deceased Shashi Pal by the accused. These were taken into possession vide memo Ext. PW-5/A. The body of the deceased was recovered in the morning of 30.10.2012. The shoes were recovered only on 16.11.2012. PW-5 HC Tarsem Singh has admitted that no witnesses were associated at the time when confession statement of the accused was recorded. He also admitted that the accused was in police custody on 16.11.2012. Independent witnesses ought to have been associated at the time of recording of the disclosure statement by the accused on 16.11.2012 qua the recovery of shoes.

36. The chain of events is incomplete. The prosecution has not attributed any motive as to why the accused would have killed the deceased. The theory of 'last seen together' has not been proved by the prosecution. The recovery of shoes in absence of associating independent witnesses at the time of recording of disclosure statement of the accused is also doubtful. The electronic evidence has not been proved as per Section 65-B of the Indian Evidence Act. The quantity of ethyl alcohol in the blood of the deceased was 172.50 mg%. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

37. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 17.10.2015, rendered by the learned Addl. Sessions Judge, Kangra at Dharamshala, H.P., in Sessions case No. 1-N/VII/2013, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

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

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

Deepak ...Appellant
Versus
State of HP ...Respondent

Cr. Appeal No. 309/2015
Reserved on: 9.3.2016
Decided on: March 11, 2016

N.D.P.S. Act, 1985- Section 20- A bus was stopped for checking, accused was occupying seat No. 35- he was carrying black coloured bag on his lap which was found to be containing 450 grams of charas- accused was convicted by the trial Court- in appeal, held that independent witnesses have not supported prosecution case- no passenger of the bus was examined- PW-2 stated that bag was kept on his lap while PW-10 stated that accused was carrying the bag on his shoulder which is major contradiction- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. (Para-15 to 18)

For the Appellant: Mr. Vikas Rathore, Advocate.
For the Respondent: Mr. Parmod Thakur, Additional Advocate General with Mr. Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted against Judgment/Order dated 12.5.2015/13.5.2015 rendered by learned Special Judge, Kullu, District Kullu, Himachal Pradesh in S.T. No. 31 of 2014, whereby appellant-accused, hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs.30,000/-and, in default of payment of fine, to further undergo rigorous imprisonment for two months.

2. Case of the prosecution, in a nutshell, is that on 12.1.2014, a police party headed by ASI Kishan Chand of PS Bhunter, was on patrolling at forest check post, Bajaura. At 8.10 pm, Haryana roadways bus bearing registration No. HR 55P-1040 came from Manali

side. It was going to Delhi. The bus was stopped and they went inside the bus for checking. When they reached seat No. 35, person sitting on that seat got perplexed. His identity was ascertained. Accused was carrying one black coloured bag on his lap. On suspicion, accused was got down from the bus and he was taken to forest check post. IO ASI Kishan Chand gave his personal search. Driver of the bus Rajinder and Conductor Jai Dev were also associated and in their presence IO had given his personal search to the accused. Then bag of the accused was searched from which two packets wrapped in Khaki cello tape were recovered. Both the packets were opened and black coloured stick shaped substance was recovered It was found to be charas. It weighed 450 grams. A sample of 20 grams charas was separated and remaining 430 grams charas was filled in the same cello tape packets and packets were put in the bag and bag was put in cloth parcel. It was sealed with 6 seals of 'M'. IO also filled in NCB form in triplicate and sent intimation to the Police Station, Bhunter for registration of FIR through ASI Yashpal. FIR was registered. Case property was resealed by SHO Police Station, Bhunter and deposited with MHC. Contraband was sent for examination to FSL Junga. Investigation was completed and Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 10 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He has admitted that he was sitting on seat No. 35, however, he denied that he was carrying any bag with him. According to him, bag was lying on the rack of the bus just above seat No. 35. Accused was convicted by the learned trial Court. Hence, this appeal.

4. Mr. Vikas Rathore, Advocate, has vehemently argued that the prosecution has failed to prove case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General, has supported the judgment/order of conviction dated 12.5.2015/13.5.2015.

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

7. PW-1 Purender Kumar deposed that on 12.1.2014, he alongwith ASI Kishan Chand and other police officials was present at Bajaura Check post. At 8.10 pm, Haryana roadways bus HR 55P-1040 came from Manali side which was going to Delhi. The bus was stopped and they went inside the bus for checking. When they reached seat No. 35, person sitting on that seat got perplexed. His identity was ascertained. Accused was carrying one black coloured bag on his lap. On suspicion, accused was got down from the bus and he was taken to forest check post. IO ASI Kishan Chand gave his personal search. Driver of the bus Rajinder and Conductor Jai Dev were also associated and in their presence IO had given his personal search to the accused. Then bag of the accused was searched from which two packets wrapped in Khaki cello tape were recovered. Both the packets were opened and black coloured stick shaped substance was recovered. It was found to be charas. It weighed 450 grams. 20 grams charas was separated and remaining 430 grams charas was filled in the same cello tape packets and packets were put in the bag and bag was put in cloth parcel. Words 'Fast Track' were written on the black coloured bag. In the cross-examination, he has admitted that they had taken lift in a vehicle. He did not remember the number of the vehicle. He also did not remember the name of the driver. He did not remember that whether the front and back side seats of seat No. 35, were occupied or not. IO has not asked any passenger to become witness. In all, 40-42 passengers were in the bus. After giving search, IO had conducted personal search of the accused. Volunteered that personal search of accused was carried out after search of the bag. It was conducted before the arrest of the

accused. Personal search of accused was carried out after 10-15 minutes of search of the bag.

8. PW-2 ASI Yashpal deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. Rukka was handed over to him by IO. It was taken to Police Station Bhunter. In the cross-examination, he has admitted that other vehicles were also checked. He also admitted that the IO gave personal search to the accused and thereafter search of accused was conducted by the IO. Volunteered that IO checked the bag of accused and thereafter, personal search of accused was conducted.

9. PW-3 HC Gian Chand deposed that ASI Rajesh Kumar had deposited on 12.1.2014, two sealed parcel sealed with six seals of 'M' and three seals of 'T' along with NCB I form in triplicate, copy of seizure memo, copy of FIR, sample seals of 'M' and 'T'. He made entry of said case property in the register vide abstract Ext. PW-3/A. He sent the bigger parcel to FSL Junga through Constable Umesh.

10. PW-4 Constable Umesh deposed that MHC Gian Chand has handed over to him one parcel sealed with six seals of 'M' and three seals of 'T' alongwith NCB forms etc. to be deposited with Forensic Science Laboratory Junga. He deposited the same with FSL Junga.

11. PW-6 ASI Rajesh Kumar, deposed that at 11.35 pm, ASI Kishan Chand produced one bag, one small sealed parcel sealed with 6 seals of 'M' each alongwith sample seal, copy of FIR, NCB I forms and other relevant documents. Both the aforesaid parcels were resealed by him with three seals of 'T' and he filled in relevant columns of NCB I forms, one of which is Ext. PW-3/C.

12. PW-7 Rajinder Kumar is the driver of the Bus. According to him, bus was stopped by the police personnel at the barrier. Police entered the bus for checking whereas he and conductor got down from the bus. Police personnel checked the bus and after about 15 minutes they came down with a bag and the accused. He did not identify the accused. He deposed that the police did not check the bag in their presence and nothing was recovered from the bag in their presence. He was declared hostile and cross-examined by the learned Public Prosecutor. According to him, he has signed blank papers on that day. He denied that bus was searched by the police personnel in his presence and in presence of the conductor. He denied that in their presence accused was found sitting on seat No. 35 in the bus and he was carrying black coloured bag, on which 'fast track' was written, on his legs. He denied the suggestion that before checking the bus, police personnel gave their personal search to the accused and nothing incriminating was found from the police personnel. He denied that in their presence, bag of accused was searched and from it two packets, which were taped, were recovered and those were found containing Charas, which weighed 450 grams. He denied that in their presence, one sample of 20 grams was separately packed and sealed in a parcel and sealed with six seals of 'M'. He admitted that accused handed over a ticket of `340/- to the police. He admitted that contraband was taken into possession by the police. In the cross-examination by the learned defence counsel, he has admitted that police told that bag was recovered by them from the rack of the bus just above where the accused was sitting. Accused was saying that the bag did not belong to him. Accused was taken by the police to the check post. PW-7 Rajinder admitted his signatures on memo Ext. PW-1/C, Ext. PW-1/B and Ext. PW-1/A.

13. PW-8 Jai Dev deposed that the police stopped the bus for checking. He and Driver got down from the bus. Police asked the passengers to get their luggage checked.

After some time, police got down with the bag. Bag was not checked in their presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that he and driver were associated in the investigation and in their presence, bus was checked and accused was found sitting on seat No. 35 with bag on his legs. He denied that the accused was got down from the bus in their presence and taken to check post. He denied that carry bag of the accused was checked and from it two packets which were taped, containing charas were recovered and on weighing, charas was found to be 450 grams. He also denied that in his presence, police separated sample of 20 grams from the contraband, packed it in a parcel and sealed with six seals of 'M' and remaining charas was put back in the same bag and it was sealed with 6 seals of 'M'. He denied that he signed the documents after going through them. He denied that he refused to sign the documents. He has identified the signatures on Ext. P2 and Ext. P4.

14. PW-10 ASI Kishan Chand deposed the manner in which accused was apprehended. Accused was sitting at Seat No. 35. They found that the person sitting on that seat was terrified. He was having a Pithu bag on his shoulder on which 'Fast Track' in red thread was inscribed. On inquiry, he disclosed his identity. Thereafter, bag was opened. Contraband was recovered. Sealing proceedings were completed. He prepared Rukka Ext. PW-10/A. It was sent through ASI Yashpal to Police Station, Bhunter. FIR was registered. In the cross-examination, he has admitted that he had checked 7-8 passengers before reaching seat No. 35. Seat No. 35 was on the driver side of the bus. He did not remember whether the passengers were sitting on front and back side of seat No. 35. Bag was kept by the accused on his legs. Passengers were not associated in the investigation though they had seen the accused being taken out of the bus. He had conducted the personal search of the accused after arresting him and not before that. There was nothing in the Bag Ext. P2, except Charas.

15. Case of the prosecution has not been supported by PW-7 Rajinder Kumar and PW-8 Jai Dev. PW-7 Rajinder Kumar has denied the suggestion that the police in his presence and in the presence of the Conductor checked the bus. He denied that in his presence, accused was found sitting on seat No. 35. He also denied that in their presence bag of the accused was checked and from it two packets containing contraband were recovered. Though, he has admitted his signature on Ext. PW-1/C, PW-1/B and PW-1/A. Similarly, PW-8 has denied that the bag was searched in their presence and contraband was recovered from it. He has admitted his signatures on Ext. P2 and Ext. P4

16. Case of the prosecution is that the accused was sitting on Seat No. 35 and he kept the black coloured bag on his lap. Prosecution has not examined any of the passengers from the bus though the bus was carrying 40-42 passengers. PW-2 ASI Yashpal has deposed that the accused had kept the bag on his lap. However, PW-10 ASI Kishan Chand deposed that the accused was carrying rucksack on his shoulder, on which 'Fast Track' was inscribed. There is major contradiction in the statements of PW-2 ASI Yashpal and PW-10 Kishan Chand, whether the accused was carrying bag on his lap or was carrying it on his shoulder.

17. Case property in this case was produced while recording statement of PW-10 Kishan Chand. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

18. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be

kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused.

19. Accordingly, the present appeal is allowed. Judgment/Order dated 12.5.2015/13.5.2015 rendered by learned Special Judge, Kullu, District Kullu, Himachal Pradesh in S.T. No. 31 of 2014 is set aside. Accused is acquitted of the offence under Section 20 of the Act. He is ordered to be released, if not required by the police in any other case. Fine amount, if any, paid by the accused, be refunded to him. The Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned forthwith.

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

Smt. Kalawati ...Petitioner

Versus

Sh. Netar Singh and others ...Respondents

CMPMO No. 492 of 2015.
Date of decision: March 11, 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Petitioner filed a civil suit for permanent prohibitory and mandatory injunction pleading that suit land was jointly owned and possessed by the parties- respondents be restrained from raising construction over the best piece of the land until the land is partitioned- suit was opposed by filing a reply pleading that parties were in separate possession under a family arrangement and the petitioner had constructed a house over the suit land- application was allowed by the trial Court and parties were directed to maintain status quo qua nature and possession of the suit land- an appeal was preferred- appellate court reversed the order of the trial Court and dismissed the application filed by the petitioner – In revision, held that suit land is large chunk of land, wherein, the petitioner is having 1/4th share- petitioner has already constructed a house over the suit land- mere fact that parties are co-owners or joint owners is not the sole criteria for granting or refusing injunction - the conduct of the parties also plays an important role- plaintiff has raised the construction and has not disclosed this fact in the plaint- she is estopped from questioning the construction being raised by the respondents- petitioner has not approached the Court with clean hands, this is a sufficient ground for declining the injunction- an error was committed by the trial Court- revision dismissed. (Para-5 to 12)

Case referred:
M.Gurudas and others versus Rasaranjan and others (2006) 8 SCC 367

For the Petitioner : Mr. Rajneesh K. Lal, Advocate.
For the Respondents : Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This petition under Article 227 of the Constitution of India is directed against the order passed by learned District Judge, Mandi whereby he set-aside the order passed by the trial Court and dismissed the application preferred by the petitioner for grant of injunction.

2. The petitioner filed a suit for permanent prohibitory and mandatory injunction on the ground that the suit land was jointly owned and possessed by the parties and therefore, until and unless partition is carried out by metes and bounds, the respondents be restrained from raising construction over the best piece of the land. It was further submitted that once the proceedings for partition were pending before the leaned Assistant Collector 1st Grade, then it was of the more reasons that the respondents ought to be restrained. Similar prayer was made in the application for interim injunction.

3. The respondents contested the suit as also the application by raising various preliminary objections like maintainability, cause of action, suppression of material facts, estoppel, misjoinder and non-joinder of necessary parties, valuation and jurisdiction. On merits, it was pleaded that the parties to the lis were in separate possession under family arrangement and that the petitioner had already constructed a house over the suit land. The pendency of the partition proceedings was admitted, but it was denied that the respondents were raising construction on the best part of the suit land, rather it was specifically stated that construction being raised was on a part of Khasra No. 160 which was not abutting to Pairi road.

4. The learned trial Court granted the application by directing the parties to maintain status quo qua nature and possession of the suit land till the disposal of the suit. This order was questioned in appeal before the learned lower Appellate Court, who reversed the order passed by the trial Court and ordered the dismissal of the application. It is against this order that the instant petition has been filed on the ground that once the parties were recorded in joint ownership and possession, then there was no occasion for the learned lower Appellate Court to have dismissed the application when partition had not been effected and proceeding qua the same were admittedly pending before the Collector.

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

5. It is not in dispute that the suit land comprises of a fairly big chunk of land wherein the petitioner is having 1/4th share, whereas the respondents are owners to the extent of half share. It is also not in dispute that insofar as the petitioner is concerned, she has already constructed two house(s) over the suit land. No doubt, learned counsel for the petitioner has tried to dispute this position but then the pleadings in the suit stand in the way of the petitioner. The respondents in para 3 of the written statement had clearly averred as under:

> *".....The plaintiff has already constructed two houses and two cow-sheds over the better portion of the suit land and the defendants Nos. 1 and 2 have not constructed any house over the suit land as yet. Photographs of the house of plaintiff snapped over the suit land are attached herewith for kind perusal of the learned Court, which fact has been suppressed by the plaintiff from this learned Court and thus, the plaintiff has not come with clean hands before the*

learned Court for redressal ; hence she is not entitled for any equitable relief of injunction against the defendants…"

6. In response to the aforesaid averments, the petitioner in the replication has only come out with the simplicitor denial as would be evident from para-3 of the replication which reads thus:

"3. That para No. 3 of the written statement is also wrong hence denied and that para of the plaint is reaffirmed to be correct."

7. Even if the entire replication is read, it would evident that the petitioner has not at all disputed the aforesaid averments. It is more than settled rule that a specific averment in the pleading is required to be rebutted with a specific denial alongwith sufficient explanation and reasons for denial. Once, there is no denial much less specific denial, then the contents of the written statement shall be deemed to have been admitted.

8. 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)."

9. Learned counsel for the petitioner would vehemently argue that since the respondents are admittedly joint owners of the property, therefore, they should be restrained from raising any construction till the suit is finally ordered to be partitioned more particularly when the same are already pending. The matter is not so simple as is being portrayed by the petitioner. This Court in an elaborate judgment has considered the rights and liabilities of co-owners in *CMPMO No. 52 of 2014 titled as Ashok Kapoor vs. Murtu decided on 24.6.2015* and thereafter concluded as follows:

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his

position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands.

10. It would be evident from the decision, the mere fact that the parties are co-owners and joint owners etc. is not the sole criteria for granting or refusing injunction, the conduct of the parties too plays an important role and in such like cases, the plaintiff conduct has to be free from blame so as to enable the court to conclude that the plaintiff has approached the Court with clean hands. But here is a case where the petitioner though claims herself to be a joint owner with the respondents after having already raised construction over the suit land seeks an injunction against the respondents without even disclosing this fact.

11. The injunction being an equitable relief, the person seeking injunction must come with clean hands. The well known mechanism that applies in such matter is "*he who seeks equity must do equity*". Since the petitioner has admittedly raised construction of her house(s) on a portion of the suit land, she is estopped and has waived of her right to assail and question the construction being raised by the respondents. The fact that the petitioner has not approached the court with clean hands in itself is a sufficient ground for not granting the relief of injunction.

12. Having said so, I find no merit in this petition and the same is accordingly dismissed, so also the pending applications, leaving the parties to bear their own costs. However, before parting, it may be observed that the findings, observations, reasons and conclusions recorded hereinabove are solely for the purpose of determination of this petition and the trial Court shall proceed to decide the matter without being influenced by whatsoever observed hereinabove. With these observations, the petition stands disposed of.

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

State of Himachal Pradesh ...Appellant

Versus

Vishnu Pal @ Papla and another ...Respondents

Cr. Appeal No. 357/2012
Reserved on: 8.3.2016
Decided on: March 11, 2016

Indian Penal Code, 1860- Section 363, 366 and 376- PW-1 and PW-17 were alone in their house- their grand-father had gone to Vikasnagar - when he returned, he found that his grand daughters were missing- they were recovered from the house of accused- PW-17 was raped by the accused- accused was tried and acquitted by the trial Court- PW-17 had not made the complaint to any person- her version that she slept with the accused inside the room and other family members were sleeping outside the house, is also not believable, when the accused was married and is having children- Medical Officer did not find any evidence of recent intercourse- both PW-1 and PW-17 knew that accused was married and there was no occasion to hold out a promise to marry PW-17- held, that in these circumstances, prosecution version is not believable and the accused was rightly acquitted by the trial Court- appeal dismissed. (Para-18 and 19)

For the Appellant: Mr. Kush Sharma, Deputy Advocate General.
For the Respondents: Mr. Deepak Kaushal, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted against Judgment dated 26.4.2012 passed by learned Additional Sessions Judge, Sirmaur District at Nahan, HP in Sessions Trial No. 28-N/7 of 2007, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences under Sections 363, 366 and 376 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 9.7.2007, Johari Ram, resident of Adarsh Colony, Rajban lodged a report in the police post Rajban, Police Station, Paonta Sahib that on the said date, he had accompanied Smt. Roshni Devi w/o Joginder Singh to Vikas Nagar for treatment. His grand daughters PW-1 and PW-17 (names withheld) aged about 18 years and 16 years, respectively, were in the house and when he came back, he found that his grand daughters were missing. They were recovered from the house of Vishnu Pal. According to him, prosecutrix PW-17 had been raped by accused No.1. PW-17 was subjected to medical examination. Investigation was completed and Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 19 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. According to them, they were falsely implicated. Trial Court acquitted the accused. Hence, this appeal.

4. Mr. Kush Sharma, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Deepak Kaushal, Advocate, has supported the judgment of acquittal dated 26.4.2012.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 (name withheld) deposed that in the year 2007, she and her sister were residing with their maternal grand father at Rajban. Both the accused used to visit Rajban. On 9.7.2007, at about 2 pm, both the accused came on motor cycle to Rajban. Accused Rishipal @ Ajay promised to marry her and accused Vishnu Pal @ Papla promised to marry PW-17. Accused asked them to accompany them. On his promise, they accompanied the accused. Accused Vishnu Pal took them on motor cycle to his village in Haryana. Accused Rishipal @ Ajay came by bus from Village Tagain. Accused Ajay kept her in the fields during night. Accused Vishnu took PW-17 to another place and thereafter accused Ajay told her that he will not marry her and left the place. Accused Vishnu went alongwith her sister to another place. Accused Vishnu left her in the house. In her cross-examination, she deposed that Vishnu used to come to Rajban prior to 9.7.2007. She had been talking with accused Rishipal @ Ajay on telephone. She did not know whether he was married or not. However, they came to know that that accused Vishnu was married and had children also. On 9.7.2007, her grand father had gone to Vikas Nagar. Accused Rishipal @ Ajay has not committed any sexual intercourse with her neither did he misbehave with her in any manner. Her marriage was solemnised on 11.3.2008.

8. PW-2 Choti deposed that PW-1 and PW-17, used to work in Mahila Samiti Club. They had gone to the club where they used to serve water to the club members. They did not come back to their house when maternal grand father came back from Vikas Nagar. He told that PW-1 and P-17 did not come back to his house. She knew the accused. They used to visit Rajban. She had seen Vishnu talking to PW-17. Prosecutrix had told her that he wanted to marry the accused.

9. PW-3 Johari Ram deposed that PW-1 and PW-17 are his maternal grand daughters. On 9.7.2007, he had gone to Vikas Nagar. In the evening when he came back to home, both were missing. He searched for them and reported the matter to the police. On the next day, he went to Mulana in search of PW-1 and PW-17. PW-1 was found in the house of accused Vishnu. They came back to Rajban on the next day. PW-17 was also recovered from the house of Vishnu.

10. PW-4 Shalender deposed that he has not seen any girl in his fields. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that accused Rishipal @ Ajay wanted to have sexual intercourse with PW-1 and on denial, accused left her alone in the fields. He denied that he took her to the house of the accused Vishnu.

11. PW-5 Balbir Singh deposed that the date of birth of PW-17 was 2.3.1989 and date of birth of PW-1 was 1.1.1991.

12. PW-6 Ranjeet Singh deposed that accused Vishnu was married and had four issues.

13. PW-7 Dr. Daljeet Kaur has medically examined PW-17. According to her opinion, she was used to sexual intercourse. However, there was no evidence of recent sexual intercourse. She issued MLC Ext. PW-7/B. she also examined PW-1 on 11.7.2007. According to P/V examination and local examination, there was no evidence which suggested that sexual intercourse has taken place with her. She issued MLC Ext. PW-7/C.

14. PW-12 Mahinder Singh being Panchayat Assistant has issued certificate Ext. PW-12/A qua PW-1 and PW-17.

15. PW-13 Vijay Kumar deposed that he was posted as TGT in GMS Muglawala Kartarpur. He issued date of birth certificate of PW-1 and PW-17, daughters of Chaman Lal.

16. PW-17 (name withheld), deposed that the accused Vishnu asked them to have friendship with him. He told her that he was unmarried and would marry her. Thereafter, Vishnu used to talk on telephone and stated that in case she does not marry him, he will consume poison. On 9.7.2007, at 3 pm, accused Vishnu and Ajay came to their village on motor cycle. Both the accused promised to solemnise marriage with them and took them on motor cycle to village Tagain. Accused Ajay came by bus. Accused Vishnu took her to the fields at village Tagain and stayed there during night. Ajay reached the village and promised to marry the younger sister. During night, Ajay left her sister by saying that he will not marry her. Brother of Vishnu, Golu came there and took PW-1 to the house of Vishnu Pal. Vishnu forcibly and without her consent committed rape upon her in the fields. Vishnu kept her in the fields for two nights and committed sexual intercourse with her without her consent. On the third day, Vishnu took her to his house where she found that the wife and three children were in the house. In her cross-examination, she deposed that the family members including Golu, brother of Vishnu, were sleeping outside the house and she alongwith Vishnu slept and stayed in the house. She has not complained to the members of the family of the accused about the incident. There were many houses in the village of Vishnu but she did not complain to any villagers about this. She was already married at the time of recording her statement. Name of her husband is Suresh

17. PW-19 ASI Ram Pal Yadav was the IO. He recovered PW-1 and PW-17. He also took into possession the motor cycle. He obtained the birth certificates of PW-1 and PW-17.

18. According to the statement of PW-1, accused Rishipal @ Ajay had no sexual intercourse, nor did he misbehave with her in any manner. She was medically examined by PW-7 Dr. Daljeet Kaur and she issued MLC Ext. PW-7/C. According to her, there was no evidence to suggest that sexual intercourse has taken place with her. It has come in her statement that she was on talking terms with Rishipal @ Ajay on the telephone. Both the sisters knew that accused Vishnu was married and had children also. PW-17 deposed that accused forcibly raped her in the fields and thereafter took her to his house. She found that her wife and three children were present in the house. Version of PW-17 is not believable that she was raped in the house in the presence of the members of the family of the accused. There were houses in the village. She has not made complaint to any one. Her version that she slept with the accused Vishnu inside the room and other family members were sleeping outside the house, is also not believable. In case, she has been raped by the accused No.1, Vishnu, she could have told this incident to the wife of the accused No.1. According to PW-7, Dr. Daljeet Kaur, prosecutrix was used to sexual intercourse however, there was no evidence of recent intercourse. She was examined on 12.7.2007. Age of PW-1 is more than 16 years and age of PW-17 was more than 18 years. PW-1 was not raped even according to her own version. Act of PW-17 was consensual. She has gone voluntarily on motor cycle to the village of accused No.1. Since both the sisters knew that the accused Vishnu was married, there was no occasion for him to hold out a promise to marry PW-17. PW-17, in her cross-examination, admitted that she has not shown the fields and the room , where accused had sexual intercourse with her nor the police inquired about this aspect.

19. The prosecution has failed to prove its case against the accused. Accordingly, there is no occasion for us to interfere in the well reasoned judgment of acquittal passed by the learned trial Court.

20. The appeal fails and is accordingly dismissed. Pending applications, if any, are also disposed of. Bail bonds of both the accused persons are discharged.

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

Unpa .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 382 of 2014
Reserved on:March 08, 2016.
Decided on: March 11, 2016.

Indian Penal Code, 1860- Section 302 and 309- Complainant was told by 'R' that something unusual had happened to her husband- she went to the house of 'N'- the accused was found unconscious and vomiting- 'A' was taking her towards the road- 'S' was told by 'A' that accused had taken fungicide and had administered it to her child G who was unconscious- vehicle was driven by 'A' with the high speed- vehicle went off the road and fell into a deep gorge –'A' died and other occupants received injuries- injured were taken to hospital, where the statement of the complainant was recorded- accused was convicted and sentenced by the trial Court- held in appeal that Police had not examined 'R' who had informed the complainant - he was a material witness- PW-1 did not support the complainant regarding his presence at the house – the recoveries of mat and bottle of fungicide are also doubtful- no person had seen the accused administering the poison to the child- motive for commission of crime was also not proved- Medical Officer had not given the proximate time of taking poison and time of death- mother-in-law of the accused and her husband were not examined- chain of circumstances is incomplete - the prosecution has not successfully proved his case against the accused beyond reasonable doubt-appeal accepted and accused acquitted. (Para- 18 to 33)

Cases referred:
Dandu Jaggaraju vrs. State of Andhra Pradesh, (2011) 14 SCC 674
Sathya Narayan vrs. State rep. by Inspector of Police, (2012) 12 SCC 627
Majenderan Langeswaran vrs. State (NCT of Delhi) and another, (2013) 7 SCC 192
Rishipal vrs. State of Uttarakhand, (2013) 12 SCC 551
Jaipal vs. State of Haryana, (2003) 1 SCC 169

For the appellant: M/S Anup Chitkara, N.S.Chandel and Dinesh Thakur, Advocates.
For the respondent: Mr. Kush Sharma Dy. AG with Mr. J.S.Guleria, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 8.7.2014, rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Distt. Shimla, H.P. in Sessions Trial No. 0100032/2012, whereby the appellant-accused (hereinafter referred to as accused), who was charged with and tried for offences punishable under Sections 302 & 309 IPC, has been convicted and sentenced to imprisonment for life and fine of Rs.10,000/- and in default of payment of fine to further undergo simple imprisonment for three months under Section 302 IPC. She was also convicted and sentenced to undergo simple imprisonment for one year for the offence punishable under Section 309 IPC and fine

of Rs.1000/-. In default of payment of fine she was further sentenced to undergo simple imprisonment for a period of one month.

2. The case of the prosecution, in a nut shell, is that Smt. Shiksha was residing in the backyard of the house of in-laws of accused. She was attending to the daily chores. On 22.6.2012, Raju, a Nepali labourer, came rushing and on inquiring about her husband Sh. Naresh Mukhiyan informed her that something unusual had happened. She heard cries and commotion emanating from a nearby house. She also left her work and ran towards the house of Navjeet, the husband of accused. On reaching she found Unpa accused unconscious and vomiting. Anil Dharma, a relative of the family was taking her towards road by lifting. On his asking for help, Smt. Shiksha and Anil Dharma ferried the accused upto vehicle HP-06A-2557 and made her to sit in it. During this period, Smt. Shiksha was told by Anil Dharma that accused had taken fungicide and also administered it to Gudiya Smt. Narvada and Prem Shyam were already sitting in the said vehicle and besides them Gudiya wrapped in a cloth, was in the lap of Smt. Narvada. She was also unconscious. They were being taken to CHC Kotgarh, for treatment in the vehicle driven by Sh. Anil Dharma. Sh. Anil Dharma was driving the vehicle fast under mental stress. When the vehicle reached Majehwati nullah, it went off the road and fell into a deep gorge. Sh. Anil Dharma died on the spot and other occupants received injuries. It was also noticed at that time that Gudiya also died. The injured were shifted to CHC Kotgarh and from there they were shifted to IGMC Shimla. The statement of Smt. Shiksha was recorded under Section 154 Cr.P.C. FIR was registered with Police Station Kumarsain. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 14 witnesses. The accused was also examined under Section 313 Cr.P.C. She admitted that she is resident of Jarol and houses of Smt. Shiksha and Narvada are situated nearby her house. She has also admitted that on 22.6.2012, at about 9:15 AM, she was vomiting and on seeing that Prem Shyam loudly made a call to Smt. Narvada and asked her to come to her house. She took the poisonous substance under the impression that it was a cough syrup since there were many bottles with similar appearance in their house. She mistakenly consumed that substance as a cough syrup. The child was on breast feeding and she was also vomiting on the bed. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Anup Chitkara, Advocate has vehemently argued that the prosecution has failed to prove the case against the accused beyond reasonable doubt. On the other hand, Mr. Kush Sharma Dy. AG and Mr. J.S.Guleria, Asstt. AG for the State have supported the judgment of the learned trial Court dated 8.7.2014.

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

6. PW-1 Prem Shyam deposed that on 24.6.2012, he visited the house of accused to express condolences on the death of child of accused. He had alongwith member of Panchayat handed over ex-gratia grant to the accused for a sum of Rs. 10,000/-. The police officials were already present there. The police officials told them that they have taken in possession the mat on which the accused had vomited. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that the police officials in their presence took in possession the mat by cutting the same and put in the parcel. He denied the suggestion that the police officials sealed the parcel with seals of seal impression “O” in their presence. He admitted that the samples of seal were prepared by the police in their presence. He signed Ext. PW-1/A. The seal after use was handed over

to Const. Roshan Lal. He admitted that the mat was taken into possession by the police vide recovery memo Ext. PW-1/B. He also signed the same. The accused is not related to him. In his further cross-examination by the learned defence counsel he deposed that the accused was not present on the spot when the police visited the village on 24.6.2012. According to him, the mother-in-law of accused was present in the house at that time, however, husband, sister-in-law and husband of sister-in-law were not present.

7. PW-2 Dayal Shyam deposed that he was called to the spot by the police. The police had already wrapped the cap of the bottle of fungicide with a piece of cloth. The words "Shield" was inscribed on the fungicide bottle. The accused did not hand over the bottle of fungicide in his presence to the police. Volunteered that she was not in the house on that day. He was also declared hostile and cross-examined by the learned Public Prosecutor. He did not know with what seal impression the bottle was sealed. The police had not recorded his statement at the spot. He denied that accused handed over the bottle of fungicide containing copper sulphate to the police in his presence. He also denied that accused told the police in his presence that she consumed fungicide containing the bottle. He denied that the bottle was sealed with seal impression "H" in his presence. He admitted his signatures on Ext. PW-2/A. He admitted that the fungicide bottle was taken into possession by the police vide recovery memo Ext. PW-2/B. He signed the same. In his cross-examination by the learned defence counsel he deposed that he has not seen any other person signing the document Ext. PW-2/B and perhaps it has been signed by the police officials. The fungicide bottle was in the hand of police constable and its cap had been duly sealed by the police. His signatures were obtained by the police after second and third day of the incident.

8. PW-3 Dr. Piyush Kapila has conducted the post mortem examination on the deceased. He noticed multiple injuries over the body of the deceased in the shape of contusions and one laceration on the scalp. There was fracture of right brital bone. A whitish fluid was present in the stomach with peculiar smell. Viscera was collected and was sent for chemical examination. He was of the opinion that the deceased died as a result of ante mortem poisoning. He issued final opinion Ext. PW-3/F. In his cross-examination he deposed that copper sulphate is not that potent poison. He admitted that it could not be opined as to whether the deceased was administered or taken by the deceased. Volunteered that the victim being a child of six months could not have taken it accidently. He admitted that there may be a chance that a child who has access to poison which is left behind by the parents carelessly could be taken by the child. He admitted the suggestion that a child could have survived with timely medical aid. He also admitted that he has not given any opinion regarding the time of intake of poison and time of death. He had opined the probable time that might have elapsed between death and post mortem as around 24 hours and in the same column he had not mentioned the probable time which might have elapsed between injury and death. He admitted that there was no sign of forcible administration of poison. Whitish fluid in stomach could also suggest that breast feed could have been administered to the child.

9. PW-6 Smt. Shiksha Devi deposed that on 22.6.2012 at about 9:15 AM, she was in her house when Raju Gorkha came to her house and asked about her husband. He told that something had happened in the house of Navjeet of their village. Her husband had gone for hair cut as such she went to the house of Navjeet. On reaching there, she saw Unpa accused vomiting. The husband of her sister-in-law (Nanad), namely, Anil Dharma was also present there. He requested her to help them and engage vehicle. After engaging vehicle accused was put in that vehicle and she accompanied her to Kotgarh hospital. Anil Dharma disclosed her that accused had consumed poison and she had to be taken to

hospital. The daughter of accused was also there in the vehicle wrapped in a blanket. The vehicle was driven by Anil Dharma. When the vehicle reached at Majhoti Nullah, the vehicle went off the road and fell into a gorge. The daughter of accused also died in the accident. Her statement was also recorded by the police vide Ext. PW-6/A. In her cross-examination, she admitted that the name of the father of Sh. Prem Shyam is Keshav Ram. She reached the house of accused. The child was in the lap of Narvada. She did not check the child whether she was alive or dead. Before that day, she did not see any sort of quarrel in the house of accused. The accused was taking due care of her child. Anil Dharma did not tell her that the accused had taken poison and also administered the same to her child. After this incident, she never had a talk with mother-in-law and husband of accused.

10. PW-7 Dr. Mahesh Kumar deposed that on 22.6.2012, Unpa wife of Navjeet was produced by the police for medical examination vide docket Ext. PW-7/A with history of consuming poison and being injured on roadside accident. The gastric lavage was done and sample was preserved after due sealing. I/V fluids were given. The sample of vomit was also preserved after due sealing and parcels were given with sample seal to the accompanying police for analysis with docket. The patient was referred to IGMC for further treatment. On receipt of the FSL report, traces of copper sulphate were detected in the samples of the parcels. He gave final opinion vide Ext. PW-7/B. In his cross-examination, he admitted that it was quite possible that the patient might have taken the poison accidently under mistake of fact considering it as a medicine. He further deposed that the gastric lavage was stored in a sterile bottle. The sample of vomit was not preserved. No specific seal was used in sealing the samples.

11. PW-8 Smt. Narvada deposed that on 22.6.2012 at about 9:15 AM, she was in her house when Prem Shyam loudly made a call and asked her to come to house of Unpa accused. When she reached their house, the accused was vomiting. She went inside the room and lifted the daughter of the accused who appeared to her to be sleeping. The daughter was wrapped in a blanket at that time. They brought the accused in a vehicle of Anil Dharma to Kotgarh hospital. She lifted the daughter of the accused and sat in the vehicle. However, when the vehicle reached Majhoti Nullah, it went off the road and fell into a gorge. She also became unconscious and later on came to know that Anil Dharma died in the accident. In her cross-examination, she deposed that when she reached the house of the accused, Prem Shyam son of Keshav Ram was already there. He was the first person who reached the house of the accused. The child of the accused was on the bed in a room and she took her from there. There was little movement in the hands and feet of the child. She did not come to know any circumstance that poison was forcibly administered to the child. She was not visiting the house of the accused frequently prior to this incident. She did not come to know about the circumstances which led to this incident. Prior to this incident, the accused behaved normally whenever she met her. The accused did not communicate with her from the movement when she was taken from her house in a vehicle till the accident happened. None told her that poison was taken accidently.

12. PW-9 HHC Roshan Lal deposed that the I.O. took into possession a piece of room mattress, which was placed on the room and on which the accused had allegedly vomited. It was cut from the mattress, parceled up, sealed with seal 'O" and taken into possession vide memo Ext. PW-1/B. In his cross-examination, he admitted that when the piece of mat was taken into possession the accused was not present at that time.

13. PW-10 Const. Sat Pal deposed that on 5.7.2012, Unpa accused gave to the I.O. one bottle of fungicide having some substance in it and told that she had consumed it on the date of occurrence. The bottle was packed in a cloth parcel, sealed with seal of "H" and taken into possession vide memo Ext. PW-2/B. It was signed by him alongwith Dayal

Shyam and accused. In his cross-examination, he deposed that accused went inside the room and brought the bottle and handed over to the I.O. in his presence. They were standing in the verandah just outside the room. The accused did not tell that she had accidently taken the fungicide. The piece of mattress was not taken by the I.O. from the room in her presence on that day.

14. PW-14 SI Rattan Chand deposed that on 24.6.2012, he was involved in the investigation of the accident case near Jarol falling within their jurisdiction. HC Ram Sain and Const. Jogeshwar Singh were also with them. HC Ram Sain and Const. Roshan Lal already had gone to IGMC for getting autopsy done on the body of Gudia aged six months. They met him at Jarol and handed over autopsy report Ext. PW-3/D of Gudia wherein the medical officer had reported the cause of death of Gudia because of ante mortem poisoning. The statement of Smt. Shiksha Devi wife of Naresh was recorded under Section 154 Cr.P.C. He prepared site plan Ext. PW-14/A. He got into possession the piece of mattress in the presence of Prem Shyam and Constable Roshan Lal vide memo Ext. PW-1/B. The accused was arrested on 24.7.2012. The bottle of fungicide was given by accused to her on 5.7.2012 after taking it out from store of her house. In his cross-examination, he admitted that no person had seen the accused taking poison or administering it to Gudia. It has come in the investigation that in the house of accused, her mother-in-law and husband used to reside with her. Volunteered that on that day, her husband and mother-in-law had gone in the morning to Theog for check up. Their statements were recorded under Section 161 Cr.P.C. Raju Nepali had left that area after the incident and he was not traceable during investigation. Raju Nepali was the first person who disclosed the incident to Shiksha Devi and others. Shiksha Devi had told that she was informed by Raju Nepali that something wrong had happened in the house of accused and he specifically did not disclose that it was a case of poisoning. Anil Dharma probably came to know that it was a case of poisoning because the accused was vomiting. It has not come in the investigation that the relations of accused with her husband and in laws were bad. He has categorically admitted that in the application Ext. PW-14/E and inquest Ext. PW-3/B, the cause of death of Gudia was mentioned as accident. Volunteered that the investigation was at the very initial stage at that time. He could not say whether there were signs of forcible administering of poison to the child on her body. It did not come in his investigation as to how poison was administered to the child.

15. PW-6 Smt. Shiksha Devi deposed that on 22.6.2012 at about 9:15 AM, she was in her house when Raju Gorkha came to her house and asked about her husband. He told that something had happened in the house of Navjeet of their village. Her husband had gone for hair cut as such she went to the house of Navjeet. On reaching there, she saw Unpa accused vomiting. The husband of her sister-in-law (Nanad), namely, Anil Dharma was also present there. He requested her to help them and engage vehicle. Anil Dharma disclosed her that accused had consumed poison and she had to be taken to Kotgarh hospital. The police has not examined Raju Gorkha. The police has also not made any efforts even to trace out Raju who had called Shiksha Devi PW-6 on 22.6.2012. According to PW-14 SI Rattan Chand, Raju Nepali had left that area after the incident and he was not traceable during investigation. Raju Nepali was the first person who disclosed the incident to Shiksha Devi and others. He was the material witness.

16. PW-6 Smt. Shiksha Devi also deposed that when she reached the house of accused Prem Shyam was already there. The name of the father of Sh. Prem Shyam is Keshav Ram. Prem Shyam has appeared as PW-1. He has not stated that he was present in the house of accused on 22.6.2012 as stated by PW-6 Smt. Shiksha Devi in her cross-examination. PW-1 Prem Shyam has only deposed while appearing as PW-1 that on

24.6.2012, he visited the house of accused to express condolences on the death of child of accused. He had alongwith member of Panchayat handed over ex-gratia grant to the accused for a sum of Rs. 10,000/-.

17. PW-8 Smt. Narvada deposed that on 22.6.2012 at about 9:15 AM, she was in her house when Prem Shyam loudly made a call and asked her to come to house of Unpa accused. When she reached their house, the accused was vomiting. She went inside the room and lifted the daughter of the accused who appeared to her to be sleeping. In her cross-examination, she deposed that when she reached the house of the accused, Prem Shyam son of Keshav Ram was already there. Thus, he was the first person who reached the house of the accused. The statement of Prem Shyam was recorded under Section 161 Cr.P.C. on 24.6.2012. In case he was present on the spot as per PW-6 Smt. Shiksha Devi and PW-8 Smt. Narvada on 22.6.2012, his statement ought to have been recorded under Section 161 Cr.P.C. to this effect.

18. The recovery of mat on which the accused has vomited is also doubtful. PW-1 Prem Shyam, in his examination-in-chief has deposed that the police officials told them that they took in possession the mat on which the accused had vomited. The mat had already been put in parcel. Thus, he had no occasion to see the same. PW-9 HHC Roshan Lal deposed that I.O. took into possession a piece of room mattress, which was placed on the room and on which the accused had allegedly vomited. It was taken into possession vide memo Ext. PW-1/B. He also admitted that the accused was not present at that time.

19. Now, the Court will advert to the manner in which the bottle of fungicide was taken into possession by the prosecution. PW-2 Dayal Shyam deposed that he was called to the spot by the police. The police had already wrapped the cap of the bottle of fungicide with a piece of cloth. The words “Shield” was inscribed on the fungicide bottle. The accused did not hand over the bottle of fungicide in his presence to the police. Volunteered that she was not in the house on that day. PW-10 Const. Sat Pal deposed that on 5.7.2012 Unpa, accused gave to the I.O. one bottle of fungicide having some substance in it and told that she had consumed it on the date of occurrence. The date of incident is 22.6.2012 but the bottle of fungicide has been recovered only on 5.7.2012. The delay between 22.6.2012 to 5.7.2012 has not been explained. According to PW-2 Dayal Shyam, the accused did not hand over the bottle of fungicide in his presence rather he stated that she was not present in the house on that day. It casts doubt on the version of the prosecution, the manner in which the bottle of fungicide was recovered.

20. The case of the prosecution is based on the circumstantial evidence. It is settled law that in order to prove the case based on circumstantial evidence, the chain of events must be complete and these must point exclusively towards the guilt of the accused. In cases based on circumstantial evidence, motive also plays an important role. No motive, whatsoever, has been attributed by the prosecution as to why the accused had administered poison to the child. It has come on record that the relations between the family members were cordial. If the relations were cordial, what prompted the accused, the young girl to consume poison and administer it to the child has not been explained by the prosecution. No person has seen the accused administering the poison to her child.

21. According to the prosecution, Raju Nepali and PW-1 Prem Shyam were the first who were present on the spot as deposed by PW-6 Smt. Shiksha. Raju Nepali has not been examined. PW-1 Prem Shyam though was the first person to be present on the spot, as noticed by PW-6 Smt. Shiksha, has not deposed anything about his presence on 22.6.2012.

22. Their lordships of the Hon'ble Supreme Court in the case of ***Dandu Jaggaraju vrs. State of Andhra Pradesh,*** reported in ***(2011) 14 SCC 674,*** have held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. It is this circumstance which often forms the fulcrum of prosecution story. It has been held as follows:

> "9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Sathya Narayan vrs. State rep. by Inspector of Police,*** reported in ***(2012) 12 SCC 627,*** have held that in the case of circumstantial evidence, motive also assumes significance since absence of motive would put Court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omissions or conjectures do not take place of proof. It has been held as follows:

> "42) In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust."

24. Their lordships of the Hon'ble Supreme Court in the case of ***Majenderan Langeswaran vrs. State (NCT of Delhi) and another,*** reported in ***(2013) 7 SCC 192,*** have held that onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court and all the circumstances must lead to the conclusion that accused is the only one who has committed crime and none else. It has been held as follows:

> "3. On 30th November, 1996, an altercation is stated to have taken place between the accused and the deceased L. Shivaraman. As the accused had sustained some cut injuries on his hands, he reported the matter to the officials. On 1st December, 1996 when the ship was on high seas, the appellant took off from his duty as helmsman on the ground of pain in his hands due to cut injuries and another helmsman Baria was asked to do the duty as replacement. As the accused and the deceased were staying in Cabin No. 25, the accused was temporarily shifted from that cabin to Cabin No. 23 due to the above incident of assault. At about 1510 hours, the accused allegedly approached IInd Officer Kalyan Singh (PW-6) with a blood- stained knife in his hand and his hands smearing in blood and is alleged to have

confessed before him that he had killed L. Shivaraman. On being asked by Kalyan Singh (PW-6), the appellant handed over the blood-stained knife to him which he placed in a cloth piece without touching the same. Kalyan Singh (PW-6) then intimated the Captain and other officers. The body of L. Shivaraman was found lying in Cabin No. 23 in such a way that half of it was inside the cabin and half of it outside. The officials of Shipping Corporation of India were informed. On incident being reported, pursuant to an instruction from concerned quarter, the ship was diverted to Hongkong. On being so directed by the Captain of the ship (PW-5), Kalyan Singh (PW-6) got the body of the deceased cleaned up for being preserved in the fish room with the help of Manjeet Singh Bhupal (PW-4) and Chief Officer V.V. Muralidharan (PW-18) took photographs. The blood-stained knife was kept in the safe custody of PW-5. The accused was then apprehended, tied and disarmed before being shifted to the hospital on board. Since the ship was having Indian Flag, as per the International Treaty of which India was a signatory, the act of the accused was subject to Indian laws. Accordingly, a case bearing R.C. No. 10(S) of 1996 was registered by the Central Bureau of Investigation (CBI) against the accused on 6th December, 1996.

16. Now, we have to consider whether the judgment of conviction passed by the trial court and affirmed by the High court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court.

17. In the case of Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, this Court observed as under:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. …."

18. In the case of Padala Veera Reddy vs. State of A.P., 1989 Supp (2) SCC 706, this Court opined as under:

"10. Before adverting to the arguments advanced by the learned Counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, (1982) 2 SCC 351)"

19. In the case of C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193, this Court while considering a case of conviction based on the circumstantial evidence, held as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

20. In the case of Ramreddy Rajesh Khanna Reddy vs. State of A.P., (2006) 10 SCC 172, this Court again considered the case of conviction based on circumstantial evidence and held as under:

"26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See Anil Kumar Singh v. State of Bihar, (2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P., (2005) 7 SCC 603)."

21. In the case of Sattatiya vs. State of Maharashtra, (2008) 3 SCC 210, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred

from those circumstances." This Court further observed in the aforesaid decision that:

"17. At this stage, we also deem it proper to observe that in exercise of power underArticle 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court—Bharat v. State of M.P., (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

22. In the case of State of Goa vs. Pandurang Mohite, (2008) 16 SCC 714, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

23. It would be appropriate to consider some of the recent decisions of this Court in cases where conviction was based on the circumstantial evidence. In the case of G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593, this Court elaborately dealt with the subject and held as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the

guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

24. In the case of Rajendra Pralhadrao Wasnik vs. State of Maharashtra, (2012) 4 SCC 37, while dealing with the case based on circumstantial evidence, this Court observed as under:

"12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

25. Last but not least, in the case of Brajendrasingh vs. State of M.P., (2012) 4 SCC 289, this Court while reiterating the above principles further added that:

"28. Furthermore, the rule which needs to be observed by the court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. (Ref. Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Shivu v. High Court of Karnataka, (2007) 4 SCC 713 and Shivaji v. State of Maharashtra, (2008) 15 SCC 269)"

26. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must

lead to the conclusion that the accused is the only one who has committed the crime and none else."

25. Their lordships of the Hon'ble Supreme Court in the case of ***Rishipal vrs. State of Uttarakhand,*** reported in ***(2013) 12 SCC 551,*** have held that motive does not have a major role to play in cases based on eye witnesses account of incident but it assumes importance in cases that rest entirely on circumstantial evidence. Their lordships have further held that circumstances sought to be proved against accused be established beyond reasonable doubt, but also that such circumstances form so complete a chain, as leaves no option for court, except to hold that accused is guilty of offences with which he is charged. It has been held as follows:

> "15. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See Sukhram v. State of Maharashtra (2007) 7 SCC 502, Sunil Clifford Daniel (Dr.) v. State of Punjab (2012) 8 SCALE 670, Pannayar v. State of Tamil Nadu by Inspector of Police (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.
>
> 19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the

> requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered."

26. PW-7 Dr. Mahesh Kumar in his examination-in-chief has deposed that the vomit was also preserved after due sealing and parcels were given with sample seal to the accompanying police for analysis with docket. In his cross -examination, he admitted that vomits were not preserved. No specific seal was used in sealing the samples. The gastric lavage was done and sample was preserved after due sealing. It was quite possible that the patient might have taken the poison accidently under mistake of fact considering it as a medicine.

27. PW-3 Dr. Piyush Kapila has conducted the post mortem examination on the deceased. According to him, copper sulphate is not that potent poison. He has not given any opinion regarding the time of intake of poison and the time of death. It was vital for PW-3 Dr. Piyush Kapila to give proximate time of intake of poison and time of death, though he has given probable time that might have elapsed between death and post mortem as around 24 hours. He has also admitted that there could be chances that a child who has access to poison which is left behind by the parents carelessly could be taken by the child. He admitted that there was no sign of forcible administration of poison. Whitish fluid in stomach could also suggest that breast feed could have been administered to the child. PW-14 SI Rattan Chand has also admitted in his cross-examination that no person had seen the accused taking poison or administering it to Gudia. He has categorically admitted that in the application Ext. PW-14/E and inquest Ext. PW-3/B, the cause of death of Gudia was mentioned as accident. It has not come in his investigation as to how poison was administered to the child.

28. The post mortem report is Ext. PW-3/D. The final opinion given by Dr. Piyush Kapila is that the deceased died as a result of ante mortem poisoning. Their lordships of the Hon'ble Supreme Court in the case of ***Jaipal*** vs. ***State of Haryana***, (2003) 1 SCC 169 have held that phosphine released from zinc phosphide (rat poison) and from aluminium phosphide, is mainly used as fumigant to control insects and rodents in food grains and fields. Aluminium phosphide is available in the form of chalky-white tablets and when the same are taken out of the sealed container, they come in contact with atmospheric moisture and the chemical reaction takes place liberating phosphine gas (PH3). Their Lordships have further held that if only the tablet given by the accused to the deceased was celphos it is not likely that the deceased would have consumed it inasmuch as the pungent smell of celphos would have alerted P and S and certainly the deceased would not have consumed the tablet. Their Lordships have held as under:

> "[15] Dr. Sharma's opinion, as expressed during his deposition, has authoritative support. Modi in Medical Jurisprudence and Toxicology (Twenty-Second Edition) states (at pp. 197-198) that aluminium phosphide (celphos) is used as a fumigant to control insects and rodents in food grains

and fields. In reported cases of poisoning, symptoms which have been found are burning pain in the mouth, throat and stomach, vomiting mixed with blood, dyspnoea, rapid pulse, subnormal temperature, loss of co-ordination, convulsions of a clonic nature and death.In the solid form, it acts as corrosive in the mouth and throat as it precipitates proteins. In post-mortem appearance, the tongue, mouth and oesophagus are oedematous and corroded. The mucous membrane of the stomach is corrugated, loosened or hardened and is stained red or velvety.The intestines are inflamed.

[16] According to Modi symptoms and signs of poisoning by aluminium phosphide are similar to poisoning by zinc phosphide (p. 197, ibid). The chief symptoms after the administration of zinc phosphide are a vacant look, frequent vomiting with retching, tremors and drowsiness followed by respiratory distress at death. -inc phosphide acts as a slow poison and is decomposed by hydrochloric acid in the stomach with the liberation of phosphine which acts as a respiratory poison. Being a very fine powder zinc phosphide adheres firmly to the crypts in the mucous membrane of the stomach, and a very small quantity only in the stomach even after vomiting is sufficient to cause death by slow absorption.

[17] Phosphine released from zinc phosphide (rat poison) and from aluminium phosphide, is mainly used as a fumigant to control insects and rodents in food grains and fields. Liberated from the metal phosphide by the action of water or acids, gaseous phosphine exerts more potent pesticidal action, for it penetrates to all areas otherwise inaccessible for pesticide application. Pathological findings from phosphine inhalation are pulmonary hyperemia and oedema. It causes both fatty degeneration and necrosis of liver. (p. 174, ibid)

[19] We may briefly sum up the opinion of the learned authors from their published paper. Phosphine gas (active ingredient of ALP) causes sudden cardiovascular collapse; most patients die of shock, cardiac arrhythmias, acidosis and Adult Respiratory Distress Syndrome (ARDS). Aluminium phosphide is available in the form of chalky white tablets. When these tablets are taken out of the sealed container, they come in contact with atmospheric moisture and the chemical reaction takes place liberating phsophene gas (PH3) which is the active ingredient of ALP. This gas is highly toxic and effectively kills all insects and thus preverves the stored grains. When these tablets are swallowed, the chemical reaction is accelerated by the presence of hydrochloric acid in the stomach and within minutes phosphine gas dissipates and spreads into the whole body. The gas is highly toxic and damages almost every organ but maximal damage is caused to heart and lungs. Sudden cardiovascular collapse is the hallmark of acute poisoning. Patients come with fast thready or impalpable arterial pulses, unrecordable or low blood pressure and icy cold skin. Somehow these patients remain conscious till the end and continue to pass urine despite unrecorded blood pressure. Vomiting is a prominent feature associated with epigastric burning sensation. The patients will be smelling foul (garlic like) from their breath and vomits. Many of them will die within a few hours. Those who survive for some time will show elevated juglar venous pressure, may develop tender hepatomegaly and still later Adult Respiratory Distress Syndrome (ARDS), renal shut down and in a very few cases toxic hepatic jaundice. The active ingredient of ALP is phosphine gas which causes extensive tissue damage. A

spot clinical diagnosis is possible in majority of cases of ALP poisoning. However, ALP on account of its very pungent smell (which can drive out all inmates from house if left open) cannot be taken accidentally.

[23] Thus on the state of the evidence as it exists we cannot conclude positively that aluminium phosphide (celphos) was administered to the deceased. This finding has also to be read in the light of very pertinent statement made by Smt. Beena. According to her while the accused and the deceased were busy talking in the inner room, the witness was sitting just outside in the outer room. When she entered in the inner room Prakash Devi complained of feeling uneasy. She never stated that she was administered anything by the accused or anything given by the accused was consumed by the deceased or that anything which the deceased was made to consume by the accused was the cause of her feeling of uneasiness. On the contrary it was in the presence of the witness Smt. Beena that the accused offered to give the deceased a tablet which could remove the feeling of uneasiness. Such tablet according to Smt. Beena was of two colours; its half portion was blue and half portion was white. Such could not have been the colour of celphos tablet. If only the tablet given by the accused to the deceased was celphos it is not likely that the deceased would have consumed it inasmuch as the pungent smell of celphos would have alerted Prakash Devi and Smt. Beena and certainly the deceased would not have consumed the tablet. It also sounds unnatural, and therefore, doubtful, if the accused would administer any poisonous tablet to the deceased by calling her to his house and at a point of time either when Smt. Beena was sitting just outside the room or when she was present inside the room. The presence of smell in the room, if any celphos tablet had remained in open there would not have escaped the attention of Smt. Beena. But she does not depose to the presence of any smell in the room having been felt by her."

29. Modi in a Textbook of Medical Jurisprudence and Toxicology (24th Edition) 2011, has mentioned that the changes produced by irritant and corrosive poisons in the digestive tract, especially the stomach are:

(a) Hyperaemia;

(b) Softening;

(c) Ulceration of the mucous membrane; and

(d) Perforation.

30. Dr. Piyush Kapila, PW-3 in his post mortem report has not stated about these changes which were bound to take place due to poison except that whitish fluid was present in the stomach with peculiar smell.

31. It has come on record that the accused was living with husband and mother-in-law. Neither mother-in-law of accused nor her husband have been examined. They were material witnesses. Their statements have also not been recorded as per the version of PW-14 SI Rattan Chand under Section 161 Cr.P.C. The explanation given by the I.O. PW-14 SI Rattan Chand for not recording the statements of mother-in-law and husband of the accused is that they had gone to Theog for check up. There is no medical prescription placed on record that the husband and mother-in-law of accused had gone to Theog for medical check up.

32. Suicide literally means the deliberate termination of one's own physical existence. Suicide *(Felo de se)* is where a man of age of discretion and *compos mentis*

voluntarily kills himself/herself. In order to bring home an offence under Section 309 IPC, the prosecution is required to prove that the accused did some act which amounts to attempt and that the attempt was directed towards the commission of suicide and his attempt did not succeed. There was no reason for the accused to commit suicide since the relations between her husband and in-laws with her were cordial.

31. The prosecution has failed to prove the motive attributed to the accused person. The chain of events is incomplete. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

32. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 8.7.2014, rendered by the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Distt. Shimla, H.P., in Sessions trial No. 0100032/2012, is set aside. Accused is acquitted of the charges framed against her. Fine amount, if any, already deposited by the accused is ordered to be refunded to her. Since the accused is in jail, she be released forthwith, if not required in any other case.

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

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

Babu Ram and others — Petitioners.

Versus

Satya Devi and others — Respondents.

CMPMO No. 353 of 2015.
Date of decision: 14.03.2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiff claimed succession to the estate of 'R'- however, his name was not recorded by the Revenue Authorities at the time of attestation of mutation- land was acquired- Award was passed- plaintiff claimed to be entitled to the amount by virtue of being a successor- application for rejection of plaint was filed- held, that Land Acquisition Authority does not have power to rectify the order passed by the Revenue Authorities- correction in the revenue entries can only be made by the Civil Court and the Civil Court had jurisdiction to entertain the suit- Trial Court had rightly rejected the application- petition dismissed. (Para- 2 and 3)

For the petitioners: Mr. Ashok K. Tyagi, Advocate.
For the respondents: Mr. Deepak Kaushal, Advocate, for respondent No.1.
Mr. Suneel Mohan Goel, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

The plaintiff claims succession to the estate of Roop Singh an ancestor common to her as well as to the defendants. However, the name of the plaintiff stood excluded by the revenue authorities while theirs on the demise of aforesaid Roop Singh

attesting mutation of inheritance qua his estate. The land of Roop Singh, which on his demise stood mutated by way of an attestation of mutation of inheritance standing recorded by the revenue agency in favour of the defendants-petitioners, stood subjected to acquisition by defendant-respondent No.6. An award stood pronounced wherein compensation stood assessed in favour of the defendants-petitioners, obviously in exclusion of the plaintiff, though she avers in the plaint of hers alike the defendants/petitioners standing entitled to succeed to the estate of Roop Singh on the latters demise. Moreover she anvils a claim to succession to the land subjected to acquisition by defendant No.6 upon the factum of hers being the grand daughter of deceased Roop Singh.

2. The defendants/petitioners contested the claim of the plaintiff-respondent. They instituted an application for rejection of the plaint under Order 7 Rule 11 CPC before the learned trial Court, which relief canvassed therein primarily rested on the score of its lacking jurisdiction. However, the application stood disallowed by the learned trial Court. Hence, the instant petition. The learned counsel on either side have been heard at length. The gravamen of the contention addressed before this Court by the learned counsel for the petitioners/defendants is of with a statutory prescription embodied in Section 30 of the Land Acquisition Act, which is a self contained code, the jurisdiction of the Civil Court to try besides adjudicate upon a plaint instituted before it under Section 7 CPC stands impliedly ousted. The claim reared besides the relief encompassed therein have been further contended to fall within the domain of or within the ambit of Section 30 of the Land Acquisition Act empowering the authority envisaged therein to alone to the exclusion of a Civil Court adjudicate upon the issue qua entitlement of the plaintiff-respondent herein to compensation for the land subjected to acquisition by defendant No.6.

3. The aforesaid contention would marshal force only when there was a lucid and a categorical display in the revenue records of the plaintiff-respondent herein being a legal heir of deceased Roop Singh whereupon on his demise, with the latter leaving no testamentary disposition, she alike the defendants/petitioners herein stood entitled to succeed to his estate besides concomitantly hers standing entitled to receive compensation, for the land/estate of Roop Singh mutated on his demise to her exclusion by the revenue authorities concerned in favour of the defendants/petitioners, on its acquisition standing culminated in an award pronounced by the competent statutory authority. Tersely put the recording of an order of mutation of inheritance on the intestate demise of Roop Singh has been espoused in the plaint to be unwarranted, as a corollary a relief has been prayed therein of the revenue entries prepared in consonance therewith being also liable to be quashed and set-aside. However, with the nature of controversy engaging the parties at lis especially with the ouster of the plaintiff-respondent herein from intestate succession to the estate of one Roop Singh, also her name standing excluded in the relevant apposite revenue papers for capacitating her to agitate before the authority/authorities contemplated in Section 30 of the Land Acquisition Act, a claim of hers alike the defendants/petitioners herein standing entitled to compensation in proportion to her share in the estate of deceased Roop Singh rather obviously renders her wholly disempowered to meet with any success before the authority/authorities contemplated in Section 30 of the Land Acquisition Act. Moreso, when the aforesaid authority/authorities envisaged therein would scuttle her claim for compensation to the lands subjected to acquisition on the mere pretext of her name not existing in the apt apposite revenue records. Even otherwise, when the authority/ authorities contemplated in Section 30 of the Land Acquisition Act are not bestowed with any jurisdiction to render a decree or order for correction of revenue records, any resort thereto by the plaintiff/respondent would be a grossly nugatory exercise. In sequel the correction of the revenue records besides of the revenue entries is imperative rather a precursor to the plaintiff/respondent herein drawing up proceedings under Section 30 of the

Land Acquisition Act before the authority/authorities contemplated therein. Since a decree of the genre, as asked for in the plaint falls squarely within the jurisdiction of the Civil Court, any exercise of jurisdiction by it upon the plaint instituted before it by the plaintiff/respondent cannot at all be construed to be wanting in jurisdictional vigour. In aftermath, the invocation of the jurisdiction of a Civil Court by the plaintiff respondent by hers instituting a plaint before it under Section 9 of the CPC is the appropriate remedy to seek correction of the revenue records for facilitating the plaintiff respondent herein to subsequently draw up proceedings under Section 30 of the Land Acquisition Act. Moreover, entertainment of the suit instituted before the learned trial Court by the plaintiff/respondent herein with the reliefs encapsulated therein besides the rendition of a decree if any in her favour by it for reiteration would not be wanting in jurisdictional vigour especially when a decree for correction of revenue records or for correction of revenue entries falls outside the scope or domain of the jurisdiction exercisable by the authority/authorities envisaged in Section 30 of the Land Acquisition Act. There is no merit in the petition, which is dismissed, impugned order is maintained and affirmed.

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

Dharmila Thakur .....Petitioner

Versus

HP University and another .....Respondents.

CWP No. 152 of 2016.
Date of decision: 14th March, 2016.

Constitution of India, 1950- Article 226- It was stated on behalf of the University that result of petitioner for 3rd and 4th Semester could not be declared due to gap of more than two years in accordance with the ordinance - held, that Court cannot direct the respondents to make orders which are not in accordance with Ordinance occupying the field- the petitioner has filed a representation before the Vice Chancellor- Vice Chancellor directed to examine the representation filed by the petitioner and take a decision within six weeks from the date of the order. (Para-1 to 4)

For the petitioner: Mr. Lokender Paul Thakur, Advocate.
For the respondents: Mr. J.L. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. J.L. Bhardwaj, Advocate stated at the Bar that he has filed the reply in the Registry. Registry to trace and place the same on record, if in order. He has also filed across the Board, the result of the petitioner in sealed cover which was opened in the open Court and returned to him. He further stated that in terms of the mandate of clauses 5.4 and 8.40 (b) of the Ordinance, result of the petitioner for 3rd and 4th Semester could not be declared due to gap of more than two years.

2. This Court cannot direct the respondents to make orders which are not in tune with the Ordinance, occupying the field.

3. At this stage, learned counsel for the petitioner stated at the Bar that the petitioner has filed representation for relaxation before the Vice Chancellor and he may be directed to examine the same and pass appropriate orders. His statement is taken on record.

4. In the given circumstances, without marshalling out the facts and merits of the case, we deem it proper to direct the Vice Chancellor to examine the representation filed by the petitioner and make decision within six weeks from today, as per law applicable. Ordered accordingly.

5. Accordingly, the petition is disposed of, as indicated hereinabove, alongwith pending applications.

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

HP Board of School Education, Dharamshala .....Appellant

Versus

Rajnesh and another .....Respondents.

LPA No. 211 of 2015
Date of decision: 14th March, 2016.

Constitution of India, 1950- Article 226- Writ petition filed by the petitioner was allowed- held, that the judgment was passed in accordance with the judgment of High Court in **Vivek Kaushal and others versus H.P. Public Service Commission,** CWP No. 9169 of 2013 decided on 10.7.2014 and **Himachal Pradesh Public Service Commission versus Mukesh Thakur and another (2010) 6 SCC 759-** hence, judgment passed by the writ Court has to be set aside - it was admitted in para No. 5 of the reply on preliminary submission that two marks are to be awarded to the petitioner- hence, writ petition allowed in terms of para No. 5 of the preliminary submission. (Para- 2 to 4)

Case referred:
Himachal Pradesh Public Service Commission vs Mukesh Thakur & anr (2010) 6 SCC 759

For the appellant: Mr. Lovneesh Kanwar, Advocate.

For the respondents: Mr. Yudhbir Singh, Advocate, for respondent No.1.
Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and 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 22.9.2015, made by the learned Single Judge of this Court in ***CWP No.2569*** of 2015 titled ***Rajnesh***

versus H.P. Board of School Education and others, whereby the writ petition filed by the petitioner came to be allowed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. The judgment, on the face of it, is not in tune with the judgment made by this Court in CWP No. 9169 of 2013 titled ***Vivek Kaushal and others versus H.P. Public Service Commission*** and other connected matters, decided on 10.7.2014, made by the Division Bench of this Court, and other cases. The judgment impugned is also bad in view of the judgment delivered by the apex Court in ***Himachal Pradesh Public Service Commission versus Mukesh Thakur and another*** reported in ***(2010) 6 SCC 759.***

3. At this stage, Mr. Lovneesh Kanwar, Advocate, for the appellant stated at the Bar that his client has admitted in para 5 of the reply on preliminary submission that two grace marks are to be awarded to the petitioner/respondent No. 1 herein. It is apt to reproduce para 5 of the reply on preliminary submission herein.

> *"5.That in respect of question No. 25 and 29 of booklet series A, the respondent Board has got again reviewed these questions from subject experts and as per the opinion of the subject experts, it has been decided to award a mark to question No. 25 and 29 respectively."*

4. In view of the discussion made hereinabove, the impugned judgment merits to be set aside and writ petition merits to be granted, in terms of para 5 of the reply on preliminary submission quoted supra.

5. Having said so, the impugned judgment is set aside and the writ petition is disposed of in terms of para 5 of the reply on preliminary submission quoted supra, alongwith pending applications, if any.

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

LPA No. 52 of 2011 a/w LPAs
No. 53, 122, 125 to 127 of 2011
Decided on: 14.03.2016

1. LPA No. 52 of 2011

Manohar Lal ...Appellant.
Versus
State of H.P. and others ...Respondents.

.....

2. LPA No. 53 of 2011

Om Raj ...Appellant.
Versus
State of H.P. and others ...Respondents.

.....

3. LPA No. 122 of 2011

Mast Ram ...Appellant.
Versus
State of H.P. and others ...Respondents.

.....

4. LPA No. 125 of 2011

Pardeep Singh ...Appellant.

Versus

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

.....

5. LPA No. 126 of 2011

Om Parkash ...Appellant.

Versus

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

.....

6. LPA No. 127 of 2011

Bal Krishan ...Appellant.

Versus

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

Constitution of India, 1950- Article 226- Petitioners were appointed as Timber Watchers in the Himachal Pradesh State Forest Corporation- Industries Department absorbed them against the posts of Mining Guards **–** subsequently an order of their repatriation was issued- respondent No. 3 pleaded that petitioners were appointed on secondment basis for a period of one year and no option was given for appointment on regular basis- a letter was written by the Corporation to the Director of Industries with a request to repatriate the Timber Watchers- repatriation order was issued- the appointment letter of the petitioners clearly shows that appointment order was on secondment basis for only one year and this condition was accepted by the petitioner- they cannot claim that they are entitled for regularization- petitioners cannot claim regularization contrary to their appointment order- writ Court had rightly dismissed the writ petition- appeal dismissed. (Para- 7 to 19)

For the appellant(s): Mr. Sunil Mohan Goel, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents-State.

The following judgment of the Court was delivered:

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

These Letters Patent Appeals are directed against the common judgment and order, dated 17th December, 2010, made by the learned Single Judge/Writ Court in a batch of writ petitions, CWP No. 2977 of 2008, titled as Om Parkash versus State of HP and others, being the lead case, whereby all the writ petitions filed by the writ petitioners came to be dismissed (for short "the impugned judgment").

2. In the given circumstances, we deem it proper to determine all these appeals by this common judgment. Accordingly, this judgment will govern all the six appeals.

3. The writ petitioners invoked the jurisdiction of the Writ Court by the medium of separate writ petitions and sought writ of mandamus commanding Director Industries, Himachal Pradesh, Shimla, to place on record order, dated 6th November, 2008 and have also sought writ of certiorari to quash order, dated 6th November, 2008 and the follow-up order, dated 7th November, 2008 (Annexure P-9 in CWP No. 2995 of 2008, subject matter of

LPA No. 52 of 2011). Further, the writ petitioners have also sought writ of mandamus commanding Director of Industries, Himachal Pradesh, Shimla, to allow them to perform their duties in Industries Department as Mining Guards and to permanently absorb them against the post of Mining Guards in Industries Department, on the grounds taken in the respective writ petitions.

4. Precisely, the case put forth by the writ petitioners before the Writ Court was that they were appointed as Timber Watchers in the Himachal Pradesh State Forest Corporation (for short "Corporation"), i.e. respondent No. 3, and thereafter, their services were regularized and were serving and performing their duties with respondent No. 3-Corporation as Timber Watchers on regular basis. Industries Department absorbed them against the posts of Mining Guards on permanent regular basis and they had opted for the said service only on the ground that they will be permanently absorbed in the said department as Mining Guards.

5. Further averred that thereafter, respondent No. 2 has issued order, dated 6th November, 2008, ordered their repatriation and also follow-up order was made on 7th November, 2008 (Annexure P-9 in CWP No. 2995 of 2008), which is not in accordance with their appointments, thus, be quashed.

6. The respondents have filed replies. Respondents No. 1, 2 and 4 have filed joint reply and respondent No. 3 has filed separate reply.

7. Respondent No. 3, in its reply, has specifically averred that the writ petitioners were appointed on secondment basis for a period of one year and no option was given by the writ petitioners for their appointment on regular basis. The appointment orders, dated 1st December, 2006 (Annexure P-6) are crystal clear, which only talk of appointment on secondment basis for a period of one year.

8. After completion of the said period, respondent No. 3-Corporation made a communication on 25th October, 2008, to respondent No. 2, i.e. the Director of Industries, Himachal Pradesh, Shimla, with a request to repatriate the Timber Watchers, whose services were placed at their disposal to the posts of Mining Guards on secondment basis in the Industries Department. Copy of the said communication has been annexed with the reply of respondent No. 3 as Annexure R-3/A.

9. Respondents No. 1, 2 and 4 have specifically averred in their reply that in view of the appointment of the writ petitioners on secondment basis, they issued order of repatriation on 6th November, 2008, relieved them and directed them to join their parent department in terms of order, dated 7th November, 2008. The order of repatriation, dated 6th November, 2008, has been annexed as Annexure R-4.

10. The writ petitioners have placed on record documents. Annexure P-6, i.e. office/appointment order, dated 1st December, 2006, is the foundation of their cases. All the appointment letters were drafted in same words. It is apt to reproduce relevant portion of Annexure P-6 in CWP No. 2995 of 2008 herein:

> *"OFFICE ORDER"*
>
> *Consequent upon the approval received from the Principal Secretary (Industries) to the Government of Himachal Pradesh to fill up the vacant posts of the Mining Guards from surplus pool of the Himachal Pradesh State Forest Corporation vide letter No. Udyog-II (B) 11-1/2004 dated 23.8.2006 and as per the candidate sponsored by the Managing Director, Himachal Pradesh State Forest Corporation,*

> *Shimla letter No. SFC(1)B(15)-13/98-Vol-III-17800-05 dated 13.10.2006 and the interview conducted for the selection of the candidates on 13.11.2006, Shri Manohar Lal, Timber Watcher, Forest Working Division, Una, is hereby offered the appointment as Mining Guard in the pay scale of Rs. 2520-4140 in the Industries Department, Geological Wing on secondment basis for one year from the date of issue of this order in the first instance. This appointment on secondment basis will however, not involve any pay fixation and incumbent will draw the basic pay which he has been drawing in the parent organization.*
>
> *The above incumbent if interested, shall join his duty in the Mining Office, Dharamshala (at Jawali), District Kangra within fifteen days from the date of issue this order failing which the offer of deployment shall stand withdrawn.*

11. While going through the said office order, it is crystal clear that the writ petitioners were made to understand loudly and clearly that their appointment/absorption in the Industries Department was only on secondment basis, that too, only for one year.

12. The writ petitioners have accepted the said order and now, cannot make u-turn by pleading in the writ petitions or by making representations that they had given option for their permanent absorption.

13. The word 'secondment' has been described in the **Black's Law Dictionary, Tenth Edition,** at page 1555, as under:

> *"**secondment.** A period of time that a worker spends away from his or her usual job, usu. either doing another job or studying."*

14. Secondment means a period which an employee spends away from his/her job usually either going to other department or studying.

15. In terms of the **Oxford Advanced Learner's Dictionary,** 'secondment' means to send an employee to another department, office, etc. in order to do a different job for a short period of time.

16. **The Chambers Dictionary** describes the word 'secondment' as temporary transfer to another position.

17. The writ petitioners have accepted the orders and were sent by the parent department, i.e. respondent No. 3-Corporation, to the Industries Department for performing their duties as Mining Guards on secondment basis, cannot claim regular absorption. No such document/order is on the files, which can be made basis for holding that the writ petitioners had given option for regular/permanent absorption.

18. The writ petitioners, once have accepted the orders, cannot plead contrary to the said orders. Pleadings are not in tune with the documents filed by them with the writ petitions before the Writ Court. Thus, the pleadings and documents are contradictory.

19. It is also apt to record herein that the writ petitioners have not questioned the letter, dated 25th October, 2008, made by respondent No. 3-Corporation to respondent No. 2, i.e. the Director of Industries, Himachal Pradesh, Shimla, for repatriation of the Timber Watchers, whose services were placed at their disposal to the posts of Mining Guards on secondment basis in the Industries Department (Annexure R-3/A).

20. Having said so, the Writ Court has rightly made the impugned judgment, needs no interference.

21. Viewed thus, the impugned judgment is upheld and all the appeals are dismissed alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Onkar Singh ...Petitioner.

Versus

Executive Engineer, HPSEB Ltd. and another ...Respondents.

Review Petition No. 20 of 2016
Decided on: 14.03.2016

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- Review can be made only on the ground of error apparent on the face of the record- the error should be such as can be unveiled on the mere looking at the record, without entering into the long drawn process of reasoning- it was contended that the Court had wrongly held the date of regularization and the petitioner was entitled to regularization from some different date- held, that this question cannot be gone into in a review petition- no case for review is made out and the petition deserves to be dismissed. (Para- 6 to 8)

For the petitioner: Mr. Anupam Angrannii Mehta, Advocate.
For the respondents: Mr. Vivek Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

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

CMP (M) No. 1705 of 2015

By the medium of this limitation petition, the applicant-petitioner has sought condonation of delay of 245 days, which has crept-in in filing the review petition, on the grounds taken in the memo of the limitation petition.

2. We deem it proper to condone the delay for the reasons stated in the limitation petition. Accordingly, delay is condoned. The limitation petition is disposed of.

Review Petition No. 20 of 2016

3. Review Petition is taken on Board.

4. Issue notice. Mr. Vivek Sharma, Advocate, waives notice on behalf of respondent No. 1.

5. The review petitioner has sought review of judgment and order, dated 12th March, 2015, made by this Court in LPA No. 4050 of 2013, titled as Onkar Singh versus Executive Engineer, HPSEB Ltd. & another.

6. It is apt to record herein that in order to seek review, the review petitioner has 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, and **Review Petition No. 65 of 2015,** titled as **Union of India & others versus Paras Ram,** decided on 25th June, 2015.

7. Review can be made only on the ground of error apparent on the face of the record. The error apparent on the face of record must be such which can be unveiled on mere looking at the record, without entering into the long drawn process of reasoning.

8. Learned counsel for the review petitioner stated at the Bar that in the judgment under review, this Court has wrongly held the date of regularization and the review petitioner was entitled to regularization from some different date, is a matter of fact, cannot be gone into in a review petition.

9. Having said so, no case for review is made out and the review petition merits to be dismissed. Accordingly, the review petition is dismissed alongwith all pending applications.

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

Sh. Pradeep Kumar Bhandari .....Petitioner.

Versus

Sh. Manohar Lal .....Respondent.

CR No. 150 of 2006 along with CMP Nos. 79/2012 & 15033/13
Date of decision: 14th March, 2016

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlord filed a petition for eviction of the tenant pleading that he required the premises for his married son and for his three daughters- respondent denied the averments made in the petition- Rent Controller ordered the eviction of the tenant- appeal was dismissed - it was contended in the revision that earlier rent petition was dismissed and this fact was not taken into consideration by the Rent Controller or the Appellate Authority- essential ingredients for seeking eviction were not pleaded – another tenant vacated the premises and one person died during the pendency of the petition due to which ground floor fell vacant- held, that subsequent events can be taken into consideration for determining the bona fide of the landlord- hence, case remanded to Rent Controller to determine whether bonafide requirement still persist in view of subsequent development or not- tenant permitted to produce the evidence to establish the subsequent developments. (Para- 7 to 15)

Cases referred:

Kedar Nath Agrawal (dead) and another v. Dhanraji Devi (dead) by LRs and another, (2004) 8 Supreme Court Cases, 76

Prabha Arora and another v. Brij Mohini Anand and others (2007) 10 Supreme Court Cases 53

Gaya Prasad v. Pradeep Srivastava (2001) 2 SCC 604

Bhagat Ram Thakur v. Smt. Enakshi Mahajan, 1999(3) Shimla Law Cases, 175

For the petitioner: Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.
For the respondent: Mr. Imran Khan, Advocate.

The following judgment of the Court was delivered:

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

Challenge herein is to the judgment dated 26.8.2008 passed by learned Appellate Authority under H.P. Urban Rent Control Act, whereby the order of eviction of the petitioner herein (respondent-tenant before the Rent Controller) from the demised premises has been affirmed and the appeal dismissed.

2. The respondent is owner of House No. 23, Ward No. 2, Lohali, Post Office, Dalhousie, District Chamba. The house is two storeyed. The respondent was inducted as tenant in the two room set situate in the 1st floor of the building, whereas, a two room set in the same floor was rented out to one Mr. Vijay Deep Singh. The ground floor was leased out to one Sh. Raj Kumar Mehra (since dead). The petitioner-landlord himself was residing in his ancestral house comprising one room and glazed verandha situate in village Lohali itself. On the marriage of his son, he felt necessity of more accommodation and as such, sought the eviction of the respondent-tenant and also of Vijay Deep Singh on the ground of personal bonafide requirement, as according to him the accommodation on 1st floor in the building with them is required by him for providing the same to his married son for residential purposes and also his three daughters though married, however, visiting him off and on at the occasion of festivals and other celebrations with other members of their families.

3. The respondent-tenant has resisted and contested the petition on several grounds, however, mainly that sufficient accommodation is available with the petitioner-landlord in his ancestral house and that the demised premises are not required by him for his personal use. Learned Rent Controller has framed the following issues:

1. Whether premises in question is required by the petitioner for bonafide use as prayed for? OPP.
2. Whether petition in the present form is not maintainable as alleged? OPR.
3. Whether petitioner has no cause of action to file the present petition as alleged? OPR.
4. Whether petition is barred by principle of res judicata as alleged? OPR.
5. Whether petition is barred under Order 2 R. 2 CPC as alleged? OPR.
6. Whether petitioner is estopped from filing the present petition as alleged? OPR.
7. Relief.

4. The petitioner-landlord has himself stepped into the witness box as PW-3 and examined Sh. Praveen Kumar, Patwari, Patwar Circle, Dalhousie to prove certificate Ext. PW-1/A regarding other house of the wife of the petitioner-landlord namely 'Mayur Guest House' situate at village Jikkar under Gram Panchayat Jiyunta, District Chamba and Sh. Rajinder Kumar, Dealing Clerk, Municipal Council, Dalhousie to prove that the house where

the demised premises situate and his ancestral house situate at Lohali, Ward No. 2, Municipal Council, Dalhousie. PW-4 is Rajesh Chauhan, son of the petitioner-landlord.

5. On the other hand, respondent-tenant has himself stepped into the witness box as RW-1 and examined S/Sh. Jarnail Singh and Chaman Lal to establish that the petitioner-landlord is residing in a residential house at village Jikkar under the jurisdiction of Gram Panchyat, Jiyunta. RW-4 Sh. Raj Kumar Mehra has been examined to establish that the ground floor of the building in question has been rented out to him and that he has not been asked to vacate the same.

6. Learned Rent Controller on appreciation of the evidence has arrived at a conclusion that the petitioner-landlord has successfully pleaded and proved the factum of the demised premises are required by him for his bonafide personal use, as such, the eviction of the respondent-tenant was ordered from the demises premises. Learned Appellate Authority has dismissed the appeal and affirmed the order of eviction passed by learned Rent Controller.

7. The legality and validity of the impugned judgment has been questioned on the grounds inter-alia that the same is against the law and facts of the case. Learned Rent Controller and for that matter the Appellate Authority both have acted beyond its jurisdiction and passed the order of eviction on surmises and conjectures. The factum of dismissal of earlier eviction petition (Rent Case No. 7/1999) filed by the petitioner-landlord against the respondent is stated to be not taken into consideration. It has been pointed out that in the judgment passed in the said rent petition, the accommodation with the petitioner-landlord in his house at village Lohali was found sufficient. The appeal he preferred was also dismissed by the Appellate Authority. Therefore, the present eviction petition being barred under Order 23 Rule 1 and 4 of the Code of Civil Procedure should have not been entertained. The ingredients essentially required for seeking eviction under Section 14(3)(a)(i) of the Act were neither pleaded not proved. On the other hand, he having sufficient accommodation in the shape of guest house adjoining to the limits of Municipal Council, Dalhousie is not taken into consideration. It is also pointed out that another tenant Sh. Vijay Deep Singh who also suffered order of eviction from the demised premises under his use and occupation had vacated the same after his eviction and not chosen to prefer an appeal. The petitioner-landlord must have used such accommodation for his own requirement. The subsequent events are also stated to be not taken into consideration. The petition, therefore, is stated to be filed not for bonafide personal requirement, however, for extraneous considerations and, as such, should have been dismissed.

8. During the pendency of this petition, applications bearing registration No. 279/12 and 15033/13 were filed by the respondent-tenant with a prayer to allow him to place on record the subsequent events i.e. another tenant Sh. Vijay Deep Singh has vacated two room set under his use and occupation and that on the death of Raj Kumar Mehra, during the pendency of this petition, the ground floor also fell vacant for being occupied and used by the petitioner-landlord for his own requirement. In reply to these applications, there is no denial so as to Vijay Deep Singh has vacated the accommodation i.e. two room set, on his eviction by the Rent Controller during the pendency of this petition. There is also no dispute so as to death of Sh. Raj Kumar Mehra aforesaid, however, according to the petitioner-landlord the ground floor of the building in question is still under the use and occupation of his family members.

9. The above subsequent events goes to the very root of the case and as such, it is this aspect of the matter, which need determination at first and thereafter, to examine the dispute on merits, if need so arises.

10. Mr. Ashwani K. Sharma, learned Senior Advocate representing the respondent-tenant while submitting that the subsequent events are required to be taken on record till the final decree is passed in a rent petition has placed reliance on the judgment of the Apex Court in ***Kedar Nath Agrawal (dead) and another*** *v.* ***Dhanraji Devi (dead) by LRs and another, (2004) 8 Supreme Court Cases, 76***. In the case before the apex Court, the landlady and her husband who initially filed the petition for eviction of the appellant-tenant on the ground of personal bonafide requirement have died during the pendency of the writ petition in the High Court. The appellant-tenant though sought to bring on record the subsequent developments so taken place, however, the High Court did not incline to the prayer so made. The Apex Court after taking note of the entire case law has concluded that in a case of eviction of a tenant on the ground of personal requirement, the requirement so pleaded by the land-lord should not exist on the date of institution of the petition alone but till the final decree or an order of eviction is made. The judgment under challenge was, therefore, quashed and set aside and the case remanded to the High Court to decide the same afresh in accordance with law and till then the parties were directed to maintain status quo as on that day when judgment was passed. The Apex Court in ***Prabha Arora and another*** *v.* ***Brij Mohini Anand and others (2007) 10 Supreme Court Cases 53*** while placing reliance on the judgment of the Apex Court in ***Kedar Nath Agrawal's*** case supra has quashed the order passed by the High Court and also the Appellate Court without taking note of the subsequent events.

11. On behalf of the petitioner-landlord, no doubt on the strength of the ratio of the judgment of the Apex Court in ***Gaya Prasad*** *v.* ***Pradeep Srivastava (2001) 2 SCC 604***, Mr. Imran Khan, learned counsel has urged that the subsequent developments having taken place need not to be taken into consideration and the requirement on the day of the institution of the rent petition has only to be taken into consideration, however, unsuccessfully, because the latest judgments of the Apex Court cited on behalf of the respondent-tenant are binding precedents. An effort has been made to draw support to the case of the petitioner-landlord from the ratio of the judgment of a co-ordinate Bench of this Court in ***Bhagat Ram Thakur*** *v.* ***Smt. Enakshi Mahajan, 1999(3) Shimla Law Cases, 175***, however, again unsuccessfully as the proposition of law settled in this judgment was that the land-lady cannot be forced to live with her husband, a Government servant in the accommodation provided to him by the Government.

12. On analyzing critically the submissions made by learned counsel representing the parties and also law laid down by the Apex Court, the only inescapable conclusion would be that the subsequent events in a case of eviction of tenant on the ground of personal bonafide requirement are required to be taken into consideration till the final decree is passed in the rent petition. The ratio of the judgment in Kedar Nath Agrawal's case supra reads as follows:

> "16. In our opinion, by not taking into account the subsequent event, the High Court has committed an error of law and also an error of jurisdiction. In our judgment, the law is well settled on the point, and it is this: The basic rule is that the rights of the parties should be determined on the basis of the date of institution of the suit or proceeding and the suit/action should be tried at all stages on the cause of action as it existed at the commencement of the suit/action. This, however, does not mean that events happening after institution of a suit/proceeding, cannot be considered at all. It is the power and duty of the court to consider changed

circumstances. A court of law may take into account subsequent events inter alia in the following circumstances:

(i) The relief claimed originally has by reason of subsequent change of circumstances become inappropriate; or

(ii) It is necessary to take notice of subsequent events in order to shorten litigation; or

(iii) It is necessary to do so in order to do complete justice between the parties."

13. After taking note of the case law, the Apex Court has further held as under:

"30. We must now refer to Hasmat Rai. As already noted, notice was issued by this Court on October 29, 1999 in view of the decision of this Court in Hasmat Rai. In the said decision, the three Judge Bench of this Court held that when eviction was sought on the ground of personal requirement of the landlord, such requirement must continue to exist till the final determination of the case. Following the ratio laid down in Pasupuleti Venkateswarlu, Desai J. stated; "It is now convertible that where possession is sought for personal requirement, it would be correct to say that the requirement pleaded by the landlord must not only exist on the date of the action but also subsist till the final decree or order for eviction is made. If in the meantime events have crept up which would show that the requirement of the landlord is wholly satisfied then in that case his action must fail and in such a situation it is not incorrect to say that such decree or order for eviction is passed against the tenant, he cannot invite the Court to take into consideration the subsequent events." (emphasis supplied).

31. In view of the settled legal position as also the decisions in Pasupuleti Venkateswarlu and Hasmat Rai, in our opinion, the High Court was in error in not considering the subsequent event of death of both the applicants. In our view, it was power as well as the duty of the High Court to consider the fact of death of the applicants during the pendency of the writ petition. Since it was the case of the tenant that all the three daughters got married and were staying with their-in-laws, obviously, the said fact was relevant and material. The ratio laid down by this Court in Rameshwar, would not apply to the facts of this case as it related to agrarian reforms. Likewise, Gaya Prasad, does not carry the matter further. There during the pendency of proceedings the son for whom requirement was sought had joined Government Service. In the instant case, the requirement was for the applicants, who died during the pendency of writ petition. Gaya Prasad is thus clearly distinguishable.

32. There is yet another reason on which the order passed by the High Court is liable to be set aside. As stated earlier, notice was issued by this Court on October 29, 1999 in view

of provisions of sub- section (7) of Section 21 of the Act. Sub-section (1) of the said section enables the landlord to get possession of the tenanted properly on certain grounds. One of such grounds is bona fide requirement by the landlord for residential purposes or for purposes of any profession, trade or calling. Sub-section (1) has to be read with sub-section (7) of Section 21. The relevant part of Section 21 reads as under;

> "21. Proceedings for release of building under occupation of tenant.(1) The Prescribed Authority may, on an application of the landlord in that behalf order the eviction of a tenant from the building under tenancy or any specified part thereof if it is satisfied that any of the following grounds exists, namely
>
> > (a) that the building is bona fide required either in its existing form or after demolition and new construction by the landlord for occupation by himself or any member of his family, or any person whose benefit it is held by him, either for residential purposes or for purposes of any profession, trade, or calling, or where the landlord is the trustee of a public charitable trust, for the objects of the trust ;
>
> (7) Where during the pendency of an application under clause (a) of sub-section (1), the landlord dies, his legal representatives shall be entitled to prosecute such application further on the basis of their own need in substitution of the need of the deceased."

33. Conjoint reading of clause (a) of sub-section (1) and sub- section (7) of Section 21 makes it clear that where the possession is sought by the landlord on the ground of bona fide requirement and during the pendency of the application, the landlord dies, his legal representatives can prosecute such application on the basis of their own need in substitution of the need of the deceased.

34. In the light of decisions referred to by us, particularly in Hasmat Rai and the provisions of sub-section (7) of Section 21 of the Act, the High Court has to consider the matter and record a finding.

35. For the reasons aforesaid, the appeal deserves to be allowed by setting aside the order passed by the High Court. The matter is remitted to the High Court with a direction that the High Court shall consider the subsequent event of death of both the applicants and also the provisions of sub-section (7) of Section 21 of the Act in the light of observations made hereinabove and pass an appropriate order in accordance with law after hearing the parties.

36. Regarding possession, as already noted earlier, according to the respondents, after the dismissal of the

appeal in default and before restoration, they have already taken over possession of the shop. According to the appellants, however, possession has remained with them. We express no opinion. When we are remitting the matter to the High Court with a direction that the High Court will decide the matter afresh according to law, appropriate order will be passed in consonance with the final decision by the High Court. Till then status quo as of today shall continue. There shall be no order as to costs.

14. In view of what has been said hereinabove, the parties on both sides area entitled to avail an opportunity to produce the evidence to find out that in view of subsequent events having taken place during the pendency of this petition the ground of eviction i.e. personal bonafide requirement still subsists in favour of the petitioner-landlord or not. It is the Rent Controller, the appropriate authority to whom the petition deserves to be remanded on reversal of the judgment under challenge in this petition with a direction to take on record the evidence, if any, to be produced by the parties in the changed circumstances and to decide the same afresh, after affording them due opportunity of being heard. Till the additional evidence is produced by the parties on both sides, in the light of subsequent developments having taken place, the status quo as of today with regard to occupancy of the demised premises also deserves to be maintained.

15. Therefore, the judgment under challenge is quashed and set aside. The case is remanded to learned Rent Controller, Dalhousie, District Chamba for fresh decision after taking on record the evidence to be produced by the parties on both sides. It is the respondent-tenant who shall produce the additional evidence first in support of the subsequent developments so having taken place and the petitioner-landlord shall produce the evidence in rebuttal thereto. In view of the present is an old matter, it is expected from learned Rent Controller to decide the petition afresh on or before 30th June, 2016. Till then, status quo with regard to occupancy of demised premises as of today shall continue. The parties through learned counsel representing them are directed to appear before learned Rent Controller, Dalhousie, District, Chamba on ***28th March, 2016***. The record be sent at once so as to reach in the Court of learned Rent Controller well before the date fixed.

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

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

State of Himachal Pradesh ..... Appellant

Versus

Anil Kumar and others ..... Respondents

Cr. Appeal No. 91/2016
Reserved on: 11.3.2016
Decided on: March 14, 2016

N.D.P.S. Act, 1985- Section 20 and 29- A vehicle being driven by 'G' was stopped – 'A' was sitting in front of the vehicle- a rucksack was found near the feet of 'A' which was containing 1.150 kg. of charas- other accused were sitting in the vehicle – they were tried and acquitted by the trial Court- in appeal held, that PW-1 had deposed that documents were prepared at the spot in the official vehicle by the I.O.- PW-8 stated that seizure memo was prepared outside the vehicle which was a major contradiction – PW-2 admitted that no specimen seal was deposited with him- there is no entry in the malkhana register regarding the deposit of the sample seals- no entry was made about the taking out of the case property from the malkhana- it was necessary to make entry in the malkhana register when the case property was taken out from the malkhana and again when it was received back- in these circumstances, prosecution case was not proved beyond reasonable doubt and the trial Court had rightly acquitted the accused. (Para- 12 to 15)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondents : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 23.9.2015, rendered by learned Special Judge-I, Shimla, HP in Sessions Trial No. 14-S/7 of 2015, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 20 read with Section 29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 19.1.2015, at about 12.05 AM, a police party consisting of ASI Mast Ram, HC Ravinder Kumar, Constable Ravi Kumar, Constable Ajay Kumar and Driver HC Rajinder headed by SI Virochan Negi was present on National Highway near Tara Devi PWD workshop. A Bolero Camper jeep bearing No. HP-08A-0669 came from Shimla side which was being driven by Guru Dutt. The vehicle was stopped. Accused Anil Kumar was found sitting in front seat of the Bolero Camper and accused Rinku Chauhan and Rajinder were sitting in the rear seats of the said jeep. A rucksack bag (Pithu) of black and brown colour was found near the feet of Anil Kumar. In the said bag, another carry bag was found. It contained Charas in the form of balls and sticks, without any licence or permit. It weighed 1.150 Kgs. The charas and carry bag were repacked and sealed in a cloth parcel Ext. P-2 sealed with nine impressions of seal 'X'. Sample of seal 'X' was obtained on separate piece of cloth. IO Virochan Negi filled in NCB form in triplicate, Ext. PW-9/B. Rukka Ext. PW-9/A was prepared and sent to the Police Station, Boileauganj (West), Shimla for registration of FIR through Constable Ajay Kumar. On the basis of Rukka, FIR Ext. PW-9/E was registered against accused persons. Personal search of the accused was conducted. Recovered Charas Ext. P5 was taken to Police Station Boileauganj, where it was resealed with seal impression 'M' by Inspector Viri Singh and sample of seal 'M' was also taken on separate piece of cloth Ext. PW-9/C. Resealing certificate is Ext. PW-9/D. Case property was handed over to MHC Police Station, Boileauganj, who entered the same in the Malkhana Register, copy of which is Ext. PW-2/A. IO also prepared spot map Ext. PW-11/A. Case property was sent to the FSL Junga for chemical examination vide RC Ext. PW-2/B.

3. Prosecution has examined as many as 11 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. According to them, they

were falsely implicated. Accused were acquitted by the learned trial Court. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. The State has produced its own record alongwith statements of witnesses. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 C. Ajay Kumar deposed that they laid a Naka near Tara Devi PWD Workshop. At 12.05 AM, one Mahindra Bolero Camper came from Shimla side. Vehicle was stopped. Name of the driver of the jeep was Guru Dutt. Accused Anil Kumar was sitting in the front seat. In the back seat of the jeep, Rinku Chauhan and Rajinder were sitting. One bag of black and brown colour was lying near the feet of Anil Kumar. It was checked. In the said bag, there was another carry bag. On opening said bag, black coloured substance was found in the shape of balls and sticks. It weighed 1.150 kgs. Substance was repacked in the carry bag in the same manner and carry bag was put into the bag and said bag was sealed with 9 seals of 'X'. Seal was handed over to HC Ravinder Kumar. NCB form in triplicate was prepared and impression of seal 'X' was also put on NCB form. Sample of seal 'X" was also taken separately on a piece of cloth. Seizure memo was prepared regarding sealing of cloth parcel, vehicle, documents and key. Rukka was handed over to him by IO. In the cross-examination, he has admitted that other vehicles were checked before the vehicle of the accused on the spot. The spot is on national highway where there was traffic. Three vehicles were challaned under the Motor Vehicles Act. No offer was made by police for their own personal search to the accused persons. Proceedings were completed on the spot in the official vehicle by the IO. The spot was 200 metres away towards Solan from Tara Devi workshop. When documents were prepared by the IO, he was inside the vehicle and on the rear seat ASI Mast Ram and HC Ravinder Kumar were sitting. He alongwith driver of official vehicle was standing near the vehicle of accused persons. All accused were inside their vehicle. Case property was kept in the official vehicle when first document was prepared. IO SI Virochan Negi put the case property inside the official vehicle from the vehicle of accused. He was outside the official vehicle when documents were prepared inside the vehicle. Case property remained inside the police official vehicle up to police station. NCB form was filled in by the IO inside the official vehicle. IO has filled in columns No. 1 to 8 of NCB form but left the space for numbering FIR. The case property was sealed inside the official vehicle of police. Case property was sealed with 9 seal of 'X'. Seal was handed over to HC. Ravinder. The doors of the official vehicle were not open when the documentation in the present case was done by the IO on the spot. Doors of the official vehicle were also not open when case property was sealed.

7. PW-2 Anil Kumar deposed that he was posted as IO in PS Boileauganj, Shimla. He had also charge of MHC Police Station (West) Boileauganj, Shimla. On 19.1.2015, at about 6.20 AM, Inspector SHO Viri Singh deposited with him one parcel sealed with nine seal impressions of 'M' stated to be containing another parcel having 9 seal impressions of 'X' stated to be containing 1 .150 kg charas, sample of seal M, NCB form in triplicate. He made entries in this regard in the Malkhana Register. He sent the case property on 20.1.2015 through Constable Mohit to FSL Junga. He deposited the same at FSL Junga and handed over RC Ext. PW-2/B. In his cross-examination, he has specifically admitted that as per Malkhana Register, no specimen of seal 'X' was deposited with him and same has not been referred in the Malkhana Register. He also admitted that the original of sample seal 'M' was also not deposited in the Malkhana. He also admitted that on Ext. PW-2/B, copy of RC, there is cutting in encircled portion 'A'. He also admitted that on

19.1.2015, there is no entry in the Malkhana Register regarding case property taken out from the Malkhana. Volunteered that on 20.1.2015, case property was sent to FSL, Junga and thereafter, there is no reference of the case property in the Malkhana Register. He further admitted that there is no entry in the Malkhana register regarding taking out the case property to the Court. Volunteered that there is a Rapat in this regard. He also admitted in his further cross-examination that the parcels which were deposited with him on 19.1.2015 were signed by two witnesses but the parcel shown to him in the Court was not signed by any witness.

8. PW-3 C. Mohit Kumar deposed that MHC Anil Kumar handed over to him one parcel sealed with nine seal impressions of seal 'M' alongwith NCB form in triplicate, sample seal 'M', copy of seizure memo, copy of FIR vide RC No. 18/15, Ext. PW-2/B and docket to be deposited with FSL Junga. He deposited the same and handed over RC to the MHC.

9. PW-8 HC Ravinder Kumar deposed the manner in which vehicle was stopped. Charas was recovered. Sealing proceedings were completed at the spot. In the cross-examination, he has admitted that the seizure memo Ext. PW-8/B was prepared outside the vehicle of accused persons by using front bonnet of the vehicle of accused. Rukka was also prepared on the front bonnet of the vehicle of accused. While documentation was done on the spot, case property remained inside the vehicle of the accused persons upto 5 AM. Case property was taken out from the vehicle of accused in the Police Station.

10. PW-9 Inspector Viri Singh, SHO deposed that on 19.1.2015, Constable Ajay produced Rukka before him. He recorded FIR No. 22/2015. IO/SI Virochan Negi produced a cloth parcel sealed with 9 seals of 'X' stated to be containing 1.150 kg charas alongwith NCB form in triplicate, sample seal 'X'. Cloth parcel was sealed. He also examined NCB form in triplicate and filled in the relevant columns. He sealed parcel in another cloth parcel sealed with 9 seals of 'M' and put the impression of seal 'M' on NCB form in triplicate.

11. PW-11 Virochan Negi also deposed the manner in which accused were apprehended and, search, sealing and seizure proceedings were completed at the spot. In his cross-examination, he deposed that the bag of charas upto 5 PM remained in the vehicle of accused persons and was brought to Police Station in the same vehicle. He did not remember to whom seal 'M' was handed over or who kept the same. He also admitted that on Rukka Ext. PW-9/A in red circle, there is cutting in the date.

12. PW-1 C. Ajay Kumar in his cross-examination, as noticed herein above, has categorically deposed that the proceedings were prepared at the spot in the official vehicle by the IO. He alongwith driver of the official vehicle was standing near the vehicle of the accused. Case property was kept in the official vehicle when first document was prepared. IO/SI Virochan Negi put case property inside the official vehicle from the vehicle of the accused. Case property remained inside the official vehicle upto the Police Station. However, PW-8, HC Ravinder Kumar deposed that the seizure memo Ext. PW-8/B was prepared outside the vehicle of the accused persons by using front bonnet. Seizure memo was written by the SI Virochan Negi when documentation was done at the spot. Case property remained inside the vehicle of accused upto 5 PM.

13. There is major contradiction in the statements of PW-1 Ajay Kumar and PW-8 Ravinder Kumar. PW-1 Ajay Kumar, deposed that the entire documentation was done inside the official vehicle and the case property remained inside the official vehicle upto the Police Station. However, PW-8, Ravinder Kumar deposed that the documentation was done

on the bonnet of vehicle of accused persons and case property also remained inside the vehicle of accused. PW-11 SI Virochan Negi deposed that the bag upto 5 PM remained in the vehicle of accused and brought to the police station in the same vehicle. PW-2 Anil Kumar has admitted in his cross-examination that as per Malkhana register, no specimen of seal 'X' was deposited with him hence there is no reference of the same in the Malkhana Register. He also admitted that original of seal 'M' was also not deposited in the Malkhana. He also admitted that after 19.1.2015, there is no entry in the Malkhana Register about the case property being taken from the Malkhana and that there was no entry in the same regarding taking case property to the Court. Volunteered that there was Rapat in this regard.

14. It was necessary to make entry in the Malkhana Register when case property was taken out from the Malkhana to be produced in the Court and entry was again required to be made in the Malkhana Register when it was received back.

15. Thus, the prosecution has failed to prove that contraband was recovered from the conscious possession of the accused persons. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court .

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

State of H.P. .....Appellant.
Versus
Sita Ram Yadav & another .....Respondent.

Cr. Appeal No. 322 of 2012
Reserved on: March 11, 2016.
Decided on: March 14, 2016.

Indian penal Code, 1860- Section 409, 420, 467, 468, 471, 120-B - **Prevention of Corruption Act, 1988-** Section 13(2)- A sum of Rs. 2,40,000/- was sanctioned by D.C., Kullu for erecting retaining wall/breast wall and fencing work of ground of School- it was shown that work in the sum of Rs.1,35,116/- was carried out- but on assessment the work was found to be worth Rs. 58,836/-- false bills were prepared- the work was entrusted by BDO to JE on his own without inviting tender- accused were acquitted by the trial Court- PW-1 did not have any personal knowledge about the work or the expenditure done- he had not made any inquiry regarding the work, the details and expenditure incurred- assessment report was prepared without associating the accused- no satisfactory evidence was led to establish that any amount was entrusted to JE or that he had misappropriated the same- statement of handwriting expert does not prove that accused had prepared false quotation- payments were made to the parties by means of cheque and case of misappropriation cannot be accepted- PW-26 was trapped in this case for taking money from the accused- he was tried and acquitted- the possibility of accused having been falsely implicated cannot be ruled out- trial Court had rightly acquitted the accused- appeal dismissed. (Para-35 to 43)

For the appellant: Mr. M.A.Khan Addl. AG.

For the respondents: Mr. Vishal Panwar, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has come up in appeal against the judgment dated 31.12.2011, rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P. in Case No. 01 of 2006, whereby the respondents-accused (hereinafter referred to as accused), who were charged with and tried for offences punishable under Sections 409, 420, 467, 468, 471, 120-B IPC and 13(2) of the Prevention of Corruption Act, have been acquitted.

2. The case of the prosecution, in a nut shell, is that a complaint mark PX was made by Pradhan PTA to DC Kullu alleging therein that there had been misuse of public money which was sanctioned for the fencing of the wall of Government High School, Chawai. For inquiry, the complaint was entrusted to ASI Kapoor Chand by S.P. Enforcement Zone. During inquiry, it was revealed that for erecting retaining wall/breast wall and fencing work of ground of School, a total sum of Rs. 2,40,000/- were sanctioned by D.C.Kullu. On checking bills, muster rolls, MBs and MAS register, it was noticed that work to the tune of Rs. 1,35,116/- was shown to be carried out. However, when the work was got assessed from SDO, HP PWD, Ani, it was found that the same was worth of Rs. 58,836/-. It also came to light that on 20.3.2011, material worth Rs. 90,144/- such as wire mesh was shown to have been given while handing over the charge. The amount had wrongly been shown in the MB by preparing false bills. The inquiry also revealed that accused Sita Ram Yadav, the then J.E. with Block Development Office had handed over to Sh. Ramesh Gandhotra J.E., 70 bags of cement, 9 M^3 sand and 6.89 M^3 of aggregate of value of Rs. 19,550/-. However, in the MB, by forging bills, material worth Rs. 56,730/- was shown to have been given while handing over charge to Ramesh Gandhotra. Sh. Sita Ram Chauhan (since deceased), the then BDO, Ani had entered into conspiracy with Sita Ram Yadav as well as accused Kamal Dev, who had prepared false bills and also forged the record by misusing their powers while causing loss/misappropriating to the public funds meant for the execution of the work. Sh. Kamal Dev has expired on 11.1.2012. The work was entrusted by the BDO to J.E. on his own. No estimate was got prepared and no tenders were invited. The wire mesh and angle iron worth Rs. 1,19,974/- was purchased from Skirni Hardware, Ani vide bill No. 1706, dated 30.3.1999. Vide bill No. 1924,dated 1.6.1999, 150 cement bags had been allegedly purchased from Malhotra Traders by respondent No. 1 regarding which entry was made at page No. 93 of MB. On 28.5.1999, Sita Ram Yadav had collected quotations for sand, stones and aggregate (Bazri) which were to be opened by the BDO. The BDO in order to help Kamal Dev Ex-Pradhan, Chawai accepted his quotation despite the fact that he was not a sand contractor. He had no permission to deal with sand and was not having crusher. The BDO without checking the material passed the bill for an amount of Rs. 52,400/- and thereby made payment vide cheque No. 661470 dated 7.6.1999. The BDO also issued muster roll No. 314 for fencing to JE for the period from 1.6.1999 to 30.6.1999 and thus got entrusted the work for execution to Sita Ram Yadav. It was also detected that the workers who were named in the muster rolls had been engaged by Kamal Dev accused who used to supervise the work. As per the muster roll, 20 labourers/beldars were shown to have worked in the execution of work but in the investigation only 10 were found to have actually worked. The material was purchased without checking the same. Fake bills were prepared. It also transpired that Kamal Dev accused had procured quotations in the name of Kumbh Dass and Roshan Lal regarding stones, sand and aggregate by getting the same prepared fakely and got his quotations

approved from BDO for the supply of material who also passed bills amounting to Rs. 52,400/-. 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 33 witnesses. The accused were also examined under Section 313 Cr.P.C. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, Addl. AG has vehemently argued that the prosecution has proved the case against the accused persons beyond reasonable doubt. On the other hand, Mr. Vishal Panwar, Advocate, has supported the judgment of the learned trial Court dated 31.12.2011.

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

6. PW-1 Atma Ram deposed that he was Pradhan of PTA Chawai School. The budget was approved for fencing the ground of the School. It had come to the Block from DC, Kullu. It came to his notice that initially Rs. 1.5 lacs had been sanctioned to the Block for the work in question and subsequently Rs. 90,000/- were received by the Block. The work was being executed by the Block since 1999. Its pace was quite slow. When in the year 2001, the new Panchayat came into being, he inquired from the then BDO regarding the work in question. At that time, the BDO told that since the funds had exhausted and the further work could not be executed. When the work had been sanctioned, at that time, Sita Ram was the BDO and now he has died. JE was Sita Ram Yadav. At that time, accused Kamal Dev was the Up Pradhan of Gram Panchayat Chawai. He made complaint to the Deputy Commissioner vide mark PX. In his cross-examination, he admitted that Mark PX did not bear his signatures. He had no personal knowledge as to how much work was got conducted and what was the expenditure that incurred thereon. He did not inquire regarding the details of work and expenditure incurred thereon. He did not inquire from the Block regarding payment amounting to Rs. 30,086/- made to the labourers. He did not know that BDO through accused Kamal Dev had made payment to the labourers. He did not know that iron/wire mesh of value of Rs. 1,19,974/- was purchased and the payment was made by BDO Sita Ram to Skirny Hardware, Ani. He did not know that similarly BDO Sita Ram had paid Rs. 22,800/- to Malhotra Traders through cheque. He also admitted that at that time, material such as aggregate, sand and stones were lying on the site. He did not know that BDO Sita Ram had made payment of Rs. 52,400/- to Kamal Dev accused. He did not know that when accused Sita Ram Yadav was transferred at that time he handed over material worth Rs. 90,144/- to his successor Vijay Kaushal. He also admitted that the work was being executed by the Block directly without the indulgence of the Panchayat. The muster rolls were issued by the Block. In case the work was to be executed by the Panchayat, the muster rolls were to be issued by it. He reiterated that even after stoppage of the work, some material, such as, sand, aggregate etc. was lying on the spot.

7. PW-2 Vijay Kaushal deposed that he was posted as JE in BDO Office, Ani since November, 1999. He was associated in the investigation by the police. He handed over record to the police vide memo Ext. PW-2/A. In his cross-examination, he admitted that when he was handed over the charge, at that time, accused Sita Ram Yadav had given to him wire mesh measuring 3600 sq. feet and M.S. flat weighing 2232 Kg. He could not say that their value was Rs. 90,144/-. He also admitted that the work which was executed by the Block, the payment was to be made by the BDO and Superintendent of the BDO Office. The payment to the labour is made on the identification of the Mate. He also deposed that the Panchayat had no role in the execution of the work.

8. PW-3 Beli Ram deposed that in the year 2002, he was posted as Secretary Gram Panchayat Chawai. He was associated by the police during the investigation in the case. He handed over the record to the police for the period of 1995 to 2001 which was taken into possession by the police vide Ext. PW-1/A.

9. PW-4 Kamlesh Kumar deposed that he was posted as P.A. in the office of BDO. He was associated by the police during the investigation in the case. He handed over the record mentioned in Ext. PW-2/A to the police. Memo Ext. PW-2/A was signed by him.

10. PW-5 Sant Ram deposed that he has attested the signatures of Sita Ram Yadav.

11. PW-6 Kumb Dass deposed that he has not put his signatures on Ext. P-20. He has not worked as labourer in the construction of fencing of the School. In his cross-examination, he has admitted that he has not disclosed the names of the accused persons to the police that they have forged his signatures on muster roll Ext. P-20.

12. PW-7 Lal Chand deposed that he has worked as labourer in the construction of fencing of the School. He was engaged as labourer. He has worked for 26 days @ Rs. 51/- per day. It was paid to him. He has not put his signatures in red circle R-1 on the muster roll Ext. P-20. In his cross-examination, he has deposed that he had received money from Kamal Dev. He has never worked as mate. He has only worked as labourer.

13. PW-8 Pune Ram deposed that he was working as mason from the year 1999 to 2005. Alongwith him, 5-7 labourers were working for constructing wall. He identified muster roll Ext. P-20. He has signed the same in red circle R-2.

14. PW-9 Chaman Lal deposed that he had worked as labourer in the construction of fencing of the School and work of angle iron. There were six labourers and two masons working for the said work.

15. PW-10 Sohan Lal and PW-11 Rajesh Kumar also deposed that they have worked in the site along with 8 persons.

16. PW-12 Brikam Chand deposed that he has not worked in the fencing work of the High School ground.

17. PW-13 Chapa Ram deposed that he has not put his signatures in red circle as P-4 on the muster roll Ext. P-20. He has given his signatures before Naib Tehsildar, Ani.

18. PW-14 Shyam Dass deposed that he has also not worked as labourer in the construction of fencing of the School. He has put his signatures in red circle R-8 on the muster roll Ext. P-20.

19. PW-15 Sadhu Ram deposed that he has worked for six days in fencing work at High School Chawai. He has not put his signatures in red circle R-9 on the muster roll Ext. P-20.

20. PW-16 Chaman Dass deposed that he has not worked as labourer in the construction of fencing of the School. He has not put his signatures in red circle R-10 on the muster roll Ext. P-20.

21. PW-17 Prem Chand deposed that he was called by Kamal Dev for fencing work. He has not put his signatures in red circle R-11 on the muster roll Ext. P-20.

22. PW-18 Shyam Lal deposed that he has worked in the construction of fencing of the School. Lal Chand paid him for the work. He has not put his signatures on the muster roll Ext. P-20.

23. PW-19 Joginder Singh deposed that he has not worked as labourer in the construction of fencing of the School. He has not put his signatures in red circle R-13 on the muster roll Ext. P-20.

24. PW-20 Hira Lal deposed that he has worked as labourer in the construction of fencing of the School. He has not put his signatures in red circle R-14 on the muster roll Ext. P-20.

25. PW-21 Chaman Lal deposed that he has not worked as labourer in the construction of fencing of the School.

26. PW-22 Shyam Singh and PW-23 Karam Dass deposed that they have not worked in the fencing work in the High School Chawai.

27. PW-24 Kamal Kant Saroch deposed that the accused was posted as JE in the Block. Sita Ram had got passed a muster roll No. 314 of the period June, 1999 from him. He had visited the spot and found that the boundary wall had already been constructed. On the spot, there were angle iron put on the boundary wall and on some portion of the boundary wall, wire mesh was put. In his cross-examination, he deposed that cash is kept in chest, of which one key is kept by the Accountant/Superintendent and another by the BDO. Usually when payment of cash is made to the JE, receipt is taken. He also admitted that for payment of cash, receipt should have been taken.

28. PW-26 Karam Chand Sharma deposed that he started the investigation on 1.8.2002. He went to BDO Office Ani and took into possession record pertaining to Govt. High School, Chawai vide memo Ext. PW-2/A. He has also obtained their specimen signatures from Naib Tehsildar, Ani. Specimen signatures were obtained of twelve persons, namely, S/Sh. Lal Chand, Roshan Lal, Chaman Lal, Shyam Lal, Sohan Lal, Sadhu Ram, Charan Dass, Chaman Lal, Hira Lal, Rajesh, Shyam Dass and Chepa Ram. On 3.8.2002, he also obtained specimen signatures of Prem Chand. He also called Sita Ram Yadav for getting his specimen signatures and handwriting at Dharamshala. He admitted categorically in his cross-examination that in this case he was trapped. He denied that he was demanding Rs. 50,000/- from accused Sita Ram Yadav for getting it settled. He admitted that he was tried in the Court of ADJ, Mandi. Volunteered that the same stands decided in his favour. He admitted further that BDO was the executing agency.

29. PW-28 Dr. Meenakshi Mahajan has proved reports Ext. PW-28/B and PW-28/C. In cross-examination, she admitted that the police had not asked to identify the author of the writings in Exts. P-5, P-6 and P-7. By seeing the writing in the Court, she could not say whether they have been written by one person or otherwise. She could not say anything about the author of the writing by looking at them with naked eyes.

30. PW-29 Surinder Singh Thakur deposed that on 1.8.2002, specimen signatures of 12 persons were taken in his Court on the application of the police. These were identified by Atma Ram, Ex-President, Gram Panchayat Chawai. In his cross-examination, he admitted that he was not knowing the persons personally whose signatures were taken by him.

31. PW-30 Gujant Singh deposed that he remained posted as Assistant Engineer, HPPWD Sub Division, Ani, w.e.f. 9.2.2001 to 31.10.2003. He remained associated in the investigation of this case. His assessment report is Ext. PW-30/A and it was signed

by Sh. Jai Kumar J.E. According to him, the total cost in respect of expenditure was Rs. 58,836/-. In his cross-examination, he admitted that when assessment report was prepared, accused Sita Ram Yadav was not called by them. The site was shown to him by the police and the local people. At the spot iron angles were fixed vertically and horizontally. He got excavated some portion of the land, however, he did not remember as to how much portion was got excavated by him. He did not remember the names of the persons who excavated the portion of land. There were 25 iron angles fixed vertically. He admitted towards the end of his cross-examination that head load carriage for carrying cement, sand, aggregate, stone and water had not been taken on prevailing market rates and in assessment report he had taken the same as per the schedule rate pertaining to the year 1987. He did not make assessment on the spot. He did not assess the value of the construction material lying at the site.

32. PW-31 Ram Singh deposed that he had not worked in fencing work of the school.

33. PW-32 Kapoor Chand deposed that the complaint was entrusted to him for inquiry. He inquired into the complaint. On the basis of inquiry, he sent rukka Ext. PW-32/A on the basis of which FIR was registered. In his cross-examination, he admitted that the application mark PX was not signed by anyone. He could not say that the payment of muster roll Ext. P-20 was made by cheque or by cash. He did not check the record of BDO office. He had visited the spot alongwith SDO for assessing the work done by the accused. He did not remember as to whether the official from BDO was with them or not. The work at site was shown to him by the complainant Atma Ram. He did not associate any official from BDO Office to conduct inquiry. He did not associate accused Kamal Dev during inquiry. He also admitted that sand, stones and grit was lying unused on the spot.

34. PW-33 Babita Negi, has proved the prosecution sanction accorded by Superintending Engineer, 14th Circle, HPPWD, Rohru.

35. Though the complaint Mark PX was made by PW-1 Atma Ram, but he has not signed the same. The Block has got the work executed from the labourers. He did not remember the names of the local labourers. He had no personal knowledge as to how much work was executed and how much expenditure was incurred thereon. He did not inquire regarding the details of work and expenditure incurred thereon. He did not inquire from the Block regarding payment amounting to Rs. 30,086/- made to the labourers. He did not know that BDO through accused Kamal Dev had made payment to the labourers. He did not know that iron/wire mesh of value of Rs. 1,19,974/- was purchased and the payment was made by BDO Sita Ram to Skirny Hardware, Ani. He did not know that similarly BDO Sita Ram had paid Rs. 22,800/- to Malhotra Traders through cheque. He also admitted that at that time, material such as aggregate, sand and stones were lying on the site. He did not know that BDO Sita Ram had made payment of Rs. 52,400/- to Kamal Dev accused. He did not know that when accused Sita Ram Yadav was transferred at that time he handed over material worth Rs. 90,144/- to his successor Vijay Kaushal. The muster rolls were issued by the Block. He also admitted that the work was being executed by the Block directly without the indulgence of the Panchayat. PW-2 Vijay Kaushal, in his cross-examination, admitted that when he was handed over the charge, at that time, accused Sita Ram Yadav had given to him wire mesh measuring 3600 sq. feet and M.S. flat weighing 2232 Kg. He did not know the value of the same was Rs. 90,144/-. He also admitted that the work which was executed by the Block, the payment was to be made by the BDO and Superintendent of the BDO Office. The payment to the labour is made on the identification of the Mate. PW-24 Kamal Kant Saroch, in his cross-examination, deposed that cash is kept in chest, of which one key is kept by the Accountant/Superintendent and another by the BDO. Usually

when payment of cash is made to the JE, receipt is taken. He also admitted that for payment of cash, receipt should have been taken.

36. PW-32 Kapoor Chand deposed that the complaint was entrusted to him for inquiry by the Superintendent of Police. He inquired into the complaint. In his cross-examination, he admitted that the application mark PX was not signed by anyone. He could not say that the payment of muster roll Ext. P-20 was made by cheque or by cash. He did not check the record of BDO office. He had visited the spot alongwith SDO for assessing the work done by the accused. The work at site was shown to him by the complainant Atma Ram. He did not associate any official from BDO Office to conduct inquiry. He did not associate accused Kamal Dev during inquiry. He also admitted that sand, stones and grit were lying unused on the spot. PW-30 Gujant Singh has prepared the assessment report Ext. PW-30/A. In his cross-examination, he admitted that when assessment report was prepared, accused Sita Ram Yadav was not called by them. The site was shown to him by the police and the local people. He did not remember the names of the persons who excavated the portion of land. At the spot iron angles were fixed vertically and horizontally. He got excavated some portion of the land, however, he did not remember as to how much portion was got excavated by him. He admitted towards the end of his cross-examination that head load carriage for carrying cement, sand, aggregate, stone and water had not been taken on prevailing market rates and in assessment report he had taken the same as per the schedule rate pertaining to the year 1987.

37. According to the muster roll Ext. P-20, Rs. 30086/- had been paid to the labourers. However, from the statement of PW-24, Kamal Kant, who was BDO, Ani at the relevant time, it is not proved that the amount was paid by Sita Ram and subsequently, payment was made to the labourers as per their names mentioned in muster roll Ext. P-20. In case, he had paid money to him, he was supposed to take receipt of the same. Ext. P-18 is the bill which was passed by BDO Ani vide Ext. P-17 and payment was made through cheque No. 625002 dated 3.4.1999. Ext. P-19 is the receipt of the person who has received this cheque from BDO Ani. Ext. P-13 is the bill which was raised by Malhotra Traders in the sum of Rs. 2,800/- in respect of 150 bags of ACC cement. The payment of the bill was passed by the BDO vide Ext. P-11 through cheque No. 869939 dated 2.6.1999. Ext. P-12 is the receipt of the same. Ext. P-8 is the bill which was raised in the sum of Rs. 52,400/- by Kamal Dev accused for supplying stones, sand and aggregate. Vide Ext. P-9 bill was passed by BDO Ani and payment was made through cheque No. 661470 dated 7.6.1999. The cheque was received by Kamal Dev accused vide receipt Ext.. P-10.

38. The prosecution has not led any clinching evidence to the effect that respondent J.E. Sita Ram Yadav was entrusted any amount and that he has misappropriated the same for his own use or for the use of his co-accused. The amount, as discussed hereinabove, was passed by the BDO, Ani and payments were released through cheques to the concerned quarters.

39. Now, as far as signatures on various receipts are concerned, PW-28 Dr. Minakshi Mahajan, Asstt. Director FSL, Junga has admitted that the police had not asked to identify the author of the writings in Exts. P-5, P-6 and P-7. By seeing the writing in the Court, she could not say whether they have been written by one person or otherwise. She could not say anything about the author of the writing by looking at them with naked eyes. Thus, there is not an iota of evidence which would prove that accused Kamal Dev had prepared false quotations Ext. P-5, Ext. P-6 and Ext. P-7. There is ample evidence on record to prove that the work was executed by BDO office and not by the Panchayat. The muster rolls were also issued by Block. Thus, the prosecution could not proved that the accused

Kamal Dev has made interpolations in the muster rolls or engaged labourers/beldars. There is no evidence that accused Kamal Dev has made payments to the labourers.

40. The prosecution has also alleged that accused Kamal Dev never supplied the material in question for which he has received the payment, since he was not registered contractor. There is no requirement that the construction material could only be supplied by the registered contractor having mining licence. The construction material could be purchased by making payments, rather it has come on record that sand, aggregate etc. were lying on the spot unused.

41. PW-30 Gujant Singh has not assessed the value of the material lying on the spot. Even, the site was shown to him by the police and the local people. He got excavated some portion of the land, however, he did not remember as to how much portion was got excavated by him. He did not associate any official from the office of BDO. He has not got the material used for construction attested from the Laboratory. He has made entry as per the schedule pertaining to the year 1987.

42. It has come in the statement of PW-2 Vijay Kaushal that when he was handed over the charge, accused Sita Ram Yadav had given him wire mesh measuring 3600 sq. feet and M.S. flat weighing 2232 kg. He did not know the value of this material could be Rs. 90,144/-. The payments have been made to the parties through cheque. The prosecution has miserably failed to prove that money was appropriated by Sita Ram Yadav. There is no evidence that accused Sita Ram Yadav has paid the money to the labourers amounting to Rs. 30,086/-.

43. It has also come on record that PW-26 Karam Chand was trapped in this case for taking money from the accused. He was tried in the Court of ADJ, Mandi, though he was acquitted. He was apprehended while accepting Rs. 15,000/-. The possibility of the accused being falsely implicated by PW-26 Karam Chand cannot be ruled out since Sita Ram Yadav has not paid the amount as demanded by him. Thus, the prosecution has failed to prove the case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 31.12.2011.

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

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

State of Himachal Pradesh .....Appellant

Versus

Darshan Kumar .....Respondent

Cr. Appeal No. 84 /2016
Reserved on: 4.3.2016
Decided on: March 14, 2016

N.D.P.S. Act, 1985- Section 20- Accused was holding a carry bag in his right hand- he became perplexed and tried to run away on seeing the police- his search was conducted during which 1.5 kg. of charas was recovered- it was admitted by PW-1 in his cross-examination that the place was a busy road and vehicles pass through the place frequently -

independent witnesses were easily available but prosecution has not joined any independent witness- held, that in these circumstances prosecution has failed to prove its case beyond reasonable doubt and the accused was rightly acquitted by the trial Court. (Para-10 and 11)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted by the State against Judgment dated 3.9.2015 rendered by Special Judge, Chamba Division, Chamba, HP in Sessions Trial No. 83 of 2013, wherby respondent has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 3.10.2013, ASI Rajesh Kumar of State CID Crime Bureau, Chamba alongwith IO Kit and other police officials, ASI Bhupinder Singh, HHC Surinder Kumar, Constable Abnish, Shoukat Ali and Lady Constable Asha Kumari was present at place Gunnu Nallah in connection with a secret information. At about 11 AM, one person came from Nakrod side towards Chamba on foot. He was holding a carry bag in his right hand. On seeing the police party, he became perplexed and tried to run back side. He was nabbed. ASI Rajesh Kumar entertained suspicion that accused might be possessing some illegal thing or contraband and therefore asked the accused to give his search to the police present on the spot or some Gazetted Officer and he can inform him orally or in writing. Accused opted to give his personal search as well as search of the bag to the police officials present on the spot. After giving personal search, carry bag was checked. It contained black substance in the shape of sticks. It was found to be Charas. It weighed 1.500 kg. After weighing charas was put in the same carry bag and packed in a parcel and sealed with eight seals of impressions 'K'. Specimen seal impressions were retained on a separate cloth piece. NCB form was filled in triplicate and impression of seal was also embossed on the NCB form. Seal after use was given to ASI Bhupinder Singh. Charas parcel was taken into possession. Thereafter, ASI Rajesh Kumar prepared Rukka. It was faxed to the police station and its copy was also sent to the SP Crime through fax. FIR was registered. Parcel of charas was got resealed from Inspector/ SHO Surat Ram. It was sent to FSL Junga. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 12 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. Accused was acquitted. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

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

6. Case of the prosecution, in a nutshell, is that accused was apprehended at Gunnu Nallah. Police had prior information. It reached the spot. Accused was carrying bag. It contained Charas. It weighed 1.5 kg.

7. PW-3 Sunil Kumar has admitted in his cross-examination that he left the spot at 1 pm with Rukka. However, IO deposed that he had sent Rukka through private fax,

however, neither the number of fax machine is given nor the owner of the fax machine has been examined.

8. PW-7 ASI Kalyan Singh deposed that he received information on 4.10.2013 under Section 42(2) of NDPS Act. However, alleged information was sent on 3.10.2013. According to the IO, he sent the information to the senior officers as required under Section 42(2) through Lady Constable Asha Devi on 3.10.2013.

9. PW-12 Rajesh Kumar, in his cross-examination, has admitted that at a distance of four kms from Gunnu Nallah, villages Rampur, Kandla are situated and there is habitation in those villages. He further admitted that at a distance of 1 ½-2 kms, there is a barrier and locality is there and forest officials used to work there day and night.

10. PW-1 ASI Bhupinder Singh, in his cross-examination, has admitted that the road passing through Gunnu Nallah is a busy road and vehicles pass through this Nallah frequently. He admitted that every bus going towards Tissa passes through Gunnu Nallah and about 5-7 vehicles crossed Gunnu Nallah in his presence till 1 am. Thus, independent witnesses were easily available but the IO has not made any efforts to join the independent witnesses at the time of search and seizure. IO has not mentioned in the Rukka that he has received secret information and has complied with mandatory provisions of Section 42 (2) of the Act and further he has not recorded in the statement of the witnesses that lady Constable Asha Devi was with him.

11. Thus, the prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court .

12. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

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

Union of India & others ....Petitioners
Versus
Shri Lal Dass ....Respondent

Review Petition No. 19 of 2016
Date of decision: 14.03.2016

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- Petitioner has sought review on the ground of subsequent developments i.e. judgment passed by the Apex Court- this does not satisfy the requirement of Section 11 read with Order 47 Rule 1 CPC- petition dismissed. (Para- 2 and 3)

Case referred:
Union of India & others versus Shri Lal Dass, I L R 2015 (VI) HP 189 D.B.

For the petitioner(s) : Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate.
For the respondent(s): Nemo

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

By the medium of this Review Petition, the petitioners have sought review of the judgment and order dated 04.11.2015, made by this Court in CWP No. 3641 of 2009, titled **Union of India & others** versus **Shri Lal Dass**, for short 'impugned judgment', on the ground which was not available to them, at the time when the impugned judgment was made.

2. The petitioners have sought the review on the ground of subsequent developments, i.e. judgment made by the Apex Court.

3. We have gone through the impugned judgment and the review petition. The petitioners have not made any ground in terms of the mandate of Section 114 read with Order 47 of the Code of Civil Procedure. No case for review is made out.

4. In view of the above, the review petition is dismissed in limine.

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

Review Petitions No. 17 & 18 of 2016
Date of decision: 14.03.2016

1. Review Petition No. 17 of 2016

Vijay Sood ....Petitioner
Versus
Central University of Himachal Pradesh ....Respondent

2. Review Petition No. 18 of 2016

Mohan Kumar & others ....Petitioners
Versus
Central University of Himachal Pradesh ....Respondent

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- The grounds taken in the review petition does not satisfy the requirement of Section 114 read with Order 47 Rule 1 CPC- hence, no case for review is made out and the Review Petition ordered to be dismissed. (Para- 4 to 6)

Case referred:
Union of India & others versus Paras Ram, I L R 2015 (III) HP 1357 D.B.

For the petitioner(s) : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.
For the respondent(s): 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 (Oral)

By the medium of these review petitions, the petitioners have sought review of the judgment and order dated 23.12.2015, whereby two writ petitions being CWPs No.

575 of 2015, titled Vijay Sood versus Central University of H.P., Dharamshala and 580 of 2015, titled Mohan Kumar & others versus Central University of HP, came to be disposed of.

2. Review Petition No. 17 of 2016 contains five paras and Review Petition No. 18 of 2016 contains six paras, which are factual grounds.

3. The grounds taken in the review petitions do not satisfy the mandate of Section 114 read with Order 47 Rule 1 of the Code of Civil Procedure.

4. It is apt to record herein that this Court has already laid down the parameters in the judgments rendered in **Review Petition No. 56 of 2014**, titled as **Ranjeet Khanna versus Chiragu Deen and another**, decided on 8th August, 2014 and **Review Petition No. 65 of 2015**, titled as **Union of India & others versus Paras Ram**, decided on 25th June, 2015.

5. We have gone through the judgment under review and the grounds taken in the review petitions. The review petitioners have not taken any ground, as required under law.

6. Having said so, no case for review is made out and the review petitions merit to be dismissed. Accordingly, the review petitions are dismissed alongwith all pending applications.

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

Balkrishan ... Appellant

Versus

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

L.P.A. No. 42 of 2010
Reserved on: 29.02.2016
Date of decision: 15.03.2016

Constitution of India, 1950- Article 226- Appellant was engaged as a beldar- he claimed that he was working as a supervisor- he further claimed that the person appointed after him had been appointed as supervisor, whereas, benefit was denied to him- writ petition was ordered to be dismissed by the Writ Court- original record shows that petitioner had only worked as beldar and not as a supervisor- in some muster rolls attendance has been marked by appellant but these are only stray entries and cannot be relied upon - the findings recorded by the writ Court are pure findings of facts and cannot be interfered in the appeal- appeal dismissed. (Para-5 to 10)

For the appellant: Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.:

This Letters Patent Appeal is directed against the judgment passed by the learned writ Court, whereby the claim of the petitioner for directing the respondents to consider him as Supervisor and pay him salary accordingly from the date of his initial engagement, that is, March, 1992, stands rejected.

The facts in brief may be noticed.

2. The appellant is matriculate and was engaged as a Beldar by the respondents in March, 1992 and claimed that ever since his appointment, was working as Supervisor. He further claimed that the persons appointed much after him had been designated as Supervisors whereas, this benefit had been denied to him. The petitioner made various representations and thereafter ultimately filed Original Application before the Tribunal.

3. In response to the claim, the respondents had submitted that the appellant had been appointed as a Beldar and had, therefore, rightly been paid the wages of Beldar. The appellant filed rejoinder and annexed therewith muster rolls Annexures A-2/1 to A-2/7 in support of his contention that he marked the presence of workers who were on duty and thus according to him this was sufficient proof to prove that he had been working as Supervisor.

4. On closure of the Administrative Tribunal, the Original Application came to be transferred to this Court and was registered as CWP(T) No. 4885 of 2008 and came up for consideration before the learned Single Judge on 13.07.2009.

5. The learned Single Judge made elaborate discussion on the aforesaid muster rolls, as is evident from Paras 9 and 10 of the impugned judgment, which reads as under:-

> "9. The petitioner has heavily relied on muster rolls Annexures A-2/1 to A-2/7 in order to show that he had been working as Supervisor. The muster rolls Annexures A-2/1 to A-2/7 were issued in the name of J.S. Verma, Junior Engineer, Darlaghat. The muster rolls Annexure A-2/1 to A-2/4 and A-2/7 were issued for Beldars whereas muster rolls Annexure A-2/5 and A-2/6 were issued for Beldars and Masons. The petitioner has marked his presence by signing muster rolls Annexure A-2/1 to Annexure A-2/7. It is the case of the petitioner that right from the year 1992 he had been working as Supervisor and not as Beldar. The muster rolls Annexures A-2/1 to A-2/7 were not issued for any Supervisor. The petitioner has marked his presence by signing muster rolls Annexures A-2/2 to A-2/6 but on these muster rolls he has nowhere indicated that he has marked his presence by signing these muster rolls as Supervisor.
>
> 10. It appears the muster rolls Annexures A-2/1 to A-2/7 were not issued and maintained properly. It is the case of the respondents that petitioner was engaged as Beldar and he never worked as Supervisor. On the contrary, it is the case of the petitioner that he has worked as Supervisor though muster rolls of Beldar were issued to him. The muster rolls Annexures A-2/1 to A-2/7, do not show that

petitioner actually worked as Beldar or Supervisor but he has signed these muster rolls in token of his presence. The obvious inference from the stand of the respondents is that petitioner was paid wages of Beldar. In what capacity the petitioner has marked his presence and signed these muster rolls Annexures A-2/1 to A-2/7 that has not been made clear."

After making these observations, the petition was ordered to be dismissed.

6. Aggrieved by the judgment passed by the learned Single Judge, the petitioner/appellant filed the instant appeal and has reiterated all those grounds which he had taken before the learned writ Court.

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

8. At the outset, it may be stated that in order to satisfy ourselves regarding the claim set forth by the appellants, we called for the original muster rolls for the relevant period. Having minutely gone through the muster rolls for the entire period one comes to the inescapable conclusion that the petitioner had only worked as a Beldar and not as a Supervisor from the date of his initial appointment. For the year 1992-1993 onwards, majority of the muster rolls have been marked by one Jamna Dass. For the year 1995 again, the attendance in majority of the muster rolls have been marked by Jamna Dass and in one muster roll, the attendance has also been marked by Roop Ram. Similarly for the muster rolls of the year 1997, it is one Govind, who alongwith petitioner has marked the attendance. In the muster rolls for the year 1999, it is again Jamna Dass, who has marked the attendance. It is only in the year 2000 that majority of the attendance in the muster roll has been marked by the appellant. However, thereafter again the attendance is being marked by some other person(s). Thus, the entries in the muster rolls of the relevant period do not support the contentions of the appellant.

9. Further the documents annexed as Annexure A-2/1 to A-2/7 are only selective copies of the muster rolls wherein the attendance has undisputedly been marked by the appellant. But as discussed above, these are only stray entries and, therefore, do not in any manner establish that the appellant was in fact working as a Supervisor from the date of his initial appointment as is being claimed by him.

10. Moreover, the findings recorded by the learned writ Court are pure findings of fact which normally cannot be interfered with in this appeal except on well established principles. Having said so, we find no merit in this appeal and the same is dismissed leaving the parties to bear the costs.

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

Court on its own motion ...Petitioner.

Versus

Sh.P.C.Dhiman & others ...Contemnors.

CMP No.11068 of 2015 in COPC No.276 of 2015 a/w CWP No.1259 of 2015.

Reserved on: 27.02.2016.

Date of Decision: March 15, 2016.

Contempt of Courts Act, 1971- Section 12- Writ petitioner filed a writ pleading that they were appointed as lecturers under Para Teachers Policy- policy was framed by the Government to regularize the services of those para teachers who had completed uninterrupted service of 10 years- 439 para teachers were regularized- names of the writ petitioners were not mentioned in the list - a subsequent notification was issued stating that the Lecturers in the subjects of Psychology, Electronics and Home Science would be offered appointment as TGTs and not PGTs as the cadre was declared as dying cadre- however, another notification was issued and the teachers in the Home Science were offered the post of PGT- the services of the petitioners were regularized as TGTs and not PGTs- an application for interim relief was also filed- interim order was passed by the writ Court and the petitioners were permitted to work as PGTs- a subsequent order was passed stating that it would be open to the respondents to redress the grievances of the petitioners by granting them the pay scale of post graduate teachers- another order was passed that the order had not been complied with, therefore, the contempt proceedings be initiated- respondents informed the Court that they had complied with the direction- Contempt petition was disposed of- petitioners filed a petition pleading that the order should be recalled as the respondents had not implemented the order and had not paid the salary as PGTs- respondents filed a reply in which they admitted that order had been implemented- when the petitions came up for consideration, it was conceded that the matter was covered in the SLP pending before the Hon'ble Supreme Court in which order of status quo was granted- held, that respondents should have approached the Court to explain the difficulty instead of saying that the order had been implemented- respondents had obtained legal advice from the Law Department in which it was stated that petitioners are entitled to the salary of PGT- petitioners will succeed in their claim only if the decision of the Government to regularize the services of the Lecturers School Cadre (Para Teachers) is upheld by the Hon'ble Supreme Court- status quo order was passed earlier to the order of the High Court- hence, proceedings dropped and the respondents warned to be careful in future. (Para-2 to 19)

Case referred:
Rulda Ram Vs. Rakesh Kanwar, I L R 2015 (I) HP 495 D.B.

For the Petitioner	:	Mr. Sanjeev Bhushan, Senior Advocate with Mr. Sanjay Bhardwaj, Advocate.
For the Respondents:		Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

On 23.04.2015, a Co-ordinate Bench of this Court drew contempt proceedings against the respondents for having, prima facie, violated the orders passed by this Court on 18.02.2015.

2. The factual matrix giving rise to this petition is that one Sunita Pandey alongwith two other petitioners (hereinafter referred to as the writ petitioners) filed CWP No. 1259 of 2015 before this Court wherein it was averred that they came to be appointed as Lecturers in the subject of psychology pursuant to the policy framed by the Government and commonly known as "Para Teachers Policy, 2003".

3. A policy was framed by the Government to regularize the services of those Para Teachers, who had completed uninterrupted service of 10 years vide Office Order dated 18.12.2014. Pursuant to such order, as many as 439 Para Teachers came to be regularized as PGTs. The names of the writ petitioners did not figure in the aforesaid order dated 18.12.2014. However, a subsequent notification was issued on 03.01.2015 wherein it was stated that the Lecturers in the subjects of Psychology/Electronics and Home Science would be offered appointment as TGTs and not PGTs since these had been declared as dying cadre.

4. On 15.01.2015, the respondents issued another notification whereby the PTA Teachers in the subject of Home Science were offered the post of PGT. On 19.01.2015, another notification was issued whereby the services of the writ petitioners came to be regularized as TGTs. It was against the aforesaid notifications whereby the writ petitioners had been appointed as TGTs and not PGTs that CWP No. 1259 of 2015 came to be filed by them. Alongwith the writ petition, an application for interim relief was also filed and operative portion of the prayer clause reads as under:-

> "It is, therefore, respectfully prayed that this application may kindly be allowed and during the pendency of the writ petition, non applicants respondents may kindly be directed to direct the Principals of the concerned schools/DIETs where the applicants were performing their duties to allow the applicants to perform their duties as PGTs, Psychology and further to pay salary and emoluments to the applicants as is paid to the other PGTs who have been regularized vide annexure P-1 dated 18.12.2014, in the interest of justice."

5. The petition came up for consideration on 18.02.2015 and this Court passed the following orders:-

> "CMP No. 2053/2015
>
> Allowed and disposed of.
>
> CWP No. 1259/2015 & CMP No. 2054/2015
>
> Notice. Mr. M.A. Khan, Additional Advocate General, appears and waives service of notice on behalf of the respondent-State. He prays for and is granted eight weeks' time to file reply.
>
> Till further orders, petitioners are permitted to work as PGT's and shall also be entitled to the salary of the post of PGT."

6. The mater thereafter came up for consideration on 09.04.2015 and the Court passed the following orders:-

> "Mr.Anup Rattan, learned Additional Advocate General has placed on record copy of letter dated 12.3.2015. This letter is in derogation of the directions issued by this Court on 18.2.2015. Mr.Anup Rattan, learned Additional Advocate General prays for and is granted a week's time to seek instructions. List next week.
>
> In the meantime, it shall be open to the respondent-State to redress the grievances of the petitioner by granting him the pay scale of post graduate teacher."

7. Subsequently, when the matter came up for consideration on 23.04.2015, this Court proceeded to draw contempt proceedings against the respondents by passing the following orders:-

> "The order dated 18.2.2015 has not been complied with by the respondents. The learned Additional Advocate General was permitted to seek instructions on 9.4.2015 and 22.4.2015. The order dated 18.2.2015 ought to have been complied with, more particularly, when till date no reply has been filed.
>
> In view of above, registry is directed to draw separate contempt proceedings against all the three respondents and assign number thereof.
>
> Notice to the respondents why contempt proceedings be not initiated for willfully disobeying the order dated 18.2.2015, returnable on 15.5.2015."

8. On 18.05.2015 the respondents through the learned Deputy Advocate General informed this Court that they had complied with the directions passed on 18.02.2015 and the contempt petition was accordingly disposed of.

9. The writ petitioners on coming to know that the contempt petition had been disposed of on the basis of the statement on behalf of the respondents, thereafter filed an application being CMP No. 11068/2015 for reviving the contempt petition, as according to them, the respondents despite assurances were still continuing with the contemptuous action and had infact not implemented the order dated 18.02.2015 by paying them the salary of PGTs as had been ordered.

10. The application was taken on board and the respondents were called upon to file their replies wherein they repeatedly maintained that the orders passed by this Court have been implemented.

11. However, when the matter came up for consideration before this Court on 02.01.2016, it was fairly conceded by the respondents that since the issue involved in this lis was already the subject-matter in SLP No.1426/2015 arising out of judgment rendered by this Court in CWP No. 6916/2011 and order of status quo had been granted by the Hon'ble Supreme Court vide order dated 22.01.2015, therefore, the respondents were not in a position to comply with the orders passed by this Court on 18.02.2015.

12. In this background, the question arises as to whether the respondents by not implementing the orders passed by this Court on 18.02.2015 in view of the orders passed by the Hon'ble Supreme Court earlier on 22.01.2015 in SLP No. 1426/2015 can be said to have committed the contempt of the orders passed by this Court.

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

13. The scope, ambit and purpose of exercising jurisdiction under the Contempt of Courts Act has been noticed by this Bench in a recent case titled 'Uma Dutt Vs. Srikant Baldi and others' (COPC No. 753/2015, decided on 09.12.2015) in the following manner:-

> "9. While it is duty of the Court to punish a person who tries to obstruct the course of justice or brings to disrepute the institution of judiciary. However, this power has to be exercised not casually or lightly, but with great care and circumspection. Contempt proceedings serve a dual purpose of vindication of the public interest by punishment of the contumacious conduct and coercion to compel the contemner to do what the law requires of him.
>
> 10. A question whether there is contempt of Court or not is a serious one. The Court is both the accuser as well as the judge of the accusation. It behoves the Court to act with as great circumspection as possible making all allowances for errors of judgment and difficulties arising from inveterate

practices in Courts and tribunals. It is only when a clear case of contumacious conduct not explainable otherwise, arises that the contemnor must be punished. Punishment under the law of Contempt is called for when the lapse is deliberate and in disregard of one's duty and in defiance of authority.

11. While dealing with the contempt petitions, the Courts are not required to travel beyond the four corners of order, which is alleged to have been disobeyed or disregarded deliberately and willfully. In this connection, it shall be apposite to make a fruitful recapitulation of a recent judgment of the Hon'ble Supreme Court in ***Ram Kishan Vs. Tarun Bajaj and others 2014 AIR SCW 1218***, wherein it was held that:-

> "**9**. Contempt jurisdiction conferred onto the law courts power to punish an offender for his willful disobedience/contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. (Vide: V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr., AIR 1992 SC 2153; Chhotu Ram v. Urvashi Gulati & Anr., AIR 2001 SC 3468; Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors., AIR 2002 SC 1405; Bank of Baroda v. Sadruddin Hasan Daya & Anr., AIR 2004 SC 942; Sahdeo alias Sahdeo Singh v. State of U.P. & Ors., (2010) 3 SCC 705; and National Fertilizers Ltd. v. Tuncay Alankus & Anr., AIR 2013 SC 1299).
>
> **10**. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is willful. The word willful introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of ones state of mind. Wilful means knowingly intentional, conscious, calculated and deliberate with full knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a bad purpose or without justifiable excuse or stubbornly, obstinately or perversely. Willful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. Committal or sequestration will not be

ordered unless contempt involves a degree of default or misconduct. (Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman; AIR 1985 SC 582; Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao & Anr., AIR 1989 SC 2185; Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors., AIR 1995 SC 308; Chordia Automobiles v. S. Moosa, AIR 2000 SC 1880; M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors., AIR 2004 SC 105; State of Orissa & Ors. v. Md. Illiyas, AIR 2006 SC 258; and Uniworth Textiles Ltd. v. CCE, Raipur, (2013) 9 SCC 753).

11. In Lt. Col. K.D. Gupta v. Union of India & Anr., AIR 1989 SC 2071, this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs. 4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court.

12. In Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors., AIR 2001 SC 1293, the Court while dealing with the issue whether a doubt persisted as to the applicability of the order of this Court to complainants held that it would not give rise to a contempt petition. The court was dealing with a case wherein the statutory authorities had come to the conclusion that the order of this court was not applicable to the said complainants while dealing with the case under the provision of West Bengal Land Reforms Act, 1955.

13. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. (See: Sushila Raje Holkar v. Anil Kak (Retd.), AIR 2008 (Supp-2) SC 1837; and Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd., AIR 2009 SC 735): (2008 AIR SCW 7951)."

Similar view has been taken by this Bench in Contempt Petition No. 415 of 2014, ***Rulda Ram Vs. Rakesh Kanwar,*** decided on 28th February, 2015."

14. At the outset, it may be stated that this Court does not at all approve the manner in which the respondents have proceeded in the matter, yet it cannot be held that the respondents have deliberately, willfully and intentionally violated the orders passed by this Court on 18.02.2015. No doubt, in case the respondents had any difficulty in implementing the order dated 18.02.2015, they then should have approached this Court, rather than, repeatedly insisting that the orders passed by this Court had been implemented.

15. However, at the same time, even the writ petitioners cannot claim that the orders passed by the Hon'ble Supreme Court in Pankaj Kumar's case (supra) have no bearing to the instant case because admittedly the instructions issued by the Government on 06.08.2013 thereby regularizing the services of Lecturers School Cadre (Para Teachers) on completion of 10 years had infact been assailed by Pankaj Kumar by filing CWP No.6916/2011 and this Court vide its interim order dated 18.10.2013 had stayed the

regularization of Para Teachers. It is only after the dismissal of the writ petition that the Education Department had once again commenced the process to regularize the services of the Para Teachers, but the subjects of Psychology and Philosophy were declared as dying cadre and the Para Teachers, who were teaching these subjects were to be offered appointment as TGTs. It is also not in dispute that the above decision rendered by this Court was assailed before the Hon'ble Supreme Court by filing SLP(C) No.1426/2015 in case titled 'Pankaj Kumar Versus State of H.P., wherein the Hon'ble Supreme Court vide order dated 22.01.2015 directed the maintenance of status quo till the orders to the contrary.

16. Furthermore, the bonafides of the respondents are established to a great extent when they themselves did not take the decision but obtained legal advice from the Law Department, who opined as under:-

> "Examined in the Law Deptt. Perusal of the record shows that the process of regularization of PTA/Para teachers stated as per the judgment of HHC dt. 9-12-2014 in CWP No.6916/2011 has been stayed by the Hon'ble Apex Court vide their interim order passed on 22.1.2015 in the SLP filed against the judgment of HHC in CWP No.6916/2011 filed by Mr.Pankaj Kumar by directing that "status quo be maintained till orders to the contrary", and in the CWP No.1259/2015 titled Sunita Pandey and Ors V/s State of H.P., the Hon'ble High Court has passed an interim order dated 18.2.2015 directing that 'Till further orders, petitioners are permitted to work as PGTs and shall also entitled to the salary of the post of PGT." Thus the interim orders of HHC are very clear and the petitioners in question are entitled to the salary which they were getting earlier as PGT Para Teachers."

17. Undoubtedly, no person can defy the Court's order, however, the default must be willful and deliberate. Willful would exclude casual, accidental, bonafide or unintentional acts or genuine inability to comply with the terms of the order. For holding the respondents to have committed contempt, it has to be shown that there is willful disobedience of the judgment or orders of the Court. Power to punish for contempt is to be resorted to only when there is clear violation of the Court's order. Since notice of contempt and punishment for contempt is of far reaching consequence, these powers have to be invoked only when a clear case of willful disobedience of the Court's order is made out. Whether disobedience is willful in a particular case depends on the facts and circumstances of that case. It is not to say that even negligence and carelessness cannot amount to disobedience, particularly, when the attention of the person is drawn to the Court's order alongwith its implication.

18. However, here the Court is dealing with a case where even the petitioners do not dispute that they would ultimately succeed in their claim only if the decision of the Government to regularize the services of the Lecturers School Cadre (Para Teachers) is upheld by the Hon'ble Supreme Court and they are granted parity alongwith said teachers. It is also not in dispute that the claim regarding regularization of these Para Teachers is not only sub-judice, but a direction to maintain status quo till the orders to the contrary has been passed by the Hon'ble Supreme Court earlier on 22.01.2015 than the order passed by this Court on 18.02.2015.

19. In view of the aforesaid discussion, though we do not approve the manner in which the respondents have conducted themselves, but, at the same time, we find no reason to continue with these proceedings. The respondents are warned to be careful in future. Accordingly, the proceedings initiated by this Court on 03.11.2015 in CMP No.11068/2015

are dropped and the show cause notice issued to the respondents is discharged. The application is dismissed, leaving the parties to bear their own costs.

CWP No.1259 of 2015.

List for hearing on **13.06.2016.**

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

Court on its own motion. ...Petitioner.

Versus

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

CWPIL No. 16 of 2014
Judgment reserved on: 24.2.2016
Date of Decision : 15.3.2016.

Constitution of India, 1950- Article 226- Court took notice of a news item published in daily newspaper highlighting the illegal use of 'Oxytocin' in fruits, vegetables and on milching animals- 117 samples of food articles were lifted in the last three years out of which 65 samples were analyzed- Government Common Testing Laboratory (CTL) does not have the facility for detection of Oxytocin in food samples- on one occasion 254 injections of Oxytocin were seized- the respondents have not disputed the misuse of Oxytocin and recommendations were made in the meeting of Drugs Consultative Committee (DCC) to ensure that the drug is not diverted to illegal use- hence, direction issued to bring about an efficient Drug Regulatory System at the Centre and the State for handling of the entire problem- Union of India directed to establish an Academy for training all drug regulatory officers- direction issued to make available testing facilities of Oxytocin at Kandaghat Laboratory - the licences of all the existing manufactures of drugs be examined to ensure that the same have been issued strictly in accordance with the Drugs and Cosmetics Act and Rules- Drug Controller directed to place the details of the licences along with monthly statement of production on its website - a Special Task Force be constituted to ensure that no prohibited and regulated drug is readily available - the wholesalers and retailers directed to maintain the records- the Government will ensure the deployment of sufficient police personnel to ensure that no prohibited or contraband drugs enter into the State - the feasibility of restricting the manufacture of Oxytocin in public sector companies be explored - the competent authorities directed to ensure sampling of milk and vegetables and to carryout prosecutions where products tests positive for Oxytocin- the police authorities directed to book all the offenders who are found using Oxytocin and public be informed about the misuse and abuse of drugs. (Para-2 to 22)

For the petitioner: Mr. Satyen Vaidya, Senior Advocate, as Amicus Curiae with Mr. Vivek Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J. K. Verma, Deputy Advocate General, for respondents No. 1 to 5, 8 and 9.

Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

"As long as greed is stronger than compassion, there will always be suffering"*. - Rusty Eric.*

This is precisely what is revealed in the instant case. On 24.11.2014, this Court took notice of a news item published in daily Hindi vernacular Amar Ujjala in its 9th November, 2014 edition, wherein the illegal use of lethal vaccine 'Oxytocin' in fruits, vegetables and on milching animals was highlighted.

2. What is Oxytocin has been lucidly explained in the affidavit of respondent No. 1, wherein it is stated that Oxytocin was originally extracted from animal posterior pituitaries and is now chemically synthesized. Its only use is in obstetrics, where it is employed to stimulate uterine contraction to induce or reinforce labour or to promote ejection of breast milk. Oxytocin causes milk ejection by contracting the myoepithelial cells around the mammary alveoli. Although toxicities are uncommon when the drug is used properly; hypertensive crises, uterine rupture, water retention, and fetal death have been reported. Oxytocin is contraindicated in abnormal fetal presentation, fetal distress and premature births. Oxytocin for human use is available in injections as also by way of nasal solution.

3. Mr. Satyan Vaidya, learned Senior Advocate and Amicus Curiae is at pains to point out that there is rampant and extensive misuse of Oxytocin, not only in the dairy sector, but also in the agriculture and horticulture sector and the State Authorities, as also the Central Authorities entrusted with the task of preventing the misuse of Oxytocin have completely failed to check and curb this menace.

4. In order to buttress his submission, learned Amicus Curiae has relied upon the statistics reflected in the affidavits filed by the official respondents themselves as the basis of his arguments. Apparently, in the last three years, only eleven samples of fruits, four samples of vegetables, eleven samples of non-vegetarian food items and ninety one samples of milk were lifted in the entire State of Himachal Pradesh. Meaning thereby that over the last three years, in all only 117 samples of food articles were lifted, out of which only 65 samples had been analyzed, which means that only one sample per ten days was lifted in the entire State.

5. It is further pointed out by the learned Amicus Curiae that the sole Government Common Testing Laboratory (CTL) Kandaghat, District Solan does not even have the facility for detection of Oxytocin in food samples, as has been admitted by respondent No. 5 in his affidavit and if that be so, then there is no purpose of sending the food articles to CTL Kandaghat and the action of the respondents in doing so is merely an eye wash.

6. It is also pointed out that respondents in their replies have been conspicuously silent about the possibility of the drug Oxytocin being illegally imported in the State of Himachal Pradesh from other parts of the country or even overseas and their assertion that strict vigil and check is being maintained falls flat on the ground as during the last three years, there was only one seizure, wherein 254 injections of Oxytocin (for

veterinary use) were seized. This inaction clearly reflects the casual approach of the authorities to such a serious issue.

7. The learned Amicus Curiae has painstakingly placed on record additional material, wherein it is pointed out that the misuse of drug Oxytocin is rampant and wide spread and is being indiscriminately used in most parts of the country on milching animals, vegetables, fruits and non-vegetarian consumable items by unscrupulous people with the motive to earn more profits at the cost of serious consequences on the animals as well as human health. A few of the dangers and hazards, beside many others have been summarized as follows:-

> *"(a) Its usage predisposes the new born baby to jaundice and reduces the supply of blood to its brain.*
>
> *(b) Diary owners use the Oxytocin injection twice a day injecting it into the cow-buffaloes to make the milk flow faster by causing the animal's uterus to start contracting putting the animal in enormous pain.*
>
> *(c) The drug makes the animal barren within three years and also lowers its life span. The cow-buffalo is inseminated within 24 hours of calving by the dairy owners and then the animal, without any respite, has to undergo the agony and pain of maltreatment with the drug of Oxytocin.*
>
> *(d) The Oxytocin not only effects the cow/buffalo, it filters into the milk and consequently, has been held responsible for breast and uterine cancers, male impotence, excessive hair on woman and balding for men, early or erratic periods, early development of breasts (in both sexes). Its use is also considered harmful eyes, especially in children. The hormone affects the reproductive ability of woman. Its most common symptoms are exhaustion and loss of energy. Consumption of Oxytocin infected milk by pregnant woman increases risk of hemorrhage. It is also responsible for high spike in tuberculosis cases in humans.*
>
> *(e) Beef all over India has been found to be extremely toxic with large amount of this drug.*
>
> *(f) The direct infusion of this drug in vegetables, fruits and other consumables for humans is also widespread making such food items highly infected with Oxytocin."*

8. At this stage we may notice that under Section 5 of the Drugs and Cosmetics Act, 1940 (for short the "Act"), the Central Government is required to constitute the Drugs Technical Advisory Board (for short DTAB), whose duty is to advice the Central Government and State Government on technical matters arising out of the administration of the Act and to carry out the other functions assigned to it by the Act.

9. Similarly, under Section 7 of the Act, the Central Government may constitute an advisory committee to be called Drugs Consultative Committee (for short DCC) and its duties is to advise the Central Government, State Government and DTAB on any matter tending to secure uniformity throughout India in the administration of the Act.

10. The respondents in their response have not disputed the misuse of Oxytocin. Rather in the affidavit filed by respondent No. 2, it is clearly pointed out that in the 44th meeting of DCC, held on 20.7.2012, the issue of misuse of Oxytocin injection by dairy owners to extract milk from milch animals and its harmful effects were discussed and the following recommendations were made:-

"The members felt that the misuse of oxytocin is rampant in many of the States and reports of its clandestine manufacture and sale appear now and then in the press. The Drug is available as unlabelled or wrongly labelled packs. Many of the States like UP, Delhi have taken action in seizures of stocks on the basis of intelligence gathered. As the manufacture and sale of these products is through clandestine channels, it becomes difficult to stop their misuse except through continuous surveillance. After deliberations it was opined that as the bulk drug (oxytocin) is being manufactured in a few States only, the diversion of the bulk drug to the illegal channels could be curtailed to a large extent if it is ensured that the bulk drug is sold to the licensed manufacturer only."

11. The matter was again considered in the 46th DCC meeting held on 12-13 November, 2013 and the following recommendations were made:

"The members felt that the illicit manufacture of Oxytocin injection for the use of extracting milk from milch animals by the diary owners is a clandestine activity. The manufacture of the drug for diary owners etc. takes places in the regions where drug control administration is lax and then the drug is transported to other States clandestinely. It is available in unlabelled or wrongly labelled packs. Even though many of the States have taken action on the basis of intelligence gathered through surveillance. However, strong measures are required to restrict the supply of oxytocin injection for veterinary use and also ensured that diversion of the bulk drug to illegal channels is curtailed."

12. In the 65th meeting of DTAB, a statutory body under the Drugs and Cosmetics Act, 1940 (for short the Act of 1940), the issue of continued misuse of Oxytocin injections by the dairy owners for extracting milk from milch animals and its harmful effects on the health of cows and buffaloes as well as on the consumers was again discussed and the silent features of the discussion emerged as under:-

"The drug Oxytocin has medical use for induction and augmentation of labour, to control post partum bleeding and uterine hypo tonicity. The alleged abundant availability and use of the drug in a clandestine way, however, is a matter of great concern for public health. The sale of the Oxytocin injection is regulated under Schedule H of the Rules, which requires the drug to be dispensed on the prescription of a Registered Medical Practitioner only. Further, to avoid its bulk sale, Oxytocin injection is required to be packed in single unit blister pack only."

13. The issue of prohibiting the drug also came up for consideration, but after detailed deliberations the members of DTAB agreed that as the drug has a definite use for therapeutic purposes, it need not to be prohibited. However, the DTAB agreed with the suggestion that the manufacturers of bulk drug should supply active pharmaceutical drug only to the manufacturers licensed for manufacture of formulations and the formulations meant for veterinary use are sold to the veterinary hospitals only. The DTAB further recommended that the State Drug Controllers may be asked to curb the misuse of the drug through increased surveillance and raids conducted on the possible hideouts of clandestine manufacture and sale of this drug and take strict action against the offenders.

14. It was on the basis of the aforesaid recommendations of the DTAB that the Ministry of Health and Family Welfare issued G.S.R. 29(E) dated 17.1.2014, restricting the manufacture and sale of Oxytocin as under:

"The manufacturers of bulk Oxytocin drug shall supply the active pharmaceutical drug only to the manufacturers licensed under the Drugs and Cosmetics Rules, 1945 for manufacture of formulations of the said drug.

The formulations meant for veterinary use shall be sold to the veterinary hospitals only."

15. It was also came in the affidavit of respondent No. 2 that at one time concerns were raised and the Government was requested to have complete ban on circulation/marketing of this drug except in registered hospitals and for this a special meeting of DTAB was convened on 1st April, 2014. The DTAB again deliberated the matter in depth and the members were of the view that the drug is already a prescription drug and can be sold only under the prescription of a Registered Medical Practitioner (RMP). The drug as such had a definite role in the medical field both for humans and animals and the legitimate manufacture and sale of the drugs would not, therefore, be stopped. Moreover, keeping in view the medical emergency in rural or remote areas, the drug could only be obtained from the sale outlets and its sale could not, therefore, be restricted to the registered hospitals.

16. However, even in this meeting, it was acknowledged that there was rampant and wide spread misuse of the drug for the milking purposes and was required to be stopped. The suggestions then mooted and put forth for preventing the misuse of Oxytocin was by way of enhanced surveillance by the regulatory authorities, strict action against the violators, sensitizing the general public by launching campaigns through print and audio visual media and the local police could also book the offenders under Prevention of Cruelty to Animals Act, 1960 and the Drugs and Cosmetics Act, 1940, which do not permit the sale of the drug except under proper prescription.

17. It was further recommended that a new clause be added to the already issued notification stating that the supply of the Oxytocin shall be recorded by the retail chemist at the time of supply giving the name and address of the prescriber, name of the patient and the quantity supplied. Such records would be maintained for three years and shall be open for inspection. This would help in not only maintaining the legitimate supply of the drug but also to curb misuse of the drug through legitimate sale channels.

18. It was pursuant to the aforesaid recommendations that notification G.S.R. 29(E) dated 17.1.2014, restricting the manufacture and sale of Oxytocin was issued and reads thus:-

"The manufacturers of bulk Oxytocin drug shall supply the active pharmaceutical drug only to the manufacturers licensed under the Drugs and Cosmetics Rules, 1945 for manufacture of formulations of the said drug."

The formulations meant for veterinary use shall be sold to the veterinary hospitals only.

The supply of the Oxytocin formulations for human use by the retail chemist shall be recorded at the time of supply giving the name and address of the presciber, name of the patient and the quantity supplied. Such records shall be maintained for three years and be open for inspection."

19. Further, in order to curb the misuse of Oxytocin, especially by the dairy owners, a notification was issued by the Central Government on 22.10.2014. The relevant portion whereof reads thus:

"Strict regulatory control over the manufacture, sale and distribution of Oxytocin and measures required to be taken to curb the misuse of Oxytocin by

dairy owners for milking milch animals. In order to take stringent measures on all cases of misuse of Oxytocin by the State Drug Control Authority in their States/UT and a constant vigil needs to be kept on the illegal movement of the Oxytocin. Investigate the source of the illegal supply of the Oxytocin sold to dairy owners. The help from the NGOs in the States/UT could be taken to locate the areas where such illegal sale is being done. In this connection, the State Drugs Controllers are requested to provide the details of the manufacturers of bulk and formulations of Oxytocin in their State along with the statistical information on the seizures conducted, quantity seized along with its value persons arrested, prosecutions filed, samples taken, reports of sub-standard quality received during the last three years to the office DCG (I) within 30 days of receipt of this letter."

20. It would be noticed that inspite of various provisions of the Drugs and Cosmetics Act and other statutes in place, this Court cannot be oblivious to the fact that there is large scale manufacture and sale of drugs carried out in clandestine manner and that there is grave misuse of Oxytocin by farmers and dairy owners, which is the matter of great concern. This clandestine activity of manufacture and sale of the drug to the farmers or dairy owners requires constant surveillance and interstate coordination and the violators are required to be dealt with heavy hand. It is not only the health of the animals, especially milch animals, which is matter of concern, but a greater concern lies in the fact that it is this very milk and vegetables which have been injected with Oxytocin to increase its size, that is being consumed by all of us.

21. The above narration of facts do indicate that the respondents have though initiated steps to check and curb the misuse of Oxytocin, but yet the same cannot be termed to be sufficient and therefore, taking into consideration the entirety of the facts and circumstances, we proceed to pass the following directions:-

(i) The respondents shall bring about an efficient Drug Regulatory System both at the Centre and the State for better co-ordination and handling of the entire problem so as to regulate the manufacture, import and distribution, especially, those drugs like Oxytocin. For efficient administration, these authorities are directed to work with effective co-ordination among themselves, so that there is uniformity of approach amongst different stakeholders.

(ii) The Union of India will establish within three months an Academy for training all drug regulatory officers both from Enforcement and Laboratory set up as decided, in principle, in the 49th meeting of DCC held on 16th October, 2015.

(iii) The State Government shall make available adequate testing facilities of Oxytocin at its Kandaghat Laboratory within a period of three months and the respondent-State shall further ensure that all vacancies and posts in the said Laboratory are made functional by appointing duly qualified personnel(s) within the aforesaid period.

(iv) The State Government will henceforth examine the licences of all the existing manufactures of drugs to ensure that the same have been issued strictly in accordance with the Drugs and Cosmetics Act and Rules.

(v) The State Government through its Drug Controller (under the Drugs and Cosmetics Act) shall place on its website by 10th of each month the details of the licences issued to the various manufacturers alongwith monthly statement of production and sales with complete particulars and details

made by the manufacturers. The manufacturers of the drugs shall in turn submit these details in advance so as to reach the Office of the Drug Controller by 7th day of every month.

(vi) The respondent-State shall within three months constitute a Special Task Force in each district, whose duty shall be to ensure that no drug which is either prohibited or regulated is readily available in the open market, save and except, in the manner prescribed.

(vii) The wholesalers and retailers of all prohibited scheduled drugs shall maintain records as required under the law and the same shall be produced for inspection after every quarter before the Officer specially appointed for this purpose by the Drug Controller.

(viii) The State Government will ensure the deployment of sufficient police personnel (atleast four) at all its Inter-State Borders so as to ensure that no prohibited or contraband drugs enter into the State and for this purpose it shall be incumbent upon these officials to check all vehicles viz. taxis, private vehicles, official vehicles, public transport vehicles etc.

(ix) Respondent No. 1 is further directed to consider the feasibility of restricting the manufacture of Oxytocin only in public sector companies and also restricting and limiting the manufacture of Oxytocin by companies to whom licenses have already been granted.

(x) The competent authorities under the Food Safety and Standards Act, 2006 are directed to ensure random sampling of milk and vegetables and carryout prosecutions where such products tests positive for Oxytocin.

(xi) The police authorities are directed to book all the offenders under the Prevention of Cruelty to Animals Act, 1960 who are found using Oxytocin, more particularly in milching animals.

(xii) Respondents No. 1 and 2 are directed to sensitize the general public about the misuse and abuse of drugs and its ill effects by launching campaigns through print, audio, video modes etc.

22. With these observations, the petition is disposed of, so also the pending application(s), if any.

Before parting, we place on record our appreciation and gratitude for the valuable assistance rendered by Mr.Satyen Vaidya, Senior Advocate as Amicus Curiae, Mr. Sharwan Dogra, learned Advocate General and Mr.Ashok Sharma, learned Assistant Solicitor General of India to this Court.

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

Daulat Ram .....Appellant

Versus

State of HP and others ...Respondents.

LPA No. 618 of 2011

Date of decision: 15th March, 2016.

Constitution of India, 1950- Article 226- Petitioner was a Deputy Ranger- his name appeared at serial No.8 of the LPC sent to the government- he filed a writ petition in which the Writ Court ordered that he be regularized as forest guard- separate appeals were preferred against this order- documents on the file show that petitioner was performing his duty as Deputy Ranger – hence, petitioner be appointed as Deputy Ranger -petitioner held entitled to all service benefits as Deputy Ranger from the date of appointment till his retirement, including retiral benefits. (Para- 4 to 9)

For the appellant: Ms. Shreya Chauhan, Advocate.
For the respondents: Mr. Yudhbir Singh, Advocate, for respondent No.1.
Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General, for respondent No. 1 to 4.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment dated 6.7.2010, made by the learned Single Judge of this Court in ***CWP (T) No.5637*** of ***2008*** titled ***Daulat Ram versus State of HP and others,*** whereby the writ petition filed by the petitioner came to be allowed and respondents were directed to regularize the services of the petitioner and also release him all arrears while treating him as Forest Guard, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. The State had also questioned the impugned judgment by the medium of LPA No.326 of 2010, titled ***State of HP and others versus Daulat Ram and another***, which was dismissed vide judgment dated 27.7.2011.

3. The appellant herein/writ petitioner has questioned the impugned judgment only to the extent that he was to be appointed as Deputy Ranger and is entitled to all service benefits as Deputy Ranger but the Writ Court has fallen in an error in holding that his appointment as Forest Guard is legal and well founded.

4. Respondent No. 5 has filed the reply and admitted that the writ petitioner was Deputy Ranger on 6.2.1996. His name was figuring at Sr. No. 8 of the LPC sent to the Government. It is apt to reproduce relevant portion of the reply filed by respondent No. 5 at page 83 of the paper-book, under the captioned "SUBJECT IN BRIEF" herein.

> *"SUBJECT IN BRIEF.*
>
> *It is correct that Shri Daulat Ram was a Deputy Ranger on 6.2.1996. His name appears at serial No. 8 of the LPC sent to the government by the replying respondent No.5 on 24.5.1996. It is denied that the entitlement of pay scale etc. at Government norms was payable with effect from 11.3.1995. The same are payable from 7.2.1996 as the management/property was actually taken over on 7.2.1996 from the replying respondent No.5. The applicant Shri Daulat Ram has received his salary from the replying respondent No.5 upto 6.2.1996. As far as previous benefits of service it is for the new employer to take decision on this score."*

5. Mr. Anup Rattan, the learned Additional Advocate General argued that the appellant/writ petitioner has accepted the order as Forest Guard and now cannot make an 'U' turn. The argument though attractive, is devoid of any force, for the following reasons.

6. It was the policy of the State Government that no such order should be made, which will adversely affect an employee of the institution, i.e., Kutlehar Forest. The petitioner immediately made representation and filed the Original Application before the Tribunal in the year 1999 without wasting any time for the redressal of his grievances. Thus, it cannot be said that the petitioner is precluded from seeking his redressal of his grievances.

7. The documents on the file do disclose that he was performing his duty as Deputy Ranger in Kutlehar Forests.

8. The reply-affidavit filed by respondent No. 5 has not been questioned by respondents No. 1 to 4. They have also not filed any response, rejoinder or replica to the said averments.

9. Having said so, it is held that the petitioner was to be appointed as Deputy Ranger and is entitled to all service benefits as Deputy Ranger right from the date of his appointment till his retirement, including retiral benefits.

10. Viewed thus, the LPA is allowed and impugned judgment is modified as indicated hereinabove. The LPA is disposed of, alongwith pending applications, if any.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Himachal Pradesh Housing & Urban Development Authority & another ...Appellants.

Versus

M/s Kundan Lal Hari Ram & Company ...Respondent/Objector

Arb. Appeal No. 14 of 2015
Date of Decision : March 15 , 2016

Arbitration and Conciliation Act, 1996- Section 37- H.P. Housing Board awarded work to the claimants, which was to be completed in 21 months- certain disputes arose between the parties on which the claimant called upon the Competent Authority to appoint the Arbitrator and refer the dispute for adjudication- no action was taken on which the claimant approached the High Court seeking the appointment of Arbitrator- an Arbitrator was appointed who passed the award- Arbitrator held that his appointment and the claim of the claimants were beyond limitation- petition was filed before the District Judge for setting aside the award -District Judge held that appointment of Arbitrator was within limitation – observation was made that the claims were within limitation - matter was remanded to Arbitrator-held, that the question of the claims being within limitation or not could not have been adjudicated by the Arbitrator or the Court- once Arbitrator had concluded that his appointment was beyond the period of limitation, he could not have gone into the question of claim being barred by limitation- the Court was also required to consider whether the appointment was within limitation- Arbitrator could not have sat over the judgment passed by the High court- Arbitrator had failed to apply the relevant statutory provisions to the facts– he could not have gone into the question of limitation- appeal allowed and observation

made by the Court regarding the claim being within limitation was set aside- Arbitrator left free to decide this question. (Para-5 to 11)

Cases referred:

Schlumberger Asia Services Limited vs. Oil & Natural Gas Corporation Ltd., (2013) 7 SCC 562

Mehrunnissa Sheikh Abdul Rahim vs. Rashidabai Allarakha, decided on 30.07.2015

Singhal and Brothers & another vs. Mahanagar Telephone Nigam Ltd., 2005 (5) BomCR261, 2005 (3) MhLj 951

Kartar Singh and Co. vs. Punjab State Electricity Board, (2007) 147 PLR 589, 2008 (1) ARBLR 616 PH

For the appellants : Mr. C. N. Singh, Advocate, for the appellants.

For the respondent : Mr. Suneet Goel, Advocate, for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J. (oral)

In this appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "Act"), appellant Himachal Pradesh Housing & Urban Development Authority (hereinafter referred to as the "Board") has laid challenge to the order dated 25.8.2015 passed by learned District Judge, Shimla, H.P. in Arb. Case No. 21-S/2 of 2014/10, titled as M/s Kundan Lal Hari Ram & Company vs. Himachal Pradesh Housing & Urban Development Authority and another, whereby Award dated 31.3.2010 passed by Arbitrator-cum-Superintending Engineer, Arbitration Circle, HP. PWD, Solan, stands quashed and set aside, with the matter being remanded back to the very same Arbitrator for adjudication of the disputes afresh.

2. Certain facts are not in dispute. With regard to construction of Social Housing Scheme at Kasumpti Zonal Centre, the Board awarded certain works to the claimant M/s Kundan Lal Hari Ram & Company (respondent herein). Work allotted vide agreement dated 17.10.1989 was to be completed within a period of 21 months. Certain disputes having arisen between the parties, claimant issued notice dated 20.4.1996, calling upon the competent authority to appoint the Arbitrator, in terms of the agreement and refer the disputes for adjudication. What led to the issuance of notice was release of payment on 6th July, 1995, which was in terms of final bill prepared by the Board. Notice dated 20.4.1996 stood received by the competent authority on 26.4.1996/15.5.1996. Undisputedly no action was taken thereupon, prompting the respondent to approach this Court, seeking appointment of the Arbitrator and such petition [Arb. Case No.7 of 2002, titled as M/s Kundan Lal Hari Ram & Co. vs. H.P. Housing Board and another] so filed on 20.1.2002, came to be decided by this Court on 9.5.2002 , in the following terms:-

> "Reply not filed. Heard. It is not in dispute that there exists arbitration agreement and despite notice issued by the petitioner-contractor the respondents have failed to appoint Arbitrator. Therefore, this petition is allowed and the Superintending Engineer (Arbitration), HP. PWD Solan is appointed as Arbitrator to adjudicate the disputes raised by the petitioner-contractor. Objections, if any, of the respondents will be decided by the Arbitrator.

> This order has been passed in view of the law down by the Supreme Court in Konkan Railway Corporation Ltd. and another v. Rani Construction Pvt. Ltd. 2002 (1) Arb. L.R. 326 (SC)." **[Emphasis supplied]**

3. Pursuant thereto, the Arbitrator passed his Award dated 31.3.2010 holding his appointment as also the claims of the respondent to be barred by law of limitation.

4. In a petition filed under Section 34 of the Act, the District Judge, while setting aside the award passed by the Arbitrator, has held the appointment of the Arbitrator to be within the period of limitation. However in a passing reference, in para -22 of the order, it also stands observed that even the claims of the respondent are within the period of limitation. Eventually he remanded the matter back to the Arbitrator for adjudication on merits.

5. Having heard learned counsel for the parties as also perused the record, one is of the considered view that the question of the claims being within limitation or not could not have been adjudicated either by the Arbitrator or the Court below. Once the Arbitrator had come to the conclusion that his appointment was beyond the period of limitation, he could not have adjudicated the matter and gone into the question of the claims being barred by limitation. Also what the Court below was required to consider was the question of the appointment of the Arbitrator being barred by limitation or not. Perusal of the impugned order reveals that the observations made by the learned District Judge in para – 22 of the order are in the nature of alibi, inasmuch as the primary issue before him was the appointment of the Arbitrator being barred by limitation and not with respect to the maintainability of the claims. No specific issue/point was framed for consideration. He was not adjudicating the validity of the claims, else there was no need to have remanded the matter back to the Arbitrator.

6. The Court below has rightly held the observations made by the Arbitrator qua his appointment to be barred by limitation, to be illegal, so as to fall within the statutory exceptions stipulated under Section 34 of the Act. To that extent, no fault lies with the impugned order.

7. The Arbitrator could not have sat over the judgment dated 9.5.2002 rendered by this Court, which undisputedly had attained finality, more so, in the light of the decision rendered by the apex Court in *Schlumberger Asia Services Limited vs. Oil & Natural Gas Corporation Ltd.,* (2013) 7 SCC 562 wherein it is held that at the time of appointment of the Arbitrator, it is not for the court to go into the contentious issue inter se the parties, with regard to the claims being barred or not, which question is left to be adjudicated by the Arbitrator.

8. Also the Arbitrator failed to apply the relevant statutory provisions to the given facts and circumstances. The Arbitrator failed to consider that the reference was sought within three years from the date of receipt of payment made towards the final bill so passed by the Board. The Arbitrator also failed to consider the impact of Section 21 of the Act which read as under:-

> "21. Commencement of arbitral proceedings. – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

9. In the instant case notice issued on 20.4.1996 stood received by the competent authority on 26.4.1996. The Arbitrator could not have gone into the question of his appointment being barred by limitation.

10. While contending that the Court below was right in deciding the issue of the claims being barred by limitation or not, Mr. Suneet Goel, learned counsel invites attention of this Court to the decisions rendered by the Bombay High Court in Arbitration Petition No. 646 of 2015 alongwith Arbitration Petition No. 1683 of 2014, titled as *Mehrunnissa Sheikh Abdul Rahim vs. Rashidabai Allarakha,* decided on 30.07.2015; *Singhal and Brothers & another vs. Mahanagar Telephone Nigam Ltd.,* 2005 (5) BomCR261, 2005 (3) MhLj 951; as also by Gujarat High Court in First Appeal No. 3740 of 2006, titled as *DLF Universal Limited vs. State Bank of India,* decided on 14.6.2011; and by the Punjab & Haryana High Court in *Kartar Singh and Co. vs. Punjab State Electricity Board,* (2007) 147 PLR 589, 2008 (1) ARBLR 616 PH.

11. The law with regard to the jurisdiction and scope of the Arbitrator is now well settled. In fact statutory provisions are unambiguously clear. The provisions of the Limitation Act, 1963, by virtue of Section 43 of the Act, are squarely made applicable to all arbitral proceedings. Only for the purposes of commencement of such proceedings, it stands clarified that limitation would commence from the date postulated under the provisions of Section 21 of the Act. Hence the issue as to whether, claims were barred by limitation or not could have been considered only by the Arbitrator and not by the Court below in the proceedings under Section 34 of the Act.

12. As such the appeal is partly allowed and the observation made in para-22 of the impugned order, only with respect to the claims being within the period of limitation, is set aside. It shall be open for the Arbitrator to decide the question of the claims being barred by limitation.

13. The Arbitrator is directed to decide the claims expeditiously and certainly before 30th of June, 2016. Parties undertake to appear before the Arbitrator on 22nd March, 2016. Appeal stands disposed of accordingly, so also the pending applications, if any.

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

M/s Ban Labs Ltd. and another. .....Petitioners.

Versus

State of Himachal Pradesh. .....Respondent.

Cr.MMO No.283 of 2014
Date of Decision: 15.3.2016

Drugs and Cosmetics Act, 1940- Section 18(a) (ii) read with Section 16(b) and Section 17-E(f) and 27-A – Proceedings were initiated against the petitioner under Drugs and Cosmetics Act- it was contended that report of the chemical analyst is not proper as, the permissible percentum of the ingredients of the sample was not mentioned in the report - held, that report of the Chemical Analysts showed that the matter insoluble in alcohol was much beyond the prescribed limit- this conclusion was sufficient even if exact quantity was not stated- further held that mis-reflection/mis-quoting of the provision of law is not sufficient to quash the proceedings- petition dismissed. (Para-2 to 4)

For the Petitioners: Mr. Vijay Kumar Arora and Mr. Shubhankar Baweja, Advocates.
For the Respondent: Mr. Ravinder Thakur, Addl. AG with Mr. Vivek Singh Attri, Dy. AG.

The following judgment of the Court was delivered:

Sureshwar Thakur, J (oral)

The instant petition has been filed at the instance of the petitioners-accused for quashing of Criminal Complaint No.122/3 of 2013, filed by the respondent against them before the learned Chief Judicial Magistrate, District Sirmour at Nahan, H.P. under Section 18(a) (ii) read with Section 16(b) and Section 17-E(f) of the Drugs and Cosmetics Act, 1940 wherein the petitioners herein stand alleged to have committed an offence punishable under Section 27-A of the aforesaid Act.

2. The learned counsel for the petitioners contends with vehemence qua the report of the Chemical Analyst recording an opinion therein of the sample sent to it for analysis being not upto the standard quality sprouting from the factum of it containing matter insoluble in alcohol beyond the prescribed limit, being infirm spurred by the factum of it not being in consonance with Annexure P-3, whereat the permissible percentum of the ingredients of the sample stand delineated, whereas the reports of the Chemical Analyst, comprised in Annexures R-3 to R-7 omit to with exactitude unravel with specificity the ingredients enunciated in Annexures P-3 to P-6 whose existence beyond the prescribed limit in the sample concerned would alone constitute an offence punishable under Section 27-A of the Drugs and Cosmetics Act, 1940. However, the aforesaid submission stands repelled arising from the factum of the reports of the Chemical Analysts, comprised in Annexures P-7, P-9 & R-3 to R-7 on the sample as sent to them for analysis unraveling the factum of the matter insoluble in alcohol being much beyond the prescribed limit, hence even if there is no enunciation therein with specificity of the impermissible percentum of the ingredients spelt in Annexure P-3 in the sample sent to it for analysis, nonetheless, the reports of the Chemical Analysts emanating from the labs concerned existing in Annexures P-7, P-9 & R-3 to R-7, cannot stand being either repelled or ousted at this stage nor they can be construed to be devoid of any sanctity, especially when authors thereof are not available before this Court. Preeminently, it is open for the petitioners-accused to outstrip the veracity of the reports recorded by their authors by concerting to cross examine them on theirs stepping into the witness box. In sequel, prima-facie at this stage sanctity is to be imputed to the reports emanating from the chemical labs aforesaid. Also prima-facie it is not open for the learned counsel for the petitioner to contend that the petition be allowed by this Court.

3. Further the learned counsel for the petitioner submits that there is a mis-recital/mis-quoting of the penal provisions in the complaint lodged against the accused comprised in Annexure P-19. However, mis-reflection/mis-quoting aforesaid is curable in the face of supervening circumstances manifested in the reports of the chemical labs aforesaid. Obviously given the inference of any mis-reflection of the penal provisions in the complaint comprised in Annexure P-19 being curable, the effect of any mis-reflection of the penal provisions in Annexure P-19 cannot at all stand as a good ground for the learned counsel for the petitioners to oust at this stage the allegations constituted against the petitioners-accused comprised therein. Moreover, when it is open to the learned trial Court to in the face of the supervening circumstances modify, alter or amend the charge against the petitioners-accused for bringing it in consonance with the material before it, any resort

thereto by it benumbs the efficacy or the tenacity of the contention of the learned counsel for the petitioners-accused of mis-recital of penal provisions in Annexure P-19 stripping it of its legal efficacy on all scores.

4. In view of the above, there is no merit in the present petition and the same is dismissed accordingly. Pending application(s), if any, also stand disposed of.

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

National Traders Dharamshala ...Petitioner
Versus
State of HP & ors ...Respondents

CWP No. 6630 of 2010
Reserved on 2.3.2016
Decided on 15.03.2016.

Constitution of India, 1950- Article 226 and 227- Flying Squad (Northern Zone), Dharamshala intercepted two trucks loaded with 240 quintals of steel – driver did not have bills and other documents – Assessing Authority imposed penalty of Rs. 36,000/-- appeal was preferred which was dismissed for want of deposit of 50% of the amount- An appeal was preferred before H.P. Tax Tribunal, Dharamshala which was also dismissed- it was pleaded in the writ petition that proceedings were initiated at the instance of respondent No. 3 who owed a sum of Rs.10,000/-, this plea was never taken before the authorities- driver could not produce the Bill at the time of interception- the goods were detained but were released on sapurdari- no document showing that tax was paid by the petitioner was produced - writ petition dismissed. (Para-8 to 14)

For the Petitioner: Mr.S.C. Sharma, Advocate.
For the Respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan & Mr. Romesh Verma, Addl. AGs with Mr. J.K.Verma, Dy.AG for respondents.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition is directed against the findings recorded by the H.P. Tax Tribunal, thereby upholding the decision by the two authorities below, imposing a penalty of Rs.36,000/- upon the petitioner under the H.P. General Sales Tax Act, 1968 (for short the 'Act').

2. On 1.5.1995, Flying Squad (Northern Zone), Dharamshala intercepted two trucks which were loaded with 240 quintals of steel (Saria). It was found that both the drivers were not having bills and other documents and even the ST XXVI-A form had not been filled on the inter-State Barrier.

3. The partner of the petitioner Sh.Ved Parkash Sharma, appeared and showed his ignorance regarding the bills and other documents, resulting in initiation of the proceedings against the petitioner.

4. The Assessing Authority was constrained to carry out *ex-parte* proceedings against the petitioner for want of non appearance and ultimately passed an order imposing penalty to the tune of Rs.36,000/- on the ground that the petitioner had violated the provisions of Section 22(4) of the Act.

5. Aggrieved by the aforesaid order, the petitioner filed an appeal before the first appellate authority, which came to be dismissed for want of pre-requisite deposit of 50% of the amount.

6. This order was assailed by the petitioner by filing by filing an appeal before the H.P.Tax Tribunal, Dharamshala, before whom petitioner again failed to show any bills or other documents, resulting in dismissal of the appeal. It is against these decisions that the petitioner has filed the instant writ petition.

7. Respondents have filed their reply and have supported the orders passed by the authorities below and have prayed for dismissal of the writ petition.

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

8. Sh.S.C.Sharma, learned counsel for the petitioner has strenuously argued that the entire proceedings are sham and have been initiated at the instance of respondent No.3, who in fact owed the petitioner a sum of Rs.10,000/- and has placed heavy reliance on annexure P-1, annexed with the petition. It is claimed that the petitioner had all the documents and, therefore, could not have been fastened with a penalty of Rs.36,000/-.

9. We are unable to agree with this submission, for the simple reason that the same appears to be an innovative idea generated by the petitioner to escape the liability as imposed upon him. There is nothing to suggest on record that this ground had in fact been taken before the authorities below and, therefore, the same cannot be permitted to be taken before this Court.

10. That apart, the documents filed in support of this contention are nothing, but self serving documents, to which no credence can be given.

11. It is not disputed even by the petitioner that in the event of the goods having been found without accompanying document, the petitioner would be liable to be imposed with the penalty, but his contention is that in case the petitioner's goods had in fact been found to have been transported without necessary documents, then the respondents were required to resort to the procedure as envisaged under Section 22 (6) and (7) of the Act, which they have failed to do.

12. Before we proceed any further, the relevant provisions of this 'Act' may be noticed.

> <u>Section</u> *"22(2) The owner of person-in-charge of a (goods carriage) or vessel shall carry with him a (good carriage) record, a trip sheet or a log book, as the case may be, and a bill of sale or a delivery note containing such particulars as may be prescribed, in respect of such goods, meant for the purpose or trade as are being carried in the (goods carriage) or vessel, as the case may be, and produce the same before an officer in-charge or a check post or barrier or any other officer not below the rank of Excise & Taxation Inspector checking the vehicle or vessel at any place."*
>
> *"(4)The owner or person-in-charge of a (goods carriage) or vessel entering the limits of State limits shall also give in triplicate a declaration containing such*

particulars as may be prescribed of the goods carried in such vehicle or vessel, as the case may be, before the officer-in-charge or the check post or barrier and shall produce the copy of the said declaration duly verified and returned to him by the said officer or before any other officer referred t in sub section (2) at the time of checking under this section.

Provided that where a goods vehicle or vessel bound for any place outside the State passes through the State, the owner or person in-charge of such vehicle or vessel shall furnish, in duplicate, to the officer-in-charge of the check post or barrier of his entry into the State a declaration in the prescribed form and obtain from him a copy duly verified. The owner or person-in-charge of the goods vehicle or vessel as the case may be, shall deliver within seventy two hours the said copy of the officer-in-charge of the check post or barrier at the point of its exit from the State failing which he shall be liable to pay a penalty to be imposed by the officer-in-charge of the check post or barrier of the entry not exceeding two thousand rupees or twenty per centum of the value of the goods, whichever is greater:

Provided further that no penalty shall be imposed unless the person concerned has been given a reasonable opportunity of being heard."

"(6) If the Officer-in-charge of the check post or barrier or other officer as mentioned in sub section (2) has reasons to suspect that the goods under transport are meant for trade and are not covered by proper and genuine documents as mentioned in sub section (2) or sub section (4) as the case may be, or that the person transporting the goods is attempting to evade payment of tax due under this Act, he may, for reasons to be recorded in writing and after hearing the said person, order the unloading and detention of the goods, for such period as may reasonably be necessary and shall allow the same to be transported only on the owner of goods or his representative or the driver or other person in-charge of the goods, vehicle or vessel on behalf of the owner of the goods furnishing to his satisfaction a security or executing a bond with or without sureties for securing the amount of tax, in the prescribed form and manner, for an amount not exceeding one thousand rupees or twenty per centum of the value of the goods, whichever is greater.

Provided that where any goods are detained a report shall be made immediately and in any case within twenty four hours of the detention of the goods by the officer detaining the goods to the Excise and Taxation Officer of the District seeking the latter's permission for the detention of the goods for a period exceeding twenty four hours, as and when so required and if no intimation to the contrary is received from the latter, the former may assume that his proposal has been accepted."

"(7) The officer detaining the goods shall record the statement, if any, given by the owner of the goods or his representative or the driver or other person in-charge of the goods vehicle or vessel and shall require him to produce proper and genuine documents as referred to in sub section (2) or sub section (4) as the case may be, before him in his office on a specified date on which date the officer shall submit the proceedings along with the connected records to such officer as may be authorized in that behalf by the State Government for conducting necessary enquiry in the matter. The said officer shall before conducting the inquiry, serve a notice on the owner of the goods and give him an opportunity of being heard and if, after the enquiry, such officer finds that there has been an attempt to evade the tax due under this Act, he shall, by

order, impose on the owner of the goods a penalty not exceeding one thousand rupees or twenty per centum of the value of the goods, whichever is greater, and in case he finds otherwise he shall order the release of the goods."

13. The records reveal that during inspection carried out on 1.5.1995 it was found that goods without bill or form ST XXVI-A were being carried in two trucks and neither the driver nor the petitioner could satisfy the authority regarding the same being tax paid goods. It is also borne out from the record that the respondent authorities had infact decided to detain the goods in terms of Section 26(6), but it was on account of the petitioner's persuasion that he was a local trader that the goods instead of being detained were ordered to be released to him on 'sapurdari'. Prior to doing so, statement of the driver as also Sh.Ved Parkash were duly recorded by the concerned officer. Thus, it is more than established that the procedure, as envisaged under Section 22(6) & (7) of the Act, has been duly followed.

14. Apart from above, petitioner has even before this court failed to produce the bills or any other document whereby it could be inferred that he had paid the requisite tax. Having failed to do so, no interference is called for with the decisions rendered by the authorities below.

15. Consequently, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear the costs.

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

Ram Parkash ..... Petitioner
Versus
State of Himachal Pradesh and another .....Respondents

CMPMO No. 58/2012
Reserved on: 10.3.2016
Decided on: March 15, 2016

Code of Civil Procedure, 1908- O.VII R.11- Eviction proceedings were initiated against the petitioner for his eviction from the Government land- notice was issued when it was found that petitioner had encroached upon the suit land and was causing hindrance to the use of the public road- eviction of the petitioner was ordered- appeal was preferred before Divisional Commissioner against the eviction order which was dismissed- held, that Sub Divisional Collector has necessary jurisdiction to decide the complaint filed under the HP Public Premises and Land (Eviction and Rent Recovery) Act- petitioner had not led any evidence to establish that house was constructed by him on the suit land and not on the Government land- complaint was regarding the government land and not regarding the suit land – demarcation was conducted by Field Kanungo and was checked by Assistant Collector 2nd Grade- orders passed by Sub Divisional Collector are in conformity with law which had attained finality and same could not be assailed before the Civil Court.

(Para-3 to 6)

For the petitioner :Mr. G.D. Verma, Senior Advocate with Mr. B.C. Verma, Advocate.
For the respondents :Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This petition has been instituted against Judgment dated 7.12.2011 rendered by learned Additional District Judge, Mandi, District Mandi, Himachal Pradesh in Civil Miscellaneous Appeal No. 17 of 2011.

2. "Key facts" necessary for the adjudication of the present petition are that eviction proceedings were initiated against the petitioner for eviction of the government land under the HP Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (hereinafter referred to as 'Act' for convenience sake). Notice was issued to him under Sub-section (1) of Section 4 of the Act. It was found that the petitioner has encroached upon the suit land and was causing hindrance to the use of the road. Ext. PW-2/A is *Aks Tatima* in respect of Khasra Nos. 1088/304/1 and 1088/304/2. It was prepared by Patwari Halka Karsog and verified by Field Kanungo Karsog and rechecked by Assistant Collector 2nd Grade (Naib Tehsildar) Karsog. Sub Divisional Collector, Karsog, after hearing the parties, ordered eviction of the petitioner from Khasra No. 1088/304/1 and No. 1088/304/2 measuring 0-2-8 and 0-1-0 Bigha, respectively, situated in Mohal Karsog/416, Tehsil Karsog, District Mandi. Petitioner filed an appeal before the learned Divisional Commissioner against the eviction order dated 5.6.2006. He dismissed the appeal on 16.10.2008.

3. Thereafter, petitioner filed a suit for declaration and consequential relief of permanent prohibitory injunction in respect of Khata No. 278 Khatauni No. 400, Khasra No. 1388/1257 measuring 0-1-0 Bighas situated at Mohal Karsog/416. According to the plaintiff (petitioner) suit land was originally allotted to Bhimu under Nautor scheme. Thereafter, it went to Smt. Guddi Devi. She had constructed a shop over it and was holding the same as absolute owner. Plaintiff purchased this land vide sale deed No. 542 dated 29.10.2001 and mutation was attested in his favour on 23.11.2001. Thereafter, Sub Divisional Collector passed eviction order against the petitioner. According to the averments made in the plaint, Assistant Engineer was not competent to move the petition and Sub Divisional Collector was not authorised to adjudicate the same. No notice was issued by Sub Divisional Collector. Spot map proved before Sub Divisional Collector was wrong. Demarcation was conducted by Field Kanungo and adjoining land was not correctly measured. Appeal has also not been decided in accordance with law.

4. Suit was contested by the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). According to the defendants, they have never preferred petition under the Act for vacation of suit land rather subject matter of the petition was land comprising in Khasra No. 1088/304/1 measuring 0-2-8 Bigha and Khasra No. 1088/304/2 measuring 0-1-0 Bigha. Assistant Engineer was competent to file the complaint. Sub Divisional Collector had the jurisdiction to adjudicate upon the same. Issues were framed by the Civil Judge (Senior Division), Karsog, District Mandi. He returned the plaint to the plaintiff on 21.6.2011. Petitioner filed an appeal before the learned Additional District Judge, Mandi. He dismissed the same on 7.12.2011.

5. Mr. G.D. Verma, learned Senior Advocate, has vehemently argued that the complaint filed by Assistant Engineer, could not be ordered to be transferred by the ADM to the Sub Divisional Collector, Karsog. However, fact of the matter, is that Sub Divisional Collector has necessary jurisdiction to decide the complaint filed under the HP Public Premises and Land (Eviction and Rent Recovery) Act, 1971. Petitioner had appeared before the Sub Divisional Collector and filed written statement. Petitioner has not led any evidence to establish that the house has been constructed by him on the suit land and not on the

government land. Complaint before the Sub Divisional Collector pertained to Khasra Nos. 1088/304/1 and 1088/304/2 and not qua the suit land. Suit land as per the complaint is Khasra No. 1388/1257.

6. Mr. G.D. Verma, learned Senior Advocate also argued that the demarcation was not conducted in accordance with law. However, fact of the matter is that there is a detailed demarcation report. Demarcation was conducted by Field Kanungo and it was verified and checked by the Assistant Collector 2nd Grade (Naib Tehsildar), Karsog. In the demarcation report, encroachment on Khasra Nos. 1088/304/1 and 1088/304/2 was detected. Copy of the *Tatima*/ spot map is Ext. PW-2/A. Order passed against the petitioner by the Sub Divisional Collector on 5.6.2006 and by the Divisional Commissioner dated 16.10.2008 are in conformity with law. These orders have attained finality. The same could not be assailed before a Civil Court in view of specific bar under Section 15 of the Act.

7. 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.

Raman Chand alias Relu and others. ...Appellants.

Versus

Hukam Chand. ...Respondent.

RSA No. 525 of 2007
Reserved on: 14.3.2016
Decided on: 15.3.2016

Specific Relief Act, 1963- Section 34- Father of the defendant was in possession of the suit land as a non-occupancy tenant- he had sold the suit land to the plaintiff for consideration of Rs.3,000/-- possession was also delivered to the plaintiff- defendant No.1 wanted to pre-empt the sale of the land but the matter was compromised - defendant No. 1 entered into an agreement wherein defendant No.1 admitted the sale in favour of the plaintiff to be correct and confirmed it- it was agreed that land would be transferred on the attestation of mutation and the conferment of proprietary rights – defendant No. 1 sold the suit land to the defendants No. 2 and 3 after the conferment of proprietary rights - defendant No. 1 tried to obtain the forcible possession- plaintiff had become owner by way of adverse possession- suit was partly decreed by the trial Court- appeal was preferred, which was allowed and the plaintiff was declared to be owner in possession of suit land by way of adverse possession- in second appeal held, that the sale made in favour of plaintiff was not registered – agreement only gives a right to the plaintiff to file a suit for specific performance and not to file a suit for declaration- defendant No. 1 was not owner at the time of agreement- he became owner only after attestation of the mutation- father of the defendant No. 1 has been recorded to be in possession as non-occupancy tenant in the revenue record – plaintiff had failed to prove his possession over the suit land- a plea of adverse possession can be taken as shield not a sword- sale deed was executed after the attestation of mutation - regular second appeal accepted and the judgments passed by Civil Judge and the Appellate Court set aside.

(Para-17 to 24)

Case referred:

Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669

For the Appellants : Mr. G.R. Palsra, Advocate.
For the Respondent: Mr. R. L. Chaudhary, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 28.9.2007 rendered by the Additional District Judge, Mandi in Civil Appeal No. 82 of 2004.

2. "Key facts" necessary for the adjudication of this appeal are that the respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit against the appellants-defendants (hereinafter referred to as the "defendants" for convenience sake) for declaration and injunction. According to the plaintiff, late Sh. Balu, father of defendant No.1 Raman Chand, was previously in possession of the land comprised in Khewat No.83 min/78 Khatauni No.89, khasra Nos. 599 (old 548) and 604 (old 554) kitas 2 measuring 0-6-4 bighas situated in Muhal Sehali, Illaqua Tungal, Sub Tehsil Kotli, District Mandi, H.P. as non-occupancy tenant under the land owners Raj Kumar and others. Sh. Balu during his life time sold the suit land to the plaintiff for consideration of Rs. 3000/-. This consideration was duly paid to him by the plaintiff and the possession was delivered to the plaintiff. Later on defendant No.1 wanted to pre-empt the sale of the land but with the intervention of the well wishers, the matter was compromised and defendant No.1 entered into an agreement dated 21.5.1979 with the plaintiff in presence of witnesses wherein defendant No.1 admitted the sale of the suit land by Balu in favour of the plaintiff to be correct and also confirmed the sale. He also admitted possession of the plaintiff over the suit land. Since the suit land was non-occupancy land of Balu, it was orally agreed by defendant No.1 that as soon as the mutation of conferment of proprietary rights would be attested in his favour, he would transfer the rights in favour of the plaintiff. After the death of Balu, mutation of inheritance was attested in favour of defendant No.1 and the suit land continued to be recorded in possession of defendant No.1 as non-occupancy tenant. Later on mutation No. 378 regarding conferment of proprietary rights was attested in favour of defendant No.1 on 11.1.2002 by the AC-IInd Grade. After the attestation of mutation, defendant No.1 was legally bound to convey the title of the suit land in favour of plaintiff as admitted by him. But defendant Raman Chand sold the suit land to defendant Nos.2 and 3, namely, Prem Lata and Bhuri Singh, as such, sale deed dated 1.2.2002 was wrong and null and void. Defendant Nos.2 and 3, namely, Prem Lata and Bhuri Singh were not *bona fide* purchasers. Defendant No.1 Raman Chand tried to take forcible possession of the suit land in the month of October, 1988. Possession of the plaintiff was continuous, open, peaceful, hostile and to the knowledge of defendants, as such, he has even otherwise become owner of the suit land by way of adverse possession.

3. The suit was contested by defendants. It is denied that father of defendant No.1 sold the suit land to the plaintiff for a consideration of Rs. 3,000/- and also delivered possession to him. It is also denied that defendant No.1 entered into an agreement with the plaintiff on 21.5.1979 for not filing any suit for preemption. Since there was no description of any land in the agreement, it was void. It is admitted that after the death of father of defendant No.1, mutation of inheritance was attested in favour of defendant No.1 Raman Chand and mutation has also been attested with respect to the conferment of proprietary rights. Defendant No.1 Raman Chand being the owner of the suit land, sold the same to defendant Nos.2 and 3, namely, Prem Lata and Bhuri Singh through registered sale deed

dated 1.2.2002 for consideration of Rs. 9,500/-. The possession was also delivered. Defendant Nos.2 and 3 came in possession of the suit land.

4. Issues were framed by the Civil Judge (Senior Division), Mandi on 28.5.2002. He partly decreed the suit to the extent that plaintiff was held in possession of the suit land comprised of Khewat No. 83 min/78 Khatauni No.89, Khasra No. 599 (old 548) and 604 (old 554) kitas 2 measuring 0-6-4 bighas situated in Muhal Sehali, Illaqua Tungal, Sub Tehsil Kotli, District Mandi, H.P. Defendants were also restrained from interfering in the possession of the plaintiff or forcibly dispossessing him from the suit land. The suit for other reliefs was dismissed. Plaintiff filed an appeal bearing Civil Appeal No. 82 of 2004 and defendants filed an appeal bearing Civil No. 65/2005 (2004) against the judgment and decree dated 1.9.2004. Civil Appeal No. 82/2004 filed by plaintiff was allowed by the Additional District Judge, Mandi and Civil Appeal No. 65/2005 (2004) filed by defendants was dismissed on 28.9.2007. Plaintiff was declared to be owner in possession of Khasra Nos. 599 and 604 measuring 0-6-4 bighas situated in Mauja Sehali by way of adverse possession and defendants were restrained from interfering with his possession over the suit land. Hence, the present appeal. It was admitted on 29.11.2007 on the following substantial questions of law:

1. **Whether the first appellate court has gravely fallen into error by decreeing the suit of the plaintiff for adverse possession when there is no iota of evidence in this behalf, which has materially prejudiced the case of the appellants?**
2. **Whether both the learned courts below have misread, misconstrued and misappreciated the oral as well as documentary evidence of the parties especially documents Ex.PW-2/A, Ex.PW-2/C, Ex.PW-1/D, Ex.PW-6/A and statement of PW-1 Hukam Chand?**

5. Mr. G.R. Palsra, learned counsel for the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the plaintiff has failed to prove the basic ingredients of adverse possession. He then contended that both the courts below have misread and misconstrued the oral as well as documentary evidence.

6. Mr. R. L. Chaudhary, learned Advocate for the respondents has supported the judgments and decrees passed by the courts below.

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

8. Since both the substantial questions of law are interlinked and interconnected, the same are taken up together for determination to avoid repetition of discussion of evidence.

9. PW-1 Hukam Chand deposed that he purchased the suit land from Belu Ram through agreement dated 21.5.1979. It was scribed by document writer Badri. He has admitted that at that time Belu Ram was recorded as non-occupancy tenant. He died in the year 1993-94. The mutation of inheritance was attested in favour of defendant No.1 Raman Chand. He came in possession of the suit land in the month of January, 2002. He has also admitted that when the agreement was executed, Raj Kumar etc. were owners of the suit land and Belu was non-occupancy tenant of the suit land.

10. PW-2 Birbal testified that on 21.5.1979, agreement Ex.PW-2/A was scribed by the petition writer on the instructions of Belu in his presence. Belu signed the agreement after admitting the same to be correct in presence of witnesses. Sale consideration of Rs.

3,000/- was paid by the plaintiff to Belu. He further testified that on the same day, defendant Raman Chand also executed agreement Ex.PW-2/B in presence of witnesses, which was also signed by Raman Chand after admitting the same to be correct. Possession of the suit land was delivered to the plaintiff and since then the plaintiff has been coming in possession of the suit land.

11. PW-3 Bal Ram testified that for the last 22-23 years, plaintiff is in possession over the suit land. Previously, the suit land was owned by Belu, father of defendant No.1. Plaintiff disclosed to him that he purchased the land from Belu through an agreement.

12. PW-4 Hardev Lal testified that in the year 1965, he was stamp vendor and Jai Dev, Gaurishankar and Badri Prashad, document writer, were also sitting with him. He was well conversant with the hand writing of Badri. He identified signatures of Badri Prashad on Ex.PW-2/A.

13. PW-6 Mohinder Kumar was posted as Naib Tehsildar, Kotli. He deposed that plaintiff had moved an application for correction of entries in the revenue record qua the suit land. He forwarded the same to Field Kanungo for conducting an inquiry. He summoned the parties for 1.6.2002 after receiving the report from the Field Kanungo. He recorded statement of defendant Raman Chand.

14. PW-7 Shyam Lal testified that he was directed by Naib Tehsildar to verify the facts on the spot and submit his report. He went to the spot on 20.2.2002. He summoned the parties and villagers but defendant Raman Chand did not appear before him. Thereafter, he recorded the statements of villagers Ex.PW-7/A. PW-7/B was the statement of plaintiff. He submitted his report Ex.PW-7/C to the Naib Tehsildar, Kotli.

15. Defendant Bhuri Singh has appeared as DW-1. He testified that defendant Prem Lata purchased the suit land from Raman Chand on 1.2.2000 for consideration of Rs. 9,500/- by way of registered sale deed. The possession was delivered to them.

16. DW-2 Brahma Nand testified that Raman Chand executed sale deed of suit land on 1.2.2002 in favour of defendant Nos. 2 and 3. Defendants were also put in possession of the suit land.

17. The sale allegedly made by Belu Ram in favour of plaintiff was not registered. Ex.PW-2/A dated 21.5.1979 did not confer the proprietary rights upon the plaintiff except to enforce the same by filing suit for specific performance of the contract. The plaintiff has only filed suit for declaration and injunction. Moreover, when the agreement Ex.PW-2/A was entered into by Belu, father of defendant No.1 Raman Chand, he was not owner of the suit land. He was only non-occupancy tenant. The proprietary rights have been conferred upon defendant Raman Chand by way of mutation dated 11.1.2002. He became the owner of the suit land only on 11.1.2002. PW-1 Hukam Chand has not stated anything with regard to the possession of the suit land. PW-3 Bal Ram has only stated that the plaintiff was in possession of the suit land for the last 22-23 years and before that the suit land was in possession of Belu father of defendant No.1 Raman Chand.

18. In Jamabandi for the year 1997-98 Ex.PW-1/D, defendant Raman Chand is recorded as “Gairmarusi tenant” in the column of cultivation whereas in the Jamabandi Ex.PW-1/C for the year 1977-78, Balu is recorded as owner in possession and in Jamabandi Ex.PW-1/B, Balu is recorded as “Gair Marusi tenant” of the suit land. In Khasra Girdwari Ex.PW-1/E for the year 1978-79, the possession of Balu is duly recorded.

19. According to the statement of PW-6 Mohinder Kumar, he deputed PW-7 Shyam Lal, Field Kanungo to visit the spot. PW-7, Shyam Lal visited the spot on 20.2.2002.

However, fact of the matter is that defendant Raman Chand was not present. Report Ex.PW-7/C has been prepared by the Field Kanungo behind the back of defendant Raman Chand.

20. Now, as far agreement Ex.PW-2/A is concerned, defendant Raman Chand could not undertake to deliver the possession of the suit land to the plaintiff for the simple reason that Belu was non-occupancy tenant over the suit land of Raj Kumar etc. The proprietary rights were conferred upon Raman Chand only on 11.1.2002. According to the revenue record, the suit land was in possession of Belu, father of defendant Raman and after his death, it came in possession of defendant Raman Chand. The plaintiff has failed to prove his possession over the suit land. Learned first appellate court has come to the wrong conclusion that the plaintiff's possession was hostile to the true owner. The plea of adverse possession can be taken as a shield not a sword.

21. Their Lordships of the Hon'ble Supreme Court in ***Gurdwara Sahib*** vs. ***Gram Panchayat Village Sirthala and another***, (2014) 1 SCC 669 have held as under:

> **"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 use this adverse possession as a shield/defence."**

22. The land was sold by defendant No.1 in favour of defendant Nos. 2 and 3 on the basis of sale deed dated 1.2.2002. They were also put in possession of the same. The courts below have not properly appreciated Ex.PW-2/A, Ex.PW-2/C, Ex.PW-1/D, Ex.PW-6/A and statement of PW-1 Hukam Chand. PW-1 Hukam Chand has categorically admitted that Belu was non-occupancy tenant of Raj Kumar and others. It is reiterated that the proprietary rights were conferred upon Raman Chand only on 11.1.2002. Presumption of truth is attached to the revenue record. The revenue entries are rebuttable, however, the plaintiff could not rebut the same whereby Belu and thereafter Raman Chand was shown in possession of the suit land after conferment of the proprietary rights.

23. The substantial questions of law are answered accordingly.

24. Accordingly, in view of the analysis and discussion made hereinabove, the Regular Second Appeal is allowed. Judgments and decrees dated 1.9.2004 passed by Civil Judge (Senior Division), Mandi in Civil Suit No.11/2002 and 28.9.2007 passed by the Additional District Judge, Mandi in Civil Appeal No. 82 of 2004 are set aside. Suit of the plaintiff bearing Civil Suit No.11/2002 is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Shrawan Singh .....Appellant.

Versus

Ramel Singh (dead through LRs & ors.) .....Respondents.

RSA No. 436 of 2007
Reserved on: 14.3.2016.
Decided on: 15.3.2016.

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- land of the defendant is situated at the lower level and all the rainy water of

residential house of the plaintiff and other vacant land has been passing through the site since the time immemorial – plaintiff has acquired right of easement by prescription- defendants constructed a new house over the portion with intention to divert the natural flow of water- they have dug a drain adjacent to the boundary wall of the plaintiff, due to which boundary wall was damaged- defendants denied the claim- suit was dismissed by the trial Court- appeal was preferred which was also dismissed- held, in appeal that rainy water from the house of the plaintiff started flowing towards the land of the defendant 26 - 27 years ago and not prior to that- plaintiff had not acquired easementary right by way of prescription or by necessity – Court had properly appreciated evidence- appeal dismissed.

(Para-12 to 15)

Case referred:

Om Prakash and others vrs. State of Himachal Pradesh and others, AIR 2001 HP 18

For the appellant(s):	Mr. Rajnish K. Lall, Advocate vice counsel.
For the respondents:	Mr. R.K.Sharma, Sr. Advocate with Ms. Anita Parmar, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Kangra at Dharamshala, H.P. dated 31.7.2007, passed in Civil Appeal No. 47-J/XIII-04.

2. Key facts, necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff) has filed a suit for perpetual and prohibitory injunction restraining the respondents-defendants (hereinafter referred to as the defendants) from interfering in the ownership and possession of the plaintiff, raising any construction, removing trees and changing the nature of the land, as detailed in the plaint. According to the plaintiff, the land is owned and possessed by him and he has got his *abadi* and other vacant space alongwith other co-sharers, which is situated at higher level. The land of the defendants is situated in Kh. No. 533 at lower level and all the rainy water of residential house of the plaintiff and other vacant land has been passing through the site since the time immemorial without any interruption for the last more than 30 years before filing the suit. He has acquired right of easement by prescription and the plaintiff has also got customary right of easement. The defendants demolished their old cowshed situated over Kh. No. 533 and constructed new house over the portion with intention to divert the natural flow of water which was passing through points A to C and now they were threatening to divert the same from point A. They have forcibly dug a drain just adjoining to the boundary wall of the plaintiff. The plaintiff's wall was damaged and it has caused damage to the tune of Rs. 12,000/-.

3. The suit was contested by the defendants. According to them, the *abadi* of the plaintiff is situated at higher level. The water, as alleged by the plaintiff, has acquired no right of easement by necessity or prescription. The plaintiff has no right, title or interest to pass the water to the land of defendants as the defendants are absolute owner of Kh. No. 533.

4. Replication was filed by the plaintiff. The learned Civil Judge, (Jr. Divn.), Jawali, Distt. Kangra, H.P., framed the issues on 2.5.2000 and suit was dismissed on 16.2.2004. Feeling aggrieved, the plaintiff preferred an appeal before the learned District

Judge, Kangra at Dharamshala. The learned District Judge, Kangra at Dharamshala, dismissed the same on 31.7.2007. Hence, this regular second appeal.

5. This Regular Second Appeal was admitted on the following substantial questions of law on 13.8.2008:

> "1. Whether the plaintiff had acquired the right of free flow of water from the higher level to the lower level on account of continuous, open and uninterrupted user by prescription as also under custom and the obstruction caused by the defendants had interfered with the right of the plaintiff and resulted in irreparable loss and injury to the appellant and entitling the plaintiff to decree for mandatory as also prohibitory injunction?
>
> 2. Whether the judgment of the learned District Judge is vitiated for non-consideration of the oral and documentary evidence as also evidence adduced in appeal and ignoring the report of demarcation and is vitiated for not critically examine the evidence and giving the judgment on issue-wise and in violation of Order 20 Rule 5 CPC as also judgment of this Hon'ble Court in Om Parkash versus State of H.P. reported in AIR 2001 HP 18?"

6. Mr. Rajnish K. Lall Advocate, on the basis of substantial questions of law framed, has vehemently argued that his client has acquired the right of free flow of water from higher level to the lower level on account of continuous, open and uninterrupted user by prescription as also under custom. He then contended that both the Courts below have not correctly appreciated the oral as well as documentary evidence, more particularly, demarcation report. He lastly contended that the courts below have not given the judgment issue-wise. On the other hand, Mr. R.K.Sharma, Sr. Advocate, has supported the judgments and decrees of both the Courts below.

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

8. Plaintiff has appeared as PW-1. According to him, he has constructed his house, latrine, bath-room and courtyard on both sides of the house and a cowshed. The land of the defendants is at lower level. He has constructed his house 27 to 28 years ago. There was a cowshed on the portion where the defendant had constructed his new house. When the plaintiff constructed his house, he has also raised boundary wall after leaving one meter wide land to the other side of the boundary wall. In that portion of land, rain water from his house fell towards the courtyard of the defendants. Thereafter, the natural flow of water goes towards the share-am-path. He has also placed on record site plan Ext. PW-1/A. There was no other way to pass this water. He was earlier working at Lucknow. The defendant has constructed his house on the place of cowshed 6-7 years ago. The defendants have excavated a drain towards his boundary wall due to which, the water from his *abadi* has been blocked and damage was caused to his boundary wall. He had also moved an application before the Deputy Commissioner and SDM and they have directed him to file a civil suit. The defendants have also constructed stairs at point "A" due to which the water from his *abadi* has been blocked. The water was passing through this passage right from his ancestors. He had also initiated proceedings under the Criminal Procedure Code. The Tehsildar had also visited the spot and submitted his report to the S.D.M.In his cross-examination, he admitted that his house is situated in the *abadi-deh.* All the villagers are share holders in that *abadi-deh* land including defendants. He has admitted that the *abadi-deh* is still joint amongst the parties. He further admitted that he has not taken the consent of other co-sharers when he has raised the boundary wall. Voluntarily deposed that he was in possession of that part of land. He further admitted that the land has never been

demarcated by any agency. He also admitted that there is a public path by the side of his house and the house of defendants. He admitted that the Panchayat had visited the spot and asked him that he is harassing the defendants intentionally. He denied the suggestion that Panchayat has decided that he should pass half of the rain water through the backside of the house of defendants and rest of the water through the backside of the new house. He denied that he refused to accede to the advice given by the Panchayat. Voluntarily deposed that Chain Singh started quarrelling with him so Panchayat could not arrive to any decision.

9. Defendant Rumel Singh has appeared as DW-1. According to him the suit land is situated in *Lal-lakir-abadi*. The defendant has constructed a boundary wall around his house. There was a passage which was blocked by the plaintiff by constructing the boundary wall. The plaintiff has kept four holes towards his house and the rain water use to pass through his courtyard. Earlier the water from abadies of the plaintiff use to pass towards the passage. From the passage, it passes through the backside of his house. The plaintiff has also stacked big stones towards his old house due to which his walls have developed dampness. He reported the matter to the Panchayat. The Panchayat decided and asked the plaintiff to divert half of the water from his *abadi* through the backside of old house and rest of the water through the backside of the new house. The Sub Divisional Magistrate, Jawali had also asked the plaintiff to bifurcate the rain water into two parts but he refused. He admitted that he has added one room to his old house and increased the width of the room. He has denied that the boundary wall was in bad shape as he has dug the land near to the alleged wall.

10. DW-2 Sudershana Kumari, Pardhan of the Gram Panchayat Amlela deposed that house of the Sarwan is on the higher side. The plaintiff has kept holes in his boundary wall due to which there is danger to the house of the defendant. The water from the *abadi* of the plaintiff could pass through the backside of the house of the defendant. She tried to persuade the plaintiff, but he refused to accede to the request. The Sub Divisional Magistrate, Jawali has also visited the spot. In case the holes kept by the plaintiff in the wall will not be plugged, the house of defendant can fall at any time.

11. DW-3 Gulzar Singh, Ex-Pardhan of the village Amlela for the year 1993-1996 has deposed that the wife of defendant moved an application on which he went to the spot. Sarwan Kumar was also in his house. The application was related to the holes kept by the plaintiff towards the house of the defendant. He has also placed on record the photo-copy of the order passed on the application of defendant No. 2. Many higher officials have visited the spot but the plaintiff refused to adhere to the requests made by them.

12. The plaintiff has claimed right of easement by prescription and also customary right of easement. However, the evidence on record establishes that the plaintiff himself has deposed that he has constructed house in the place of cowshed. He has raised boundary wall in the *abadi deh* land. The plaintiff has constructed his house 26-27 years back. The rain water from the house of the plaintiff only started flowing towards the land of the defendant 26 to 27 years ago and not prior to that, though plaintiff is claiming this right from the time of his forefathers. The plaintiff has not adduced any other evidence. No co-villagers have been cited as witnesses by the plaintiff.

13. According to the statement of DW-2 Sudershana Kumari, the house of the plaintiff is on the higher side. He has kept holes in the boundary wall. There was danger to the house of the defendant. The water from the *abadi* of the plaintiff could pass through the back side of the house of the defendant. Similarly, DW-3 Gulzar Singh, Ex-Pardhan of villag Amlela has testified that he has visited the spot. He had asked the plaintiff not to open holes of the retaining wall towards the courtyard of the defendant. He has also placed on

record the photocopy of the order passed on the application of defendant No. 2. The plaintiff has constructed wall without taking the permission or consent of the other proprietors of the village.

14. The appellant had also examined Sh. R.P. Shandilya as AW-1 on the basis of an application filed under Order 41 Rule 27 CPC. AW-1 Sh. R.P. Shandilya has deposed that the plaintiff has filed an application under Sections 133 and 145 of the Code of Criminal Procedure on the basis of which he conducted the demarcation of the dispute land and he prepared his report Ext. A-1. The report proves that AW-1 R.P. Shandilya had visited the spot and conducted demarcation but vide para 3 of the demarcation report, it has been stated that one Sh. Chain Singh had encroached upon two meters wide stretch of land out of the suit land, who was the owner of the adjoining khasra number. He advised the plaintiff to get proper demarcation. He could not narrate whether the plaintiff had kept 4 holes in the boundary wall or whether water from those holes was flowing in the land of the defendants. No reference of the channel has been given in the report. He did not tell about the fate of the decision of the Sub Divisional magistrate on the basis of report Ext. A-1. He has not clarified in his report as to whether he demarcated the land of both the parties. Had he demarcated the land of both the parties properly, there was no occasion for him to direct the plaintiff to obtain proper demarcation. There is nothing on record to prove whether his report Ext. A-1 was accepted by the Sub Divisional Magistrate or the same was set aside. Person who has prepared the spot map Ext. PW-1/A has not been examined. The learned Courts below have decided all the issues framed on 2.5.2000. Thus, the judgment in the case of ***Om Prakash and others vrs. State of Himachal Pradesh and others,*** reported in ***AIR 2001 HP 18,*** is not at all attracted in the instant case.

15. The report Ext. A-1 has been correctly appreciated by the learned first Appellate Court. The plaintiff has got no easementary right by way of prescription or by necessity as there is alternative way to the passage of rain water towards the back side of the house of the defendant. The substantial questions of law are answered accordingly.

16. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Surender Kumar .....Petitioner

Versus

Union of India and others .....Respondents

CWP No. 5493/2014.
Judgment reserved on 29.2.2016.
Pronounced on: 15.03.2016

Constitution of India, 1950- Articles 226 and 227- Father of the petitioner was appointed Postal Assistant in the year 1980, who died on 3.1.1998 while in service- petitioner attained the age of majority in the year 2002- application for compassionate appointment was filed, which was rejected on 5.2.2008- petitioner filed a petition for quashing the order dated 5.2.2008- original application was dismissed by the Tribunal on the ground that application

was barred by limitation- held, that a person has to make an application before the tribunal within one year from the date of passing of final order – time can be extended by six months on sufficient cause- the purpose of compassionate appointment is to provide assistance to the family, which has been deprived of the earning hands- the family of the deceased was surviving for 14 years- application for compassionate appointment was made in the year 2002- claim was rejected in the year 2008- original application was made in the year 2012 - the very purpose of granting compassionate appointment had lost its efficacy – in these circumstances, application was rightly rejected by the Tribunal- petition dismissed.

(Para-2 to 9)

For the petitioner: Mr. L.S. Mehta, Advocate.

For the respondents: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Nipun Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Petitioner, by the medium of this writ petition, has questioned the judgment and order made by the Central Administrative Tribunal, Chandigarh Bench (Circuit at Shimla) (hereinafter referred to as "the Administrative Tribunal", for short, in O.A. No. 768/HP/2011 dated 24.5.2012, whereby the O.A. filed by the petitioner came to be dismissed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of the writ petition.

2. A brief narration of the conspectus of facts are that the father of the petitioner was appointed as Postal Assistant in the year 1980, in the respondent department, who died on 3.1.1998 while in service. At the time of his death, the petitioner was minor and on attaining the age of majority in the year 2002, he laid application for compassionate appointment, which was considered and rejected on 5.2.2008, vide Annexure A5 appended with the Original Application. The petitioner had approached the Tribunal and had sought quashment of order dated 5.2.2008 Annexure A5, whereby his appointment on compassionate ground was rejected.

3. The respondents have filed the reply to the Original Application.

4. The Tribunal, after noticing the facts of the case, held that the Original Application was barred by time for the reasons that the respondents declined the appointment on compassionate grounds to the petitioner on 5.2.2008 and he approached the Tribunal after a lapse of more than three years whereas the limitation provided in the Administrative Tribunals Act, 1985, for short "the Act" is one and a half year.

5. In terms of the mandate of Section 21 (1) (a) of the Act, an aggrieved person has to make an application within one year from the date on which final order has been made. Section 21 (3) provides six months' extension of time in case the applicant satisfies the Tribunal that he had sufficient cause for not making the application within such period. It is apt to reproduce Section 21 (1) (a) and (3) of the Act herein.

> *"21. Limitation :- (1) A Tribunal shall not admit an application,-*
>
> *(a) in a case where a final order such as is mentioned in Cl. (a) of sub-section (2) of Section 20 has been made in connection with the grievance unless the application is made, within one year from the date on which such final order has been made;*

(3) Notwithstanding anything contained in sub-section (1) or sub-section (2), an application may be admitted after the period of one year specified in CI. (a) or CI. (b) of sub-section (1) or, as the case may be, the period of six. months specified in sub-section (2), if the applicant satisfies the Tribunal that he has sufficient cause for not making the application within such period."

6. The respondents have filed the reply and averred that the compassionate appointment cannot be granted after lapse of long period and it is not a vested right which, can be claimed at any time and offering of compassionate appointment, as a matter of routine, irrespective of the financial condition of the family of the deceased or medically retired government servant, is legally impermissible.

7. The Tribunal, after taking note of the facts in para 11 of the impugned judgment rightly held that the OA filed by the petitioner was barred by limitation.

8. It is apt to record herein that the purpose of granting compassionate appointment is just to provide assistance to the family, which has been deprived of by the earning hands. The aim and object of granting the compassionate appointment is to save the family from the social evils. The family of the deceased employee had been surviving for the last 14 years as the deceased employee died in 1998, application for compassionate appointment was made in the year 2002, claim of the petitioner was rejected in the year 2008 and Original Application for compassionate appointment was made in the year 2012. The very purpose of granting compassionate appointment has lost its efficacy. The Tribunal has also taken into consideration the said fact in para 12 of the impugned judgment.

9. Having said so, we are of the considered view that the Tribunal has rightly made the impugned judgment, needs no interference.

10. The writ petition merits to be dismissed and is accordingly, dismissed alongwith pending applications, if any.

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

Vinod Kumar ..Petitioner.
Versus
Smt. Shakuntala and another ..Respondents.

Cr.MMO No.44 of 2015.
Reserved on: 01.03.2016.
Date of Decision: 15th March, 2016.

Protection of Women from Domestic Violence Act, 2005- Section 12- Court awarded maintenance of Rs. 2,000/- per month to respondent No. 1 and Rs. 1,000/- per month to respondent No. 2- earlier a petition under Section 125 of Cr.P.C was filed seeking maintenance which was decided subsequent to the order awarding maintenance- application was allowed and maintenance @ Rs.500/- per month was awarded to respondent No. 2 and maintenance @ Rs.1,000/- per month was awarded to respondent No. 1- a revision was preferred before Learned Sessions Judge, Kullu which was dismissed- it was contended that award of maintenance in the earlier petition barred subsequent petition under Section 125

of Cr.P.C- held, that right of maintenance was granted under distinct statutes - any adjudication by the Court in the earlier petition will divest the jurisdiction of subsequent Court- hence, order passed by the Court awarding maintenance under Section 125 of Cr.P.C set aside. (Para-4 and 5)

Cases referred:
Sudeep Chaudhary versus Radha Chaudhary, AIR 1999 SC 536
Juveria Abdul Majid Patni versus Atif Iqbal Mansoori and another, (2014) 10 SCC 736

For the Petitioner: Mr. B.S. Thakur, Advocate.
For the Respondents: Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Respondent No.1 is the legally wedded wife of the petitioner. Respondent No.2 is the male child begotten out of the wedlock inter se the petitioner and respondent No.1. Respondent No.1 instituted a petition under Section 12 of The Protection of Women from Domestic Violence Act, 2005 (hereinafter referred in short as "the Act of 2005") before the learned Chief Judicial Magistrate, Lahaul-Spiti at Kullu, Himachal Pradesh. The Court aforesaid on considering the evidence adduced before it held both respondent No.1 and 2 herein to stand entitled for the affording of monetary reliefs to them by the petitioner herein. Accordingly, maintenance in a sum of Rs.2000/- per mensem stood adjudged for its being defrayed by the petitioner to respondent No.1 herein besides a sum of Rs.1000/- per mensem stood assessed as maintenance for its being defrayed by the petitioner to respondent No.2 herein.

2. Earlier to the institution of the petition before the Court aforesaid under the aforesaid provisions of law, a petition constituted under Section 125 of the Code of Criminal Procedure (hereinafter referred in short as "Cr.P.C.") was laid before the learned Chief Judicial Magistrate, Kullu, Himachal Pradesh. Adjudication thereon stood rendered subsequent to the rendition of an adjudication on a petition under Section 12 of the Act of 2005. The learned Chief Judicial Magistrate, Kullu in pronouncing adjudication on a petition under Section 125 of the Cr.P.C., as stood laid before him discounted the factum of an earlier adjudication standing rendered by the Court of learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu, H.P. on a petition instituted under Section 12 of the Act of 2005, whereby the Court aforesaid awarded maintenance at the rate of Rs.1000/- per month to respondent No.1 besides awarded a sum of Rs.500/- per month as maintenance to respondent No.2 herein till his attaining majority. The liability to defray the sums aforesaid stood fastened upon the petitioner herein. A revision stood preferred therefrom by the petitioner before the learned Sessions Judge, Kullu, who rendered an adjudication in affirmation to the verdict of the learned Chief Judicial Magistrate, Kullu.

3. The petitioner herein stands aggrieved by the factum of the latter verdict rendered on an application preferred before him under Section 125 of the Cr.P.C., by the learned Chief Judicial Magistrate, Kullu, H.P., verdict whereof stood affirmation by the Court of learned Sessions Judge, Kullu, inasmuch as its wanting in jurisdictional force arising from the factum of an earlier pronouncement rendered by the learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu in a petition constituted before him under Section 12 of the Act of 2005 whereby maintenance in the quantums contained therein stood awarded in favour of the respondents herein, liability whereof for defraying the amounts of maintenance

adjudged therein stood fastened upon the petitioner herein, enjoining reverence thereto by both the learned Chief Judicial Magistrate, Kullu and the learned Sessions Judge, Kullu whereas each Court discounting the factum of assessment of maintenance in favour of the respondents in a previous adjudication by the Court of the learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu on a petition laid before him under Section 12 of the Act of 2005 rather has sequelled a legally interdicted adjudication by two Courts upon a similar besides an analogous issue encompassed in two proceedings launched in two parallel Courts each enjoying jurisdictional competence to award the reliefs as claimed by the aggrieved from each.

4. The aforesaid contention addressed before this Court by the learned counsel appearing for the petitioner garners considerable force from a judgement of the Hon'ble Apex Court reported in a case titled as **Sudeep Chaudhary versus Radha Chaudhary, AIR 1999 SC 536**, the relevant paragraph whereof stands extracted hereinafter:-

> "6. We are of the view that the High Court was in error. The amount awarded under Section 125 of the Cr.P.C. for maintenance was adjustable against the amount awarded in the matrimonial proceedings and was not to be given over and above the same. In the absence of the wife, we are, however, not inclined to go into any detailed discussion of the law."

5. The inference which stands evinced therefrom is of the monetary relief as stood afforded to the respondents herein by the Court of the learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu in a petition constituted before him under Section 12 of the Act of 2005 adjudication whereon was rendered prior to an adjudication by the learned Chief Judicial Magistrate, Kullu, on a petition constituted under Section 125 of the Cr.P.C. which latter adjudication stood affirmation by the learned Sessions Judge, Kullu, barred subsequent adjudications upon a petition under Section 125 of the Cr.P.C., also such adjudications by both Courts in affirmation to the relief ventilated therein by the respondents herein stood stripped off their jurisdictional vigour, especially for reiteration spurring from the factum of both the learned Chief Judicial Magistrate, Kullu besides the learned Sessions Judge, Kullu standing subsequently legally interdicted to award an analogous relief of maintenance to the respondents herein. Accentuatedly, significantly with the respondents herein standing afforded a similar relief in a previous adjudication by the learned Chief Judicial Magistrate, Lahual & Spiti at Kullu in a petition constituted before him under Section 12 of the Act of 2005 any relief similar to the one previously claimed by the aggrieved and afforded to them as stood claimed by the respondents herein in a separate petition launched under apposite provisions of a different statute empowering them to claim from the petitioner herein a relief vis-a-vis similar to the one ventilated in the previously adjudicated petition constituted under Section 12 of the Act of 2005, yet any empowerment vested in the respondents herein to claim any relief similar to the one previously claimed by the aggrieved and afforded to them under a right vested in them under a statute distinct from the one whereon a previous adjudication stood rendered, is not an indefeasible right vested in the respondents herein. Concomitantly, exercise of such a right would not per se nor ipso facto either vest in them any right for its affirmative redressal in concurrent affirmation under subsequent adjudications by Courts of competent jurisdiction nor vest jurisdiction in each of the two Courts wherein the respondents herein instituted a petition for similar reliefs under two statutes nor validate any subsequent exercise of jurisdiction in concurrent affirmation of the reliefs ventilated by the respondents by parallel Courts of competent jurisdiction especially when a previous adjudication in affirmation to the claim ventilated by the respondents herein stood pronounced by a Court of competent jurisdiction. Contrarily, only one of the two Courts wherein petitions for reliefs analogous to the one constituted in a petition laid before Courts enjoying parallel jurisdiction under distinct

statutes to afford them, would stand vested with the jurisdiction to award monetary reliefs or reliefs of maintenance in favour of the respondents/aggrieved. Inferentially , any previous adjudication upon a petition for reliefs analogous to the one constituted in subsequently adjudicated petition by a criminal Court enjoying jurisdictional empowerment would oust the jurisdictional vigour of a parallel Court to subsequently award similar relief to the respondents herein especially when it stood previously awarded to them by a criminal Court of competent jurisdcition. In sequel with the respondents standing afforded monetary relief per mensem defrayable by the petitioner herein to them by the Court of learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu in exercise of jurisdiction in a petition under Section 12 of the Act of 2015 barred the subsequent exercise of jurisdiction by the Court of learned Chief Judicial Magistrate, Kullu in a petition laid before him under Section 125 of the Cr.P.C. besides barred the learned Sessions Judge, Kullu to render an adjudication in affirmation to the verdict of the former Court. In aftermath, the order rendered on 22.01.2013 by the learned Chief Judicial Magistrate, Kullu in a petition laid before him under Section 125 of the Cr.P.C., as also the order rendered on 7.6.2013 in affirmation to the verdict of the former Court by the learned Sessions Judge, Kullu in Criminal revision No.2 of 2013 preferred by the petitioner herein against the order of 22.1.2013 rendered by the learned Chief Judicial Magistrate, Kullu are quashed and set aside.

6. The instant petition has also been preferred before this Court by the petitioner herein for quashing and setting aside the order of 11.11.2011 rendered by the learned Chief Judicial Magistrate, Lahual & Spiti in a petition bearing No. D.V. Act No. 47-1/2011 constituted under Section 12 of the Act of 2005. However, the prayer for its being quashed and set aside cannot warrantedly stand afforded in favour of the petitioner herein for the reason that the invocation by the petitioner of the jurisdiction of this Court is grossly time barred hence rendering the petition not maintainable.

7. The learned Counsel appearing for the respondents herein has contended with force while relying upon a verdict of the Hon'ble Apex Cout reported in a case titled as **Juveria Abdul Majid Patni versus Atif Iqbal Mansoori and another, (2014) 10 SCC 736,** the relevant paragraph whereof stands extracted hereinafter to marshal an inference from this Court of the awarding of reliefs by the Court of the learned Chief Judicial Magistrate, Kullu in a petition laid before him under Section 125, Cr.P.C. pronouncement whereof stood affirmation by the learned Sessions Judge, Kullu standing clothed with a protective cover encompassed under Section 26 of the Act of 2005. Relevant Paragraph 25 of the judgment referred above reads as under:-

> "25. It is not necessary that relief available under Sections 18, 19, 20, 21 and 22 can only be sought for in a proceeding under the Domestic Violence Act, 2005. Any relief available under the aforesaid provisions may also be sought for in any legal proceeding even before a civil court and Family Court, apart from the criminal court, affecting the aggrieved person whether such proceeding was initiated before or after the commencement of the Domestic Violence Act. This apparent from Section 26 of the Domestic Violence Act, 2005 as quoted hereunder:
>
> > "26. Relief in other suits and legal proceedings.- (1) Any relief available under Sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, Family Court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.""

However, the aforesaid submission is legally frail as any reliance upon Section 26 of the Act of 2005 by the learned counsel for the respondents herein to claim validation of the orders of the learned Chief Judicial Magistrate, Kullu pronounced in a petition instituted before him under Section 125 of the Cr.P.C. by the respondents which verdict stood affirmation by the learned Sessions Judge, Kullu, arousable from the factum of Section 26 of the Act of 2005 empowering the Court of competent jurisdiction to proceed to grant reliefs comprised in Section 18, 19, 20, 21 and 22 of the Act of 2005 even in the face of similar or analogous relief thereto previously standing afforded in favour of the aggrieved, by Criminal Courts as were the courts which rather subsequently awarded maintenance per mensem in favour of the respondents herein, on an invocation by them of the provisions engrafted in Section 125 of the Cr.P.C., especially in the face of the import of the provisions aforesaid, is of theirs carrying weight only in the event of the petition constituted under Section 12 of the Act of 2005 standing subsequently adjudicated upon by the Court wherebefore it was laid. Whereas given the imminent fact of the petition under Section 12 of the Act of 2005 constituted before the competent Court of jurisdiction by the respondents herein standing adjudicated upon prior to an adjudication on a petition under Section 125 of the Cr.P.C. by the Criminal Courts of competent jurisdiction, renders the strength of the submission of the learned counsel for the respondents to stand dwindled and denuded of its vgour and accordingly, it stands rejected.

11. For the foregoing reasons, the instant petition is partly allowed and partly dismissed. Consequently, the order of 22.01.2013 rendered by the learned Chief Judicial Magistrate, Kullu in a petition bearing Cr.M.A. No. 48-IV of 2011 constituted under Section 125 of the Cr.P.C., as also, the order of 7.6.2013 rendered by learned Sessions Judge Kullu in Cr. Revision No. 2 of 2013 in affirmation to the verdict of the trial Court are quashed and set aside. However, the order of 11.11.2011 rendered by the learned Chief Judicial Magistrate, Lahaul & Spiti at Kullu, H.P. in a petition bearing No. D.V. Act No.47-1/2011 constituted under Section 12 of the Act of 2005 stands affirmed and maintained. All pending applications also stand disposed of. Records be sent back forthwith.

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

Sh. Ali Mohammed ...Petitioner

Versus

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

CWP No. 4838 of 2015
Judgment reserved on: 1.3.2016
Date of Decision: 16.3.2016.

Constitution of India, 1950- Article 226- Petitioner filed a writ petition regarding the alleged illegal constitution of Himachal Pradesh Waqf Board and arbitrary nomination made by the State to the electoral college and no material was placed on record to show that petition was filed in public interest- petitions were earlier filed regarding the constitution of Waqf Board which were dismissed- averments made in the present petition are verbatim the same as were made in the earlier petition- this clearly shoes that the petitioner has been set up at the by some other person- public interest litigation can be filed at the instance of bonafide litigant and cannot be used to disguise personal or individual grievance - the Court should be careful while entertaining public interest litigation- State Government had not constituted an electoral college for want of availability of eligible members – a satisfaction was duly recorded in the order - no genuine public interest was involved- petition dismissed.

(Para- 4 to 19)

Cases referred:

Satish Kumar Singh Vs. Union of India and others, I L R 2015 (V) HP 822 D.B.

State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402

For the petitioner:	Mr.Dushyant Dadwal, Advocate.
For the respondent:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J. K. Verma, Dy. Advocate General, for respondent No. 1. Mr. B.S. Attri, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner claims to have filed this petition as Pro Bono Publico against the so called illegal constitution of the Himachal Pradesh Waqf Board as well as the arbitrary nomination made by the State to the electoral college to be constituted under the Waqf (Amendment Act, 2013), (herein after referred to as the Act for short).

2. This Court vide its order dated 30.12.2015 had directed the petitioner to justify the maintainability of the writ petition. Mr.Dushyant Dadwal learned counsel for the petitioner would submit that the petitioner being a Muslim has every right to file the present petition, as he has sufficient interest in the subject matter of the present petition.

3. At the outset, we may observe that save and except by claiming that the petition has been filed in public interest, there is no material whatsoever placed on record whereby it can be gathered that the petitioner is a pro bono publico or that the petition in fact has been filed in public interest. Rather, if one would go through the entire petition, it would be evident that the element of public interest is conspicuously absent.

4. The credibility of the petitioner further becomes doubtful when one would go through the history of the previous litigations regarding the constitution of this very Board. In the year 2005 one Bashir Khan along with other persons filed CWP No. 12 of 2005 before this Court assailing the notification issued by the State Government on 9th December, 2004, whereby it had nominated members to the Waqf Board. When the said petition came up for hearing on 7.1.2005, it was fairly conceded by the State Government that owing to some technical reasons, the State Government may be permitted to revert/revoke and withdraw the said notification and the petition was consequently dismissed. Thereafter, in the year 2010 another petition by way of CWP No. 7647 of 2010 came to be filed before this Court

assailing therein again the notification constituting the Waqf Board and this petition came to be withdrawn on 24th May, 2012.

5. It is not the result of this petition that we are concerned, rather we are primarily concerned with the averments made in all these petitions (supra), which are verbatim the same as those in this petition. This in itself does not only suggest, but clearly indicates that this is a proxy litigation where the petitioner has been set up at the behest of someone else. Not only has the petitioner failed to satisfy this Court about his credibility, but has even failed to satisfy the prima facie correctness of the nature of information given by him, which is discussed in the latter part of this judgment. What we can, therefore, infer is that the petitioner has indulged in public mischief for oblique motive and in such circumstances the Court has to act ruthlessly while dealing with such imposters, busybody and meddlesome interlopers impersonating as public spirited holy men. The petitioner cannot masquerade as crusader of justice and is only pretending to act in the name of Pro Bono Publico, though he has no interest in the public to protect. The instant petition has been filed under ploy for achieving oblique motives.

6. The growing menace of so called public interest litigation has been repeatedly noticed by this Court and we need only to refer a recent judgment delivered by this Court on 6th October, 2015 in ***CWP No. 405 of 2014, titled Satish Kumar Singh Vs. Union of India and others***, wherein it was held:-

> *"6. It is settled law that before entertaining public interest litigation, the Courts have to be satisfied about bonafide of the petitioner and it is the cause of the public which he seeks to espouse through such litigation. This Court is repeatedly coming across litigations under the brand name of public interest litigation, whereas, the same is used for suspicious products of mischief. This Bench has repeatedly warned against such mis-adventure. Reference in this regard can conveniently be made to CWP No.7249 of 2010 titled as Devender Chauhan Jaita versus State of Himachal Pradesh and others, decided on 03.12.2014, being lead case, CWP No.9480 of 2014 titled as Vijay Kumar Gupta versus State of Himachal Pradesh and others, decided on 09.01.2015, CWP No.2775 of 2015 titled as Anurag Sharma and another versus State of Himachal Pradesh and others, decided on 07.07.2015. It may be pertinent to observe here that the decision in CWP No.9480 of 2014 was assailed before the Hon'ble Supreme Court by way of SLP(C) No.8459 of 2015 and the same was dismissed in limine on 23.03.2015.*
>
> *7. Even the Hon'ble Supreme Court has viewed the abuse of public interest litigation very seriously and in this regard reference can conveniently be made to the judgment of the Hon'ble Supreme Court in* ***State of Uttaranchal*** *versus* ***Balwant Singh Chaufal and others (2010) 3 SCC 402****, where after noticing the instances of misuse of public interest litigation, the necessity to check such abuse was emphasized. It was held:-*
>
> > *"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 litigation 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 v. Union of India & Others AIR 2002 SC 350, 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.

145. In S. P. Gupta v. Union of India 1981 Supp SCC 87 this Court has found that this liberal standard makes it critical to limit standing to individuals "acting bona fide. To avoid entertaining frivolous and vexatious petitions under the guise of PIL, the Court has excluded two groups of persons from obtaining standing in PIL petitions. First, the Supreme Court has rejected awarding standing to "meddlesome interlopers". Second, the Court has denied standing to interveners bringing public interest litigation for personal gain.

146. In Chhetriya Pardushan Mukti Sangharsh Samiti v. Starte of U.P. (1990) 4 SCC 449 the Court withheld standing from the applicant on grounds that the applicant brought the suit motivated by enmity between the parties.

147. Thus, the Supreme Court has attempted to create a body of jurisprudence that accords broad enough standing to admit genuine PIL petitions, but nonetheless limits standing to thwart frivolous and vexations petitions. The Supreme Court broadly tried to curtail the frivolous public interest litigation petitions by two methods-one monetary and second, non-monetary.

148. The first category of cases is that where the court on filing frivolous public interest litigation petitions, dismissed the petitions with exemplary costs. In Neetu v. State of Pubjab & Others AIR 2007 SC 758, the Court concluded that it is necessary to impose exemplary costs to ensure that the message goes in the right direction that petitions filed with oblique motive do not have the approval of the Courts.

149. In S.P. Anand v. H.D. Deve Gowda AIR 1997 SC 272, the Court warned that (SCC p. 745, para 18) it is of utmost importance that those who invoke the jurisdiction of this Court "seeking a waiver of the locus standi rule must exercise restraint in moving the Court by not plunging in areas wherein they are not well-versed".

150. In Sanjeev Bhatnagar v. Union of India AIR 2005 SC 2841, this Court went a step further by imposing a monetary penalty against an Advocate for filing a frivolous and vexatious PIL petition. The Court found that the petition was devoid of public interest, and instead

labelled it as "publicity interest litigation." Thus, the Court dismissed the petition with costs of Rs.10,000/-.

151. Similarly, in Dattaraj Nathuji Thaware v. State of Maharashtra & Others (2005) 1 SCC 590, the Supreme Court affirmed the High Court's monetary penalty against a member of the Bar for filing a frivolous and vexatious PIL petition. This Court found that the petition was nothing but a camouflage to foster personal dispute. Observing that no one should be permitted to bring disgrace to the noble profession, the Court concluded that the imposition of the penalty of Rs. 25,000 by the High Court was appropriate. Evidently, the Supreme Court has set clear precedent validating the imposition of monetary penalties against frivolous and vexatious PIL petitions, especially when filed by advocates.

152. This Court, in the second category of cases, even passed harsher orders. In Charan Lal Sahu v. Zail Singh AIR 1984 SC 309, the Supreme Court observed that, "we would have been justified in passing a heavy order of costs against the two petitioners" for filing a "light-hearted and indifferent" PIL petition. However, to prevent "nipping in the bud a well-founded claim on a future occasion," the Court opted against imposing monetary costs on the petitioners." In this case, this Court concluded that the petition was careless, meaningless, clumsy and against public interest. Therefore, the Court ordered the Registry to initiate prosecution proceedings against the petitioner under the Contempt of Courts Act. Additionally, the court forbade the Registry from entertaining any future PIL petitions filed by the petitioner, who was an advocate in that case.

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.

154. This court has been quite conscious that the forum of this court should not be abused by any one for personal gain or for any oblique motive. In BALCO (supra), this court held that the jurisdiction is being abused by unscrupulous persons for their personal gain. Therefore, the court must take care that the forum be not abused by any person for personal gain.

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. ...."*

156. In Thaware's case (supra), the Court encouraged the imposition of a non-monetary penalty against a PIL petition filed by a member of the bar. The Court directed the Bar Councils and Bar Associations to ensure that no member of the Bar becomes party as petitioner or in aiding and/or abetting files frivolous petitions carrying the attractive brand name of Public Interest Litigation. This direction impels the Bar Councils and Bar Associations to disbar members found guilty of filing frivolous and vexatious PIL petitions.

157. In Holicow Pictures Pvt. Ltd. v. Prem Chandra Mishra (2007) 14 SCC 281, this Court observed as under: (SCC pp. 287d-288a, para 10)

> *"10.'....12. It is depressing to note that on account of such trumpery proceedings initiated before the Courts, innumerable days are wasted, the time which otherwise could have been spent for disposal of cases of the genuine litigants. Though we spare no efforts in fostering and developing the laudable concept of PIL and extending our long arm of sympathy to the poor, the ignorant, the oppressed and the needy, whose fundamental rights are infringed and violated and whose grievances go unnoticed, un-represented and unheard; yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to civil matters involving properties worth hundreds of millions of rupees and criminal cases in which persons sentenced to death facing gallows under untold agony and persons sentenced to life imprisonment and kept in incarceration for long years, persons suffering from undue delay in service matters -government or private, persons awaiting the disposal of cases wherein huge amounts of public revenue or unauthorized collection of tax amounts are locked up, detenu expecting their release from the detention orders etc. etc. are all standing in a long serpentine queue for years with the fond hope of getting into the Courts and having their grievances redressed, the busybodies, meddlesome interlopers, wayfarers or officious interveners having absolutely no public interest except for personal gain or private profit either of themselves or as a proxy of others or for any other extraneous motivation or for glare of publicity break the queue muffing their faces by wearing the mask of public interest litigation and get into the Courts by filing vexatious and frivolous petitions and thus criminally waste the valuable time of the Courts and as a result of which the queue standing outside the doors of the Courts never moves, which piquant situation creates frustration in the minds of the genuine litigants and resultantly they loose faith in the administration of our judicial system'."*

158. The Court cautioned by observing that: (Holicow case (2007) 14 SCC 281 pp.288-89, para 10)

> *"10. '.....13. 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 armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. …

* * *

15. The Court has to be satisfied about (a) the credentials of the applicant; (b) the prima facie correctness or nature of information given by him; (c) the information being not vague and indefinite. The information should show gravity and seriousness involved. Court has to strike balance between two conflicting interests; (i) nobody should be allowed to indulge in wild and reckless allegations besmirching the character of others; and (ii) avoidance of public mischief and to avoid mischievous petitions seeking to assail, for oblique motives, justifiable executive actions. In such case, however, the Court cannot afford to be liberal. It has to be extremely careful to see that under the guise of redressing a public grievance, it does not encroach upon the sphere reserved by the Constitution to the Executive and the Legislature. The Court has to act ruthlessly while dealing with imposters and busybodies or meddlesome interlopers impersonating as public-spirited holy men. They masquerade as crusaders of justice. They pretend to act in the name of Pro Bono Publico though they have no interest of the public or even of their own to protect."

8. In ***Central Electricity Supply Utility of Odisha*** *versus* ***Dhobei Sahoo and others (2014) 1 SCC 161****, the Hon'ble Supreme Court felt the need to revisit certain authorities pertaining to public interest litigation, its abuses and the way sometimes the courts perceive the entire spectrum. It was 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 impecuniosity do not die of hunger, national economy is not jeopardized; rule of law is not imperiled; human rights are not endangered, and probity, transparency and integrity in the 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)"

28. In State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402 this Court adverted to the growth of public interest litigations in this country, and the view expressed in various PILs and the criticism advanced and eventually conceptualized the development which is extracted below: (SCC p. 427, para 43)

"43……We deem it appropriate to broadly divide the public interest litigation in three phases:

- *Phase I. – It deals with cases of this Court where directions and orders were passed primarily to protect fundamental rights under Article 21 of the marginalized groups and sections of the society who because of extreme poverty, illiteracy and ignorance cannot approach this Court or the High Courts.*
- *Phase II. – It deals with the cases relating to protection, preservation or ecology, environment, forests, marine life, wildlife, mountains, rivers, historical monuments etc. etc.*
- *Phase III. – It deals with the directions issued by the Courts in maintaining the probity, transparency and integrity in governance."*

29. In Bholanath Mukherjee v. Ramakrishna Mission Vivekananda Centenary College (2011) 5 SCC 464 it has been laid down that public interest litigation would not be maintainable in service law cases.

30. In Duryodhan Sahu v. Jitendra Kumar Mishra (1998) 7 SCC 273 a three-Judge, Bench posed a question whether the administrative tribunals constituted under the Administrative Tribunals Act, 1985 can entertain a public interest litigation. A post of lecturer was created in a Government Medical College recognized by the Medical Council of India and the State Government requested the Public Service Commission to recommend a suitable candidate from the reserved list. At that stage, a third party described himself as the Secretary of a particular Surakhya Committee, filed an original application for quashing the Government order creating the post of the teacher. A grievance was also put forth that the post was not advertised. The tribunal restrained the appointment of the beneficiary, the appellant before this Court. The learned Judges opined that the administrative tribunal constituted under the said Act cannot entertain a public interest litigation at the instance of a total stranger. While so stating the three-Judge Bench opined that as the prayer was for quashment of the creation of post itself and preventing the authorities and for preventing the Government from appointing any candidate as Lecturer, the prayer would not come in the sphere of quo warranto.

31. Thus, from the aforesaid authorities it is quite vivid that the public interest litigation was initially evolved as a tool to take care of the fundamental rights under Article 21 of the Constitution of the

marginalized sections of the society who because of their poverty and illiteracy could not approach the court. In quintessence it was initially evolved to benefit the have-nots and the handicapped for protection of their basic human rights and to see that the authorities carry out their constitutional obligations towards the marginalized sections of people who cannot stand up on their own and come to court to put forth their grievances. Thereafter, there has been various phases as has been stated in Balwant Singh Chaufal (supra). It is also perceptible that court has taken note of the fact how the public interest litigations have been misutilized to vindicate vested interests for the propagated public interest. In fact, as has been seen, even the people who are in service for their seniority and promotion have preferred public interest litigations. It has also come to the notice of this Court that some persons, who describe themselves as pro bono publico, have approached the court challenging grant of promotion, fixation of seniority, etc. in respect of third parties."

9. The issue regarding public interest has elaborately been dealt with by this Bench in ***CWP No.9480 of 2014, titled Vijay Kumar Gupta versus State of Himachal Pradesh and others****, decided on 09.01.2015 and after taking into consideration the entire law on the subject, it was concluded as follows:-*

"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."

10. In the above background, this Court is required to first satisfy itself regarding the credentials of the petitioner, the prima-facie correctness of the information given by him because after all the attractive brand name of public interest litigation cannot be used for suspicious products of mischief. It has to be aimed at redressal of genuine public wrong or public injury and not publicity-oriented or founded on personal vendetta or private motive. The process of the Court cannot be abused for oblique considerations by masked phantoms who monitor at times from behind. The common rule of locus-standi in such cases is relaxed so as to enable the Court to look into the grievances complained of on behalf of the poor, deprive, deprivation, illiterate and the disabled and who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. But, then while protecting the rights of the people from being violated in any manner, utmost care has to be taken that the Court does not transgress its jurisdiction nor does it entertain petitions which are motivated. After all, public interest litigation is not a pill or panacea for all wrongs. It is essentially meant to protect basic human rights of the weak and disadvantaged. Public interest litigation is a weapon which has to be used with great care and circumspection and the Judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or public interest seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering justice to the citizens. Courts must do justice by promotion of good faith and prevent law from crafty invasions. It is for this reason that the Court must maintain social balance by interfering for the sake of justice and refuse to entertain where it is against the social justice and public good."

7. It would be thus clear that public interest can only be entertained at the instance of a bonafide litigant. It cannot be used by unscrupulous litigants to disguise personal or individual grievance as public interest litigation.

8. That apart, this Court cannot be oblivious to the fact that it is dealing with a Waqf, as defined in Section 3 (r) of the Waqf Act, 1995, as amended vide the Waqf (Amendment) Act, 2013 (27 of 2013) which *"means the permanent dedication by any person, of any movable or immovable property for any purpose recognized by the Muslim law as pious, religious or charitable and includes-*

(i) a waqf by user but such waqf shall not cease to be a waqf by reason only of the user having ceased irrespective of the period of such cesser;

(ii) a Shamlat Patti, Shamlat Deh, Jumla Malkan or by any other name entered in a revenue record;

(iii) "grants", including mashrat-ul-khidmat for any purpose recognized by the Muslim law as pious, religious or charitable; and

(iv) a waqf-alal-aulad to the extent to which the property is dedicated for any purpose recognized by Muslim law as pious, religious or charitable, provided when the line of succession fails, the income of the waqf shall be spent for education, development, welfare and such other purposes as recognized by Muslim law, and "waqf" means any person making such dedication."

It would be evident that the waqf means the permanent dedication of any person of any movable or immoveable property for any purpose recognized by the Muslim law as pious, religious or charitable and therefore, the scope of public interest litigation in matters of such institutions is extremely limited. This dedication and institution is governed by a particular legislation, which provides for a proper mechanism for its management and it is not proper for this Court to entertain litigation, much less, public interest litigation qua the same.

9. For taking this view, we may conveniently refer to a recent judgment of Hon'ble Supreme Court in ***Jaipur Shahar Hindu Vikas Samiti Vs. State of Rajasthan and Others (2014) 5 SCC 530***, wherein the Hon'ble Supreme Court observed as under:-

"47. The scope of Public Interest Litigation is very limited, particularly, in the matter of religious institutions. It is always better not to entertain this type of Public Interest Litigations simply on the basis of affidavits of the parties. The public trusts and religious institutions are governed by particular legislation which provide for a proper mechanism for adjudication of disputes relating to the properties of the trust and their management thereof. It is not proper for the Court to entertain such litigation and pass orders. It is also needless to mention that the forums cannot be misused by the rival groups in the guise of public interest litigation.

48. We feel that it is apt to quote the views expressed by this Court in Guruvayoor Devaswom Managing Committee (supra) wherein this Court observed:

"60. It is possible to contend that the Hindus in general and the devotees visiting the temple in particular are interested in proper management of the temple at the hands of the statutory functionaries. That may be so but the Act is a self-contained Code. Duties and functions are prescribed in the Act and the rules framed thereunder. Forums have been created thereunder for ventilation of the grievances of the affected persons. Ordinarily, therefore, such forums should be moved at the first instance. The State should be asked to look into the grievances of the aggrieved devotees, both as parens patriae as also in discharge of its statutory duties.

* * *

64. The Court should be circumspect in entertaining such public interest litigation for another reason. There may be dispute amongst the devotees as to what practices should be followed by the temple authorities. There may be dispute as regard the rites and rituals to be performed in the temple or omission thereof. Any decision in favour of one sector of the people may heart the sentiments of the other. The Courts normally, thus, at the first instance would not enter into such

disputed arena, particularly, when by reason thereof the fundamental right of a group of devotees under Articles 25 and 26 may be infringed. Like any other wing of the State, the Courts also while passing an order should ensure that the fundamental rights of a group of citizens under Articles 25 and 26 are not infringed. Such care and caution on the part of the High Court would be a welcome step. When the administration of the temple is within its control and it exercises the said power in terms of a Statute, the State, it is expected, normally would itself probe into the alleged irregularities. If the State through its machinery as provided for in one Act can arrive at the requisite finding of fact for the purpose of remedying the defects, it may not find it necessary to take recourse to the remedies provided for in another statute. It is trite that recourse to a provision to another statute may be resorted to when the State finds that its powers under the Act governing the field is inadequate. The High Courts and the Supreme Court would not ordinarily issue a writ of mandamus directing the State to carry out its statutory functions in a particular manner. Normally, the Courts would ask the State to perform its statutory functions, if necessary within a time frame and undoubtedly as and when an order is passed by the State in exercise of its power under the Statute, it will examine the correctness or legality thereof by way of judicial review."

10. Apart from the above observations, the Hon'ble Supreme Court further observed that under the guise of public interest litigation, it was coming across several cases where it had been exploited for the benefit of certain individuals and therefore, directed the Courts to be very cautious and careful while entertaining public interest litigations. It is apt to reproduce the following observations:-

"*49. The concept of Public Interest Litigation is a phenomenon which is evolved to bring justice to the reach of people who are handicapped by ignorance, indigence, illiteracy and other down trodden people. Through the Public Interest Litigation, the cause of several people who are not able to approach the Court is espoused. In the guise of Public Interest Litigation, we are coming across several cases where it is exploited for the benefit of certain individuals. The Courts have to be very cautious and careful while entertaining Public Interest Litigation. The Judiciary should deal with the misuse of Public Interest Litigation with iron hand. If the Public Interest Litigation is permitted to be misused the very purpose for which it is conceived, namely to come to the rescue of the poor and down trodden will be defeated. The Courts should discourage the unjustified litigants at the initial stage itself and the person who misuses the forum should be made accountable for it. In the realm of Public Interest Litigation, the Courts while protecting the larger public interest involved, should at the same time have to look at the effective way in which the relief can be granted to the people, whose rights are adversely affected or at stake. When their interest can be protected and the controversy or the dispute can be adjudicated by a mechanism created under a particular statute, the parties should be relegated to the appropriate forum, instead of entertaining the writ petition filed as Public Interest Litigation."*

11. Adverting to the facts, it would be noticed that the entire thrust of the petitioner is that the constitution of the Board is not as per the provisions of Section 14(1) of the Act and electoral college has not been constituted by the State and therefore, it should

be directed to constitute the same in conformity with Section 14 of the Act and also include one person from the Shia community.

12. Section 14 of the Waqf (Amendment Act 2013) reads thus:-

*"14.**Comoposition of Board.**---(1) The Board for a State and the (the National Capital Territory of Delhi) shall consist of-*

(a) a Chairperson;

(b) one and not more than two members, as the State Government may think fit, to be elected from each of the electoral colleges consisting of—

(i) Muslim Members of Parliament from the State or, as the case may be, (the National Capital Territory of Delhi),

(ii) Muslim Members of the State Legislature,

(iii) Muslim members of the Bar Council of the concerned State or Union territory:

Provided that in case there is no Muslim member of the Bar Council of a State or a Union territory, the State Government or the Union territory administration, as the case may be, may nominate any senior Muslim advocate from that State or the Union territory, and;)

(iv) mutawallis of the (auqafs) having an annual income of rupees one lakh and above.

Explanation I.—For the removal of doubts, it is hereby declared that the members from categories mentioned in sub-clauses (i) to (iv), shall be elected from the electoral college constituted for each category.

Explanation II.—For the removal of doubts it is hereby declared that in case a Muslim member ceases to be a Member of Parliament from the State or National Capital Territory of Delhi as referred to in sub-clause (i) of clause (b) under sub-clause (ii) of clause (b), such member shall be deemed to have vacated the office of the member of the Board for the State or National Capital Territory of Delhi, as the case may be, from the date from which such member ceased to be a Member of Parliament from the State or National Capital Territory of Delhi, or a Member of the State Legislative Assembly, as the case may be;

(c) one person from amongst Muslims, who has professional experience in town planning or business management, social work, finance or revenue, agriculture and development activities, to be nominated by the State Government;

(d) one person each from amongst Muslims, to be nominated by the State Government from recognized scholars in Shia and Sunni Islamic Theology;

(e) one person from amongst Muslims, to be nominated by the State Government from amongst the officers of the State Government not below the rank of Joint Secretary to the State Government;

(1-A) No Minister of the Central Government or, as the case may be, a State Government, shall be elected or nominated as a member of the Board:

Provided that in case of a Union territory, the Board shall consist of not less than five and not more than seven members to be appointed by the

Central Government from categories specified under sub-clauses (i) to (iv) of clause (b) or clauses (c) to (e) in sub-section (1):

Provided further that at least two Members appointed on the Board shall be women:

Provided also that in every case where the system of mutawalli exists, there shall be one mutawalli as the member of the Board.

(2) Election of the members specified in clause (b) of sub-section (1) shall be held in accordance with the system of proportional representation by means of a single transferable vote, in such manner as may be prescribed.

Provided that where the number of Muslim Members of Parliament, the State Legislature or the State Bar Council, as the case may be, is only one, such Muslim Member shall be declared to have been elected on the Board;

Provided further that where there are no Muslim Members in any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the ex-Muslim Members of Parliament, the State Legislature or ex-member of the State Bar Council, as the case may be, shall constitute the electoral college.

(3) Notwithstanding anything contained in this section, where the State Government is satisfied, for reasons to be recorded in writing, that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of sub-section (1), the State Government may nominate such persons as the members of the Board as it deems fit.

(4) The number of elected members of the Board shall, at all times, be more than the nominated members of the Board except as provided under sub-section (3).

(6) In determining the number of Shia members or Sunni members of the Board, the State Government shall have regard to the number and value of Shia (auqafs) and Sunni (auqafs) to be administered by the Board and appointment of the members shall be made, so far as may be, in accordance with such determination.

(8) Whenever the Board is constituted or re-constituted, the members of the Board present at a meeting convened for the purpose shall elect one from amongst themselves as the Chairperson of the Board.

(9) The members of the Board shall be appointed by the State Government by notification in the Official Gazette."

13. At this stage, it shall be relevant to refer in extenso to notification issued by respondents on 22nd July, 2013 so as to appreciate as to how the Board in fact came to be constituted. The said notification reads thus:-

"Whereas, the Himachal Pradesh Waqf Board was dissolved, vide this department notification No. Rev.C(A)1-4/2008, on the 16th July, 2013 under the provisions of section 99 of the Waqf Act, 1995 (43 of 1995):

And whereas in the State of Himachal Pradesh, it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in sub-clauses (i) to (iii) of clause (b) of Sub-section (1) of Section 14 of the Act ibid for want of non-availability of eligible members:

Now, therefore, in exercise of the powers conferred upon her under Sub-Section (1) and (3) of Section 14 of the Act ibid, the Governor Himachal

Pradesh is pleased to nominate the following members from the Muslim community as members of the said Board with immediate effect:-

Sr.No.	***Name and Address***	***Provision of the act under which nominated***
1.	*Kwaja Khaleel Ullah S/o Late Shri Khwaja Aman Ullah, 70/1, Khwaja Building, The Mall Road, Shimla-1*	*Nominated under sub-section (3) of Section 14 of the Waqf Act, 1995.*
2.	*Sh.Roshan Deen S/o Shri Mohkam Deen, Vill. Dhurgeth, P.O. Dadwin (Mehla) Bakan The. & Distt Chamba, (HP) Pin No. 176311*	*Nominated under sub-section (3) of Section 14 of the Waqf Act, 1995.*
3.	*Sh. Murad Khan H/No. 202/10, Near Pratap Bhawan, Katcha Tank, Nahan, Distt. Sirmour, (HP)*	*Nominated under sub-section (3) of Section 14 of the Waqf Act, 1995.*
4.	*Sh. Shaukat Ullah S/o Late Shri Hasmatullah, President, Shimla Muslim Welfare Committee, R/o Hamid Manjil, Sanjauli, Shimla-6*	*Nominated under sub-section (1) (c) of Section 14 of the Waqf Act, 1995.*
5.	*Sh. Mushtaq Qureshi S/o Late Shri Faquir Deen President, Muslim Welfare Committee, Sunni, Distt. Shimla.*	*Nominated under sub-section (1) (c) of Section 14 of the Waqf Act, 1995*
6.	*Sh. Mufti Muhammad Shafi Qasmi S/o Shri Hameed Muhammad (Islamic Scholar) Imam and Khateeb, Jama Masjid, Middle Bazar, Shimla. R.V.P. Jhamra Rain, PO Ghandeer, The. Jhandutta, Distt. Bilaspur (HP)*	*Nominated under sub-section (1) (d) of Section 14 of the Waqf Act, 1995*
7.	*Maulana Taj Muhammad Qasmi (Islamic Scholar) Vill. & P.O. Bikram Bagh, The. Nahan, Distt. Sirmour (HP)*	*Nominated under sub-section (1) (d) of Section 14 of the Waqf Act, 1995*
8.	*Sh. S.B. Islam, IFS Managing Director, H.P. Minorities Finance and Dev. Corp., Block-38, SDA Complex Kasumpti, Shimla-9*	*Nominated under sub-section (1) (e) of Section 14 of the Waqf Act, 1995*
9.	*Sh. Amir Hussain S/o Sh. Yousf Chairman Congress Minority Deptt. Drang Constituency Distt. Mandi, (HP), R/o Jarli, P.O. Gharan, The. Sadar, Mandi(HP),*	*Nominated under sub-section (1) (c) of Section 14 of the Waqf Act, 1995*

The other terms and conditions of the above members will be issued separately.

BY ORDER
Principal Secretary (Revenue) to the
Government of Himachal Pradesh."

14. It is evident from the perusal of the above notification that it was not reasonably practicable for the State Government to constitute an electoral college from any of the categories mentioned in sub clauses (i) to (iii) of clause (b) of sub section (1) of Section 14 for want of availability of eligible members and it, therefore, exercised powers under sub-section (1) and (3) of Section 14 of the Act and nominated the aforesaid members from the Muslim community as members of the Board with immediate effect. Nowhere in the entire petition has the petitioner disputed this position or even made mention about the availability of any member who may fall within sub clauses (i) to (iii) of clause (b) of sub-section (1) of Section 14 of the Act.

15. That apart, we cannot even find any fault with the action of the respondents in falling back and invoking its authority under sub-section (3) of Section 14 of the Act, which provision by virtue of its commencing with non-obstante clause has overriding effect. What is provided therein is only that the State Government has to record its satisfaction in writing that it is not reasonably practicable to constitute an electoral college for any of the categories mentioned in clauses (i) to (iii) of clause (b) of sub-section (1) of Section 14 of the Act and nominate such persons as members of the Board as it deems fit. It is evident from the notification (supra) that such satisfaction has been duly recorded and this fact has not even been disputed by the petitioner.

16. In view of the above, we have no hesitation to conclude that the Waqf Board has been constituted strictly in terms of the Act and the present petition appears to have been filed under ploy on considerations that are extraneous to public interest. The petitioner has not approached this Court with clean hands, clean heart and clean objectives.

17. Here we may also note that in compliance to the directions issued by the Hon'ble Supreme Court in ***State of Uttaranchal Vs. Balwant Singh Chaufal (2010) 3 SCC 402,*** this Court vide notification dated 8.4.2010, with a view to preserve the purity and sanctity of Public Interest Litigation and also to keep a check on frivolous letters/petitions has framed Rules known as The Himachal Pradesh High Court Public Interest Litigation Rules, 2010. Rules 3 and 4 thereof read as under:-

> *"3. The petitions/complaints/letters and new paper clippings falling under the following categories can be treated under Public Interest Litigation.*
>
> *(i) Bonded labour matters.*
>
> *(ii) Neglected children.*
>
> *(iii) Non-payment of minimum wages to workers and exploitation of casual workers and complaints of violation of Labour Laws (except in individual cases).*
>
> *Provided that in respect of clauses (i), (ii) and (iii) above, if any of these matters forming the subject matter of the communication relates to one person (as opposed to a group of persons) this cannot be termed as a PIL and can be at best be treated as an individual writ petition.*
>
> *(iv) Petitions against atrocities on women; in particular harassment of bride, bride burning, rape, murder, kidnapping etc;*
>
> *(v) Petitions complaining of harassment or torture of villagers by co-villagers or by police in respect of persons belonging to Scheduled Castes and Scheduled Tribes and economically backward classes;*

Provided that in respect of clauses (iv) and (v) above if any of these matters of the communication relates to one person (as opposed to a group of persons) this cannot be called as a PIL.

(vi) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance of heritage and culture antiques, forest and wild life, encroachment of public property and other matters of public importance;

(vii) Petitions from riot-victims; and

(viii) Family pension.

EXPLANATION: *The test to treat a communication as PIL is whether any particular communication relates to an individual, if it does, it will be an individual, if it does, it will be an individual's C.W.P. and not a PIL irrespective of the fact whether the individual is complaining of any harassment or any violation of rights, which may also be akin to a group. If, however, the communication relates to a group and it is felt that group cannot defend itself or is not in a position to come to the Court, that would be a PIL warranting interference of the High Court in that PIL.*

4. However, no petition involving individual/personal matter shall be entertained as Public Interest Litigation including the matters pertaining to landlord tenant disputes, service matters except concerning pension and gratuity; the petitions for early hearing of cases as well as the petitions concerning maintenance of wives, children and parents."

It would be evident from the aforesaid Rules that the instant petition does not fall within any of the categories mentioned therein.

18. Apart from the above, it has clearly been stipulated in Rule 9 that before entertaining the Public Interest Litigation, following factors shall be kept in view:-

"(i) to verify the credentials of the petitioner;

(ii) satisfaction regarding the correctness of the contents of the petition;

(iii) substantial public interest is involved;

(iv) the petition which involved larger public interest, gravity and urgency must be given priority over other petitions;

(v) to ensure that the PIL is aimed at redressal of genuine public harm or public injury. It shall also be ensured that there is no personal gain, private or oblique motive behind filing the public interest litigation.

(vi) to ensure that the petition filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous consideration."

The petition does not even fulfill the criteria as prescribed in the aforesaid Rules and therefore, it can safely be concluded that even though the petition is claimed to have been filed in Public Interest Litigation, it does not even qualify to be registered as such and is therefore, not maintainable.

19. There is no genuine public interest involved in this petition and since the petitioner has abused the process of this Court, he in ordinary circumstances would have been liable for imposition of heavy costs. However, taking into consideration the fact that

the notice of this petition has not been issued to the opposite party, we refrain from doing so. But at the same time, the petitioner is warned not to indulge in such misadventures in future. 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 MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Dr. Y.S. Parmar University .....Petitioner

Versus

Dr. Narender Sharma ....Respondent.

CWP No. 604 of 2016.
Date of decision: 16th March, 2016.

Constitution of India, 1950- Article 226- An ex-parte interim order passed by H.P. State Administrative Tribunal was assailed- held, that ex-parte order cannot be made subject matter of writ jurisdiction- it is for the petitioner to approach the Tribunal and seek appropriate remedy- petition permitted to be withdrawn with liberty to seek appropriate remedy before the Tribunal. (Para-1 and 2)

For the petitioner: Ms. Ranjana Parmar, Sr. Advocate with Mr. Karan Singh Parmar, Advocate.

For the respondent: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this writ petition is the order dated 2.3.2016, made by the H.P. State Administrative Tribunal, hereinafter referred to as "the Tribunal" for short, in O.A. No. 544 of 2016, which is just an ex parte interim order not a final order. Such *ex parte* order cannot be made subject matter of writ jurisdiction. It is open for the petitioner to approach the Tribunal and seek appropriate remedy.

2. At this stage, learned Senior Counsel for the petitioner stated that she may be permitted to withdraw this writ petition with liberty to seek appropriate remedy before the Tribunal. Her statement is taken on record. Accordingly, the petition is dismissed as withdrawn, with liberty as prayed for, alongwith pending applications.

3. We hope and trust that the Tribunal may hear the matter at the earliest, preferably on 21.3.2016.

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

Manoj Joshi .....Appellant
Versus
Dr. Y.S. Parmar University .....Respondent.

LPA No. 148 of 2015
Date of decision: 16th March, 2016.

Constitution of India, 1950- Article 226- Respondent/university issued an advertisement for selection and appointment for the post of Assistant Professor (Silviculture)- writ petitioner and other persons had appeared in the selection process - one 'S' was appointed as such- the petitioner filed a writ petition questioning the appointment of 'S'- 'S' died during the pendency of the writ petition- Writ Court did not determine whether the selection and appointment of 'S' were proper or not- hence, judgment set aside and the writ petition ordered to be transferred to H.P. State Administrative Tribunal. (Para- 2 to 9)

For the appellant: Mr. M.A. Safee, Advocate.
For the respondent: Mr. Balwant Singh Thakur, 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 16.6.2015, made by the learned Single Judge of this Court in ***CWP No.3050*** of 2009 titled ***Manoj Joshi versus Dr. Y.S. Parmar University and another,*** whereby the writ petition filed by the petitioner came to be disposed of, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. It appears that the respondent-University issued advertisement notice for the selection and appointment for the post of Assistant Professor (Silviculture). One Shalender Sood, writ petitioner/appellant herein and others had participated in the selection process and Shalender Sood came to be appointed as such.

3. Feeling aggrieved, the appellant/writ petitioner filed the writ petition and had questioned the selection and appointment of Shalender Sood, on the grounds taken in the writ petition.

4. The respondent-University and Shalender Sood contested the writ petition by filing their replies. During the pendency of the writ petition, Shalender Sood died.

5. The question to be determined by the Writ Court was whether the selection and appointment of Shalender Sood was legally correct or otherwise and after thrashing that issue, the finding was to be returned by the Writ Court. Unfortunately, the Writ Court has not decided this issue but virtually disposed of the writ petition by a non-speaking judgment, which is impugned in this LPA.

6. The Writ Court has not determined the fate of selection and appointment of Shalender Sood, which was the main issue involved in the writ petition before the writ Court.

7. Having said so the LPA merits to be allowed and the impugned judgment merits to be set aside.

8. Accordingly, the impugned judgment is set aside and the writ petition is transferred to the HP State Administrative Tribunal. Parties are directed to cause appearance before the Tribunal on ***28th March, 2016***.

9. In the meantime, any follow-up action drawn by the University, qua the subject matter of the writ petition, is stayed, till disposal of the writ petition.

10. Accordingly, the LPA is disposed of alongwith pending applications, if any.

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

Rajinder Kumar Kaushal .....Appellant

Versus

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

LPA No. 19 of 2015
Date of decision: 16th March, 2016.

Constitution of India, 1950- Article 226- Petitioner had questioned Annual Confidential Report recorded by the respondents which was quashed by the Writ Court- petitioner claimed that annexure P-3 should also have also been quashed- held, that petitioner is at liberty to file representation before the Competent Authority to seek appropriate remedy.

(Para- 2 to 4)

For the appellant: Mr. G.R. Palsara, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General, for respondent-State.

Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This Letters Patent Appeal is directed against the judgment dated 4.11.2014, made by the learned Single Judge of this Court in ***CWP No.9009*** of 2013 titled ***Rajinder Kumar Kaushal versus State of H.P. and others,*** whereby the writ petition filed by the petitioner came to be partly allowed and Annexure P1 was quashed and set aside, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. It appears that the petitioner had questioned Annual Confidential Report, for short, "ACR" recorded by the respondents, containing Annexures P1 and P3, before the Writ Court.

3. It is moot question-whether the Writ Court can interfere? We leave this question open.

4. The Writ Court has interfered and quashed Annexure P1. Now the appellant/petitioner is aggrieved that the Writ Court should have quashed Annexure P3 also. Less said is better. However, the petitioner is at liberty to file representation before the competent authority for seeking appropriate remedy.

5. Having said so, the LPA is dismissed alongwith pending applications, if any.

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

Sadiq Mohd. ...Appellant
Versus
State of HP ...Respondent

Cr. Appeal No. 4014/2013
Reserved on: 8.3.2016
Decided on: March 16, 2016

N.D.P.S. Act, 1985- Section 21- Motorcycle was intercepted by the police – accused was sitting as pillion rider- he was carrying a maroon coloured carry bag- same was checked and 390 capsules of Parvon-Spas were found in it – accused was tried and convicted by the trial Court- accused was apprehended near village Trimath- population of the village was about 200-300 people- there was residential house of 'R'- vehicles also ply at the spot – independent witness was not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances, prosecution case was not proved- accused acquitted. (Para-14 to 21)

For the Appellant: Mr. Vijay Chaudhary, Advocate.
For the Respondent: Mr. Parmod Thakur, Additional Advocate General with Mr. Neeraj K. Sharma, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted against Judgment dated 28.5.2013 rendered by learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No. 39/12, whereby the appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 21 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), was convicted and sentenced to undergo rigorous imprisonment

for three years, with a fine of Rs.20,000/-, and, in default of payment of fine, to further undergo simple imprisonment for six months.

2. Case of the prosecution, in a nutshell, is that on 1.3.2012 at around 4 PM, SI Narotam Chand IO(PW-9) alongwith C. Latif Mohd. (PW-1), C. Kuldeep Chand (PW-4) and C. Sham Lal, proceeded to Chowari Bazaar and other nearby areas in official vehicle in connection with patrolling and traffic checking. They reached at Trimath around 6.35 pm and stayed there. At around 6.40 PM, a motor cycle No. HP57-320 was seen coming from Lahdu side which was signalled to stop by C. Latif Mohd. Motor Cycle was being driven by Devinder (PW-2) and accused was sitting on pillion. ASI Narotam Chand IO (PW-9) asked Devinder to produce papers of motor cycle. He produced the same and these were checked. Accused was asked to disclose his name. Devinder told the police that he was coming from Jasoor and was going to Chowari. He further disclosed that while on the way from Jasoor, accused at Sadwan, asked for lift. Accused was having a maroon coloured carry bag. He was asked to get the bag checked on which he showed little reluctance and told that he had sweet box in that bag but he prevailed upon him and bag, upon which he found two boxes with words "Parvon-Spas" inscribed on them, containing 390 capsules. One box contained 200 capsules and another 190. These were taken into possession and sealed in a cloth parcel. He affixed six seal impressions of seal 'R', in the presence of Devinder. Sample impression of seal 'R' Ext. PW-1/A was taken. He filled up relevant columns of NCB form, Ext. PW-3/G. He also prepared seizure memo Ext. PW-1/B. IO prepared Rukka Ext. PW-9/A and handed over the same to C. Kuldeep Chand to hand over the same to MHC, Police Station, Chowari for registration of FIR, Ext PW-3/A. He also prepared spot map Ext PW-9/B. ASI Narotam Chand handed over Ext P1 sealed with 6 impressions of 'R' containing 390 capsules of 'Parvon-Spas', NCB form in triplicate, sample seal impression of 'R' and copy of seizure memo for resealing to ASI Bansi Lal (PW-8), who resealed the same with three impressions of 'T'. Sample impression of seal 'T' was separately taken on piece of cloth which is Ext. PW-3/E. He also filled in relevant columns of NCB form in triplicate and seal 'T' was affixed on NCB forms Ext. PW-3/G in the presence of HC Raj Pal. Reseal memo Ext. PW-3/F was prepared. Parcel after resealing alongwith seizure memo, sample seal impression and NCB forms was deposited with MHC. He made entry in the Malkhana Register vide Rapat Ext. PW-3/B. Extract of Malkhana Register is Ext. PW-3/H. Contraband was sent to FSL Junga through Sandeep Kumar (PW-7) for chemical analysis. The Assistant Chemical Examiner on analysis opined that the exhibit stated is PARVON-SPAS and is a sample of 'dextropropoxyphene Hydrochloride capsules. Investigation was completed and Challan was put up in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 9 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. According to him, he was falsely implicated in the case. Accused was convicted by the learned trial Court. Hence, this appeal.

4. Mr. Vijay Chaudhary, Advocate, has vehemently argued that the prosecution has failed to prove case against the accused.

5. Mr. Parmod Thakur, Additional Advocate General, has supported Judgment dated 28.5.2013.

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

7. PW-1 C. Latif Mohd. deposed that he alongwith ASI Narotam, C. Kuldeep and C. Sham Lal was checking the vheicles during traffic duty at Trimath near Chowari. In

the meantime, a motor cycle No. HP 57-0320 came from the side of Lahdu being driven by Devinder and accused was sitting on pillion. He signalled the motor cycle to stop. ASI Narotam Chand checked up documents of the vehicle. Accused was carrying a carry bag of maroon colour. It was checked. It contained two boxes, on which words 'Parvon-Spas' were inscribed. ASI Narotam opened the boxes and found 10 strips having 20 capsules each in one strip. In another box, 8 strips having 20 capsules each in one strip and three strips having 10 capsules each were found. Total 390 capsules alleged to be narcotic drug were recovered from the possession of the accused. Capsules were again packed in the boxes in the same manner and both the boxes in maroon coloured bag. Thereafter, maroon coloured bag containing two boxes having 390 capsules were put in cloth parcel which was stitched and sealed with six impression of seal 'R'. Sample impression of seal 'R' was taken on separate piece of cloth. NCB form in triplicate was filled by ASI Narotam on which seal impression 'R' was affixed. Sample seal impression is Ext. PW-1/A. Case property was produced while recording the examination-in-chief of PW-1. In the cross-examination, he has admitted that population of village was 250-300 people. He also admitted that seal 'R' after use was handed over to him. He has not produced the same before the Court.

8. PW-2 Devinder Kumar deposed that on 1.3.2012 he had gone to Pathankot to purchase spare parts of motor cycle. He started back from Pathankot on the same day at around 3 PM. On his way back, accused met him at Sadwan and requested for lift on motor cycle to Chowari. On the way to Chowari, accused was sitting on the pillion. He was intercepted by the police at Trimath. He was asked to produce documents of the vehicle. Accused told the police that he was having container having sweets. Two boxes were produced before the police which contained 390 capsules alleged to be narcotic drugs. Same were taken into possession. Search, seizure and sealing proceedings were completed. In the cross-examination, he has admitted that in his presence Ext. P1 was not stitched. He also admitted that the place where police intercepted him, there was residential house of Ramu, besides 40-50 residential houses and shops. He also admitted that the population of Trimath was around 200-300 people. He further admitted that all kinds of vehicles ply between Chowari and Lahdu through Trimath and if one has to go to Dadriyada, he has to go through Trimath.

9. PW-3 MHC Rajpal deposed that the constable Kuldeep brought one Rukka at 8.40 PM for registration of case. FIR Ext. PW-3/A was registered. At 10.15 PM, on the same day, Narotam Chand handed over the case property duly sealed with six seals of 'R' alongwith NCB form in triplicate and specimen seal of 'R', to SHO, Police Station, Chowari for resealing. SHO resealed the parcel in his presence by affixing three seals of 'T', specimen seal impression 'T' was drawn on piece of cloth Ext. PW-3/E. Reseal memo Ext. PW-3/F was prepared. After resealing, SHO handed over case property alongwith specimen seal, NCB form, seizure memo etc. which he entered at Sr. No.; 86/12 of Malkhana Register. Extract of Malkhana Register is Ext. PW-3/H. He handed over case property to Constable Sandeep to be carried to FSL Junga for chemical examination vide RC No. 25/2012 dated 3.3.2012. Sandeep Kumar handed over receipt on 7.3.2012. In the cross-examination, he has admitted that there was no reference of NCB form, seizure memo, sample seal impression and copy of FIR in the road certificate, Ext. PW-3/J. Volunteered that there was no need to mention all these documents in Ext. PW-3/J. He admitted that there is no reference of column No. 4 in Ext. PW-3/H, extract of Malkhana Register with regard to NCB form, seizure memo and copy of FIR.

10. PW-4 C. Kuldeep Chand also deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. Rukka was prepared and was taken to Police Station by him. He handed over it in the Police

Station at 8.45 PM to MHC. He also admitted in his cross-examination that they had checked 5-10 vehicle but no challan was issued.

11. PW-7 C. Sandeep Kumar deposed that he had carried case property alongwith envelope to FSL Junga on 5.3.2012 vide RC No. 25/12. He admitted in his cross-examination that copy of FIR was not handed over to him alongwith case property.

12. PW-8 ASI Bansi Lal has resealed the case property by affixing three impressions of 'T'. He also filled in relevant columns of NCB form in triplicate, Ext. PW-3/G in the presence of HC Rajpal. Parcel after resealing alongwith seizure memo, sample seal impression and NCB form was deposited with the MHC.

13. PW-9 Narotam Chand deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. He filled in relevant columns of NCB form. Rukka was prepared. He handed over the same to Constable Kuldeep. He took the same to the Police Station. FIR was registered. He prepared spot map Ext. PW-9/B. He admitted in his cross-examination that there was no reference of NCB form, motor vehicle challan book and sample seal in daily diary Ext. PW-3/C.

14. Accused was apprehended near village Trimath. According to the statement of PW-1, Latif Mohd., population of village Trimath was around 250-300 people. Similarly, PW-2, Devinder has admitted in his cross-examination that the place where police intercepted him, there was residential house of Ramu, besides 40-50 residential houses and shops. He also admitted that population of Trimath was around 200-300 people. He further admitted that all kinds of vehicles ply between Chowari and Lahdu through Trimath and if one has to go to village Dadriyada, he has to go through village Trimath. PW-4 Kuldeep also admitted that they had checked 5-6 vehicles but no challan was issued. PW-9 Narotam Chand deposed that they stayed at Trimath for about 3 ½ hours till 10.05 PM. He could not say whether population of Trimath was 200-300 people. Volunteered that residential houses in Trimath are scattered. He did not recall whether vehicles had crossed the Naka.

15. Thus, it has come on record that the place where accused was apprehended, there were houses and shops. Population of the village Trimath was about 200-300 people and many vehicles have crossed through the Naka. PW-4 Kuldeep has admitted that no challan was issued. Police has not joined any independent witness from the adjoining houses and shops at village Trimath. It was neither a secluded nor isolated place. Police could have joined independent witnesses to inspire confidence in search, seizure and sealing proceedings carried out at the spot. According to PW-2 Devinder, all kinds of vehicles ply from Chowari to Lahdu through Trimath and if one has to go to village Dadriyada, he has go through Trimath. Police could easily associate occupants of vehicles as independent witnesses. Accused was apprehended on 1.3.2012 at 6.40 pm. PW-3 Rajpal, in his cross-examination admitted that there was no reference of NCB form, seizure memo, seal impression and copy of FIR in the road certificate Ext. PW-3/J. Court has gone through Ext. PW-3'/J i.e. road certificate. There is no reference of NCB form, seizure memo, seal impression, copy of FIR in the Ext. PW-3/J. However, fact of the matter is that these were received by FSL Junga as per Ext. PX.

16. Case property was produced while examining PW-1 Latif Mohd. Case property was produced by learned Public Prosecutor. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

17. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused.

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

> (2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.
>
> Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.
>
> The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.

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

> 27.18. Safe custody of property.-
>
> (1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).
>
> > Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.
>
> (2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.
>
> (3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is

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

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

21. In this case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior

police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

22. Accordingly, the present appeal is allowed. Judgment dated 28.5.2013 rendered by learned Special Judge, Chamba, District Chamba, Himachal Pradesh in Sessions Trial No. 39/12 is set aside. Accused is acquitted of the offence under Section 21 of the Act. He is ordered to be released, if not required by the police in any other case. Fine amount, if any, paid by the accused, be refunded to him. The Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned forthwith.

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

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

Vs.

Devi Ram and others. ....Respondents.

Cr. Appeal No.177 of 2006
Judgment reserved on:24.2.2016
Date of Judgment: March 16, 2016.

Indian Penal Code, 1860- Section 379- **Indian Forest Act, 1927 -** Sections 41 and 42- Accused were found transporting the timber without a valid permit- accused were tried and acquitted by the trial Court- held, in appeal that eye witnesses to the seizure memo had not supported the prosecution version- other witnesses had made contradictory statements- disclosure statement was also not proved properly- case property was not shown to the witnesses- implements for cutting were not properly identified- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-10 to 19) Title: State of H.P. Vs. Devi Ram and others Page-

Cases referred:

Shashi Pal and others vs. State of H.P. , 1998(2) SLJ 1408

State of H.P. vs. Sudarshan Singh, 1993(1) SLJ 405

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

Balak Ram and another Vs. State of UP, AIR 1974 SC 2165

Allarakha K. Mansuri Vs. State of Gujarat, (2002) 3 SCC 57

Raghunath Vs. State of Haryana, (2003) 1 SCC 398

State of U.P Vs. Ram Veer Singh and others, AIR 2007 SC 3075

Arulvelu and another Vs. State, (2009) 10 SCC 206

Perla Somasekhara Reddy and others Vs. State of A.P., (2009) 16 SCC 98

Ram Singh @ Chhaju Vs. State of Himachal Pradesh, (2010) 2 SCC 445

For the appellant: Mr.M.L.Chauhan and Mr.Ruppinder Singh, Additional Advocate Generals.

For the respondents: Mr.G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against judgment dated 20.3.2006 passed by learned Judicial Magistrate 1st Class Court No.1 Mandi HP in case No. 343-II/1999 titled State of HP Vs. Devi Ram and others.

BRIEF FACTS OF THE PROSECUTION CASE:

2. It is alleged by prosecution that on 30.7.1999 at about 3.30 AM at place Sagamor near Aut market accused persons were found transporting ten sleepers of Deodar and Kail trees without valid and legal permit in maruti van having registration No. HPY-1258. It is further alleged by prosecution that accused persons were dis-honestly carrying sleepers belonging to forest department. It is further alleged by prosecution that on the basis of rukka Ext PW13/A FIR Ext PW13/G was registered. It is further alleged by prosecution that investigating officer visited the spot and prepared site plan Ext PW13/B. It is further alleged by prosecution that investigating officer took into possession vehicle having registration No. HPY-1258 along with sleepers of Deodar and Kail and seizure memo Ext PW2/A was prepared. It is further alleged by prosecution that investigating officer also obtained valuation of seized timber vide document Ext PW6/A. It is further alleged by prosecution that investigating officer took specimen of hammer Ext PW6/A. Investigating agency prepared spot map Ext PW5/B and memo of demarcation Ext PW5/C. It is further alleged by prosecution that jamabandi also took into possession and statement of accused persons under Section 27 of Indian Evidence Act recorded. It is further alleged by prosecution that site plans Ext PW13/C to Ext PW13/F prepared. It is further alleged by prosecution that photographs Ext PW13/K-1 to Ext PW13/K-18 and negatives Ext PW13/K-19 to Ext PW13/K-36 also took into possession. Learned trial court framed charges against accused persons punishable under Sections 41 and 42 of Indian Forest Act and also framed charge under Section 379 IPC. Accused persons did not plead guilty and claimed trial.

3. Learned trial Court acquitted all accused persons under Sections 41 and 42 of Indian Forest Act and under Section 379 IPC.

4. Feeling aggrieved against judgment of acquittal State of HP filed present appeal.

5. Court heard learned Additional Advocate General appearing on behalf of appellant and learned Advocate appearing on behalf of accused persons and also perused entire record carefully.

6. Following points arise determination in present appeal.

1. Whether criminal appeal No. 177 of 2006 titled State of HP Vs. Devi Ram and others is liable to be accepted as mentioned in memorandum of grounds of appeal?.

2. Final order.

7. Findings upon point No.1 with reasons:

7.1 PW1 Thakur Singh has stated that on dated 30.4.1999 he was called by police officials in the morning and he measured seized woods. He has stated that there was

no hammer mark upon the woods. He has stated that ten sleepers were recovered out of which two sleepers were Deodar and eight sleepers were Kail. In cross examination he has stated that vehicle was parked in the market. He has denied suggestion that sleepers were found in police station. He has stated that he does not know that who was the owner of sleepers and he also does not know that from where sleepers were recovered. He has stated that he does not know whether sleepers were owned by government or owned by non-government agency.

7.2 PW2 Ram Rattan has stated that he joined investigation. He has stated that vehicle was parked upon a curve. He has stated that ten sleepers were found. He has stated that Block officer and Range officer have measured the sleepers and took photographs. He has stated that seizure memo of sleepers and vehicle is Ext PW2/A and he has signed the document as marginal witness. He has stated that he does not know that from where sleepers were brought by police officials. He has stated that he does not know who was the owner of sleepers.

7.3. PW3 Tek Chand has stated that accused persons were not searched in his presence. He has stated that no disclosure statement was given by co-accused Devi Ram in his presence. Witness was declared hostile by prosecution. Witness has admitted his signature on memo Ext PW3/A.

7.4 PW4 Piaray Lal has stated that accused persons did not give any disclosure statement in his presence. Witness was declared hostile. He has denied suggestion that he has resiled from his earlier statement in order to save accused persons.

7.5 PW5 Abhimanu has stated that in the year 1999 he was posted as investigating officer. He has stated that on 29.7.1999 he along with other police officials operated naka. He has stated that during mid night at 3.30 PM maruti van came from Kullu side. He has stated that driver of the vehicle stopped maruti van at a distance 20/25 yards and tried to run away. He has stated that on suspicion he was caught. He has stated that the driver of vehicle disclosed his name as Devi Ram. He has stated that registration number of the vehicle was HPY-1258. He has stated that vehicle was checked and ten sleepers of Deodar were found. He has stated that driver could not produce permit and thereafter vehicle and sleepers were took into possession vide seizure memo Ext PW2/A and sleepers were measured vide memo Ext PW5/A and value of the sleepers found to the tune of Rs. 18000/- (Eighteen thousand). He has stated that site plan was prepared and submitted by prosecution as per the versions recorded. He has denied suggestion that sleepers were not recovered from vehicle. He has denied suggestion that driver namely co-accused Devi Ram went to his brother house because defect occurred in vehicle. He has denied suggestion that seizure memo Ext PW5/C was prepared in police station.

7.6 PW6 Kuldip Singh Deputy Ranger has stated that on dated 30.7.1999 he was called by investigating agency at police station. He has stated that he visited at police station along with Sh. Kishori Lal Deputy Ranger. He has stated that there was no hammer mark upon sleepers. He has stated that memo Ext PW6/A was prepared. He has admitted that sleepers upon which he marked hammer not shown to him in Court.

7.7 PW7 Head Constable Harbans Singh has stated that he was on general duty at police station Aut. He has stated that on 29.7.1999 ten sleepers were took into possession from vehicle having registration No. HPY-1258 which was took into possession vide seizure memo Ext PW2/A. He has stated that marginal witnesses have also signed in his presence. He has stated that sleepers were also measured in his presence. He has stated that co-accused Mukesh Kumar has given disclosure statement that he could produce Rs. 3900/-

(Three thousand nine hundred) which he obtained after sale of sleepers. He has stated that amount to the tune of Rs. 3900/- (Three thousand nine hundred) was recovered as per disclosure statement given by co-accused Mukesh Kumar. He has denied suggestion that no sleepers were recovered from the possession of accused persons. He has denied suggestion that sleepers were not measured. He has denied suggestion that false case filed against accused persons.

7.8. PW8 Kishori Lal has stated that he was posted as Block Officer in the year 1999 and he was associated in investigation in the year 1999. He has stated that vehicle No. HPY-1258 was caught and wooden sleepers were found in the vehicle. He has stated that wooden sleepers were also measured. He has stated that two sleepers were of Deodar and eight sleepers were of kail trees. He has stated that thereafter hammers were marked upon sleepers. He has stated that vehicle and wooden sleepers were not recovered in his presence. In cross examination he has stated that he was called in police station Aut. He has stated that he is not familiar with accused persons. He has stated that no accused was present in police station Aut. He has stated that he prepared report as per direction of police officials Ext PW5/A.

7.9 PW9 Ram Kishan has stated that he joined investigation of case. He has stated that no amount of Rs.3900/- (Three thousand nine hundred) recovered in his presence from co-accused Mukesh. Witness was declared hostile. He has denied suggestion that he resiled from his earlier statement in order to save accused persons. He has denied suggestion that Rs.3900/- (Three thousand nine hundred) recovered in his presence from co-accused Mukesh.

7.10 PW10 Vishav Dev has stated that on 4.8.1999 he joined investigation. He has stated that co-accused Chuni Lal, Tek Ram and Pekh Ram have located the forest and told that two sleepers of Deodar and six sleepers of kail were sold to co-accused Mukesh. He has stated that one axe and one saw machine were also recovered.

7.11 PW11 Sukh Dev has stated that in the year 1999 he was guard in forest department. He has stated that in his presence co-accused Chunni Lal, Tek Ram and Pekh Ram were present. He has stated that he also signed Ext PW10/B and Ext PW10/C. He has stated that photographs took into possession. He has stated that accused persons did not give any disclosure statement in his presence to the effect that accused persons have cut trees from forest. He has admitted that T.D is granted to the villagers and villagers used to cut the tree on the basis of T.D. He has stated that axe and saw machine were not recovered in his presence. Witness was declared hostile by prosecution.

7.12 PW12 Inspector Vidya Dhar has stated that in the year 1999 he was posted as station house officer at police station Aut. He has stated that FIR was registered and after completion of investigation he prepared challan.

7.13 PW13 ASI Subhash Chand has stated that naka was operated at National High way No. 21 at a distance of about 500 metre from police station. He has stated that at about 3.30 AM a maruti van came from Kullu side. He has stated that when the driver of vehicle saw police officials he tried to run away but he was caught with the help of police officials. He has stated that driver disclosed his name as Devi Ram. He has stated that ten sleepers without hammer mark recovered from vehicle. He has stated that accused persons did not produce any permit. He has stated that wooden sleepers were measured. He has stated that the number of vehicle was HPY-1258. He has stated that wooden sleepers were measured vide memo Ext PW5/A. He has stated that photographs of the spot obtained and negative of photographs were also obtained. He has stated that thereafter after completion of

investigation file of the case was handed over to SHO Vidya Sagar. He has denied suggestion that no wooden sleepers found in the vehicle. He has denied suggestion that he recorded the statement of witnesses Tek Chand and Piaray Lal according to his own will. He has denied suggestion that he prepared false case against co-accused Chunni Lal, Tek Chand and Pekh Ram.

8. The statements of accused persons recorded under Section 313 Cr.P.C Accused persons did not examine any defence witness. Learned trial Court acquitted accused persons.

9. Following documentaries evidence adduced by prosecution. (1) Ext.PW2/A is recovery memo of vehicle No. HPY-1258 and recovery of eight sleepers of kail and two sleepers of Deodar. (2) Ext.PW3/B, Ext PW3/D to Ext PW3/F are disclosure statements of accused persons namely Mukesh Kumar, Chunni Lal, Pekh Ram, Tek Ram. (3) Ext.PW5/A is document of measurement of seized timber. (4) Ext.PW5/B is spot map. (5) Ext.PW5/C is memo of purchase of sleepers in consideration amount of Rs.3900/-(6)Ext.PW6/A3 is specimen of hammer. (7) Ext.PW7/A is recovery memo of Rs.3900/- from co-accused Mukesh Kumar. (8) Ext.P1, Ext.P2 and Ext.P3 are sleepers, axe and saw respectively. (9) Ext.PW13/A is ruka. (10) Ext.PW13/B, Ext.PW13/C and Ext.PW13/D to Ext.PW13/F are spot maps. (11) Ext.PW13/G is FIR. (12) Ext.PW13K-1 to Ext PW13K-18 are photographs. (13) Ext PW13k-19 to Ext PW13k-36 are negatives of photographs.

10. Submission of learned Additional Advocate General appearing on behalf of State that judgment of learned trial Court is based upon surmises and conjectures and learned trial Court has appreciated the evidence on record in slip shod and perfunctory manner and learned trial Court has not properly appreciated the evidence of prosecution in proper perspective and reasoning of learned trial Court is unsustainable and on these grounds appeal filed by State be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Seizure memo Ext.PW2/A dated 30.7.1999 relating to recovery of two deodar sleepers and eight sleepers of Kail trees from vehicle No. HPY-1258 placed on record is substantial piece of evidence. Court has carefully perused the contents of seizure memo Ext.PW2/A placed on record. Eye witnesses of seizure memo Ext PW2/A are Ram Rattan PW2, Kishori Lal PW8, Abhimanyu PW5, Subhash Chand and Ram Lal. Prosecution did not examine marginal witnesses of seizure memo Ext.PW2/A namely Subhash Chand and Ram Lal. Prosecution only examined Ram Rattan PW2, Kishori Lal PW8 and Abhimanyu PW5 who are eye witnesses of recovery of two sleepers of Deodar and eight sleepers of Kail. Court has carefully perused testimonies of PW2 Ram Rattan, PW5 Abhimanyu and PW8 Kishori Lal who are eye witnesses of seizure memo of sleepers Ext PW2/A. PW2 Ram Rattan has specifically stated in positive manner in cross examination that he does not know from where sleepers were brought and he has also specifically stated in positive manner that he does not know who was the owner of sleepers. It is held that PW2 Ram Rattan did not support the prosecution story as alleged by prosecution. Court has carefully perused testimony of Kishori Lal PW8 who is another eye witness of seizure memo of sleepers Ext PW2/A. PW8 Kishori Lal has specifically stated in positive manner when he appeared in witness box that he was called in police station. PW8 Kishori Lal has stated in positive manner that vehicle and sleepers were not recovered in his presence. PW8 has specifically stated in positive manner when he appeared in witness box that he does not know accused persons. PW8 has also stated that accused persons were not present. PW8 has also stated that in police station many sleepers were stored. PW8 has also stated that case property was not shown to him in Court during trial. PW5 Abhimanyu has supported the prosecution story as alleged by prosecution. There is material contradiction between testimonies of PW2 Ram Rattan, PW8 Kishori Lal and PW5 Abhimanyu who are eye

witnesses of recovery of sleepers from vehicle No. HPY-1258. In view of the fact that there is material contradiction between testimonies of eye witnesses relating to recovery of sleepers from vehicle No. HPY-1258 Court is of the opinion that it is not expedient in the ends of justice to convict the accused persons on the basis of contradictory testimonies of eye witnesses of recovery of sleepers from vehicle No. HPY-1258.

11. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated the statement of co-accused person Mukesh Kumar Ext PW3/B recorded under Section 27 of Indian Evidence Act and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused testimony of marginal witnesses of disclosure statement Ext PW3/B. As per prosecution story co-accused Mukesh has given disclosure statement Ext PW3/B under Section 27 of Indian Evidence Act that ten sleepers were sold in consideration amount of Rs. 3900/- (Rupees three thousand nine hundred only) and co-accused Mukesh has kept the consideration amount in his residential house. Marginal witnesses of disclosure document recorded under Section 27 of Indian Evidence Act Ext PW3/B are Piare Lal PW4 and LHC Harbans PW7. Court has carefully perused the testimonies of Piare Lal PW4 and LHC Harbans Lal. PW4 Piare Lal when appeared in witness box has stated in positive manner that co-accused Mukesh did not give any disclosure statement Ext PW3/B under Section 27 of Indian Evidence Act in his presence. PW4 Piare Lal was declared hostile by prosecution. PW4 did not support the prosecution story relating to disclosure statement of co-accused Mukesh Kumar. Testimonies of eye witnesses PW4 and LHC Harbans Lal PW7 are materially contradictory to each other. In view of material contradiction in testimonies of PW4 Piare Lal and PW7 Harbans Court is of the opinion that it is not expedient in the ends of justice to convict the accused persons.

12. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated the recovery memo of Rs.3900/- (Rupees three thousand nine hundred only) as per disclosure statement of co-accused Mukesh and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused document Ext.PW7/A relating to recovery of Rs.3900/- (Rupees three thousand nine hundred only) placed on record from co-accused Mukesh Kumar. Marginal witnesses of document Ext PW7/A are Ram Kishan PW9 and LHC Harbans Lal PW7. PW9 Ram Kishan ward member of Panchayat did not support the prosecution story. PW9 has specifically stated in positive manner that amount of Rs.3900/- (Rupees three thousand nine hundred only) was not recovered in his presence from co-accused Mukesh. PW9 has specifically stated that co-accused has not given any statement before him that co-accused Mukesh has received Rs. 3900/- (Rupees three thousand nine hundred only) from sale of ten sleepers. PW9 Ram Kishan was declared hostile by prosecution. PW9 Ram Kishan did not support the prosecution story as alleged by prosecution. In view of material contradiction between statements of PW9 Ram Kishan and PW7 Harbans Singh who are marginal witnesses of seizure memo of Rs.3900/- (Rupees three thousand nine hundred only) it is held that it is not expedient in the ends of justice to convict the accused persons.

13. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated the disclosure statement given by co-accused Chuni Lal Ext.PW3/D whereby accused persons have kept the sleepers in illegal manner and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Marginal witnesses of disclosure statement of co-accused Chuni Lal recorded under Section 27 of Indian Evidence Act Ext.PW3/D are Tek Chand PW3 and Piare Lal PW4. Court has carefully perused testimonies of PW3 Tek Chand and PW4

Piare Lal. PW3 Tek Chand has specifically stated when he appeared in witness box that no disclosure statement was given by co-accused Chuni Lal in his presence. PW3 Tek Chand was declared hostile by prosecution. Similarly PW4 Piare Lal has also stated when appeared in witness box that no disclosure statement was given by co-accused Chuni Lal. In view of testimonies of PW3 Tek Chand and PW4 Piare Lal that no disclosure statement was given by co-accused Chuni Lal in their presence it is not expedient in the ends of justice to convict the accused persons.

14. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated disclosure statement given by co-accused Pekh Ram Ext.PW3/E and on this ground appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused disclosure statement Ext.PW3/E placed on record given by co-accused Pekh Ram. Marginal witnesses of disclosure statement are PW3 Tek Chand and PW4 Piare Lal. Court has also perused testimonies of PW3 Tek Chand and PW4 Piare Lal. PW3 Tek Chand has specifically stated in positive manner that no disclosure statement was given by co-accused Pekh Ram in his presence. Both PW3 and PW4 were declared hostile by prosecution. In view of the above stated facts doubt has created in the mind of Court. Court is of the opinion that it is not expedient in the ends of justice to convict accused persons in view of testimonies of PW3 Tek Chand and PW4 Piare Lal relating to disclosure statement Ext PW3/C by co-accused Pekh Ram.

15. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated document Ext.PW3/F i.e. disclosure statement given by co-accused Tek Ram relating to mode of preparation of sleepers and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused document Ext.PW3/F placed on record. Marginal witnesses of document Ext.PW3/F are Tek Chand and Piare Lal. PW3 Tek Chand and PW4 Piare Lal have specifically stated that no disclosure statement was given by co-accused Tek Ram in their presence. In view of testimonies of PW3 Tek Chand and PW4 Piare Lal it is not expedient in the ends of justice to convict the accused persons.

16. Submission of learned Additional Advocate General appearing on behalf of State that recovery of saw is proved beyond reasonable doubt vide document Ext PW11/E and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Marginal witnesses of recovery memo Ext PW11/E of saw are Vishav Dev PW10, Jagan Nath, Roop Lal and Sukh Dev PW11. Prosecution did not examine marginal witnesses namely Jagan Nath and Roop Lal. Prosecution examined PW10 Vishav Dev and PW11 Sukh Dev. Court has perused testimonies of PW10 Vishav Dev and PW11 Sukh Dev carefully. PW10 Vishav Dev retired Range Officer has specifically stated that case property is not shown to him in Court and PW10 has specifically stated in positive manner that he could not identify the accused persons in Court. PW10 Vishav Dev has specifically stated in positive manner that TD wood was also sanctioned to villagers and people were cutting the wood on the basis of T.D. In view of the fact that PW10 Vishav Dev retired Range Officer has stated that he could not identify the accused persons in Court. It is not expedient in the ends of justice to convict accused persons. PW11 Sukh Dev forest guard has specifically stated when he appeared in witness box that he could not state that axe and saw are same. In cross examination PW11 Sukh Dev has stated that accused persons have not given any statement that they have cut the sleepers from forest. PW11 Sukh Dev has specifically stated that sleepers were not shown to him in Court. PW11 Sukh Dev has also stated in positive manner that axe and saw were not recovered in his presence.

In view of above stated testimonies of PW10 and PW11 it is not expedient in the ends of justice to convict accused persons.

17. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has not properly appreciated the recovery of axe as per document Ext PW11/D is also rejected being devoid of any force for the reasons hereinafter mentioned. Witnesses of recovery memo of axe Ext PW11/D are Vishav Dev, Roop Lal and Sukh Dev. Prosecution did not examine Vishav Dev and Roop Lal who are marginal witnesses of recovery of axe. Prosecution has only examined PW11 Sukh Dev. Court has perused testimony of PW11 Sukh Dev. PW11 Sukh Dev has stated that axe was not recovered in his presence. In view of above stated facts Court is of the opinion that it is not expedient in the ends of justice to convict accused persons because two views have emerged in present case.

18. It is well settled law that when two views emerged in prosecution story then benefit of doubt should be given to accused persons. It is well settled law that if two views have emerged in the prosecution case then view favourable to the accused has to be taken into consideration. see: 1998(2) SLJ 1408 titled Shashi Pal and others vs. State of H.P. see: 1993(1) SLJ 405 titled State of H.P. vs. Sudarshan Singh. Also see SLJ 1996(2) 890 Apex Court titled Mulak Raj vs. State of Haryana. It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible though the view of the appellate Court may be more probable. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration evidence brought on record contrary to law. See AIR 1974 SC 2165 titled Balak Ram and another Vs. State of UP. See (2002) 3 SCC 57 titled Allarakha K. Mansuri Vs. State of Gujarat. See (2003) 1 SCC 398 titled Raghunath Vs. State of Haryana. See AIR 2007 SC 3075 titled State of U.P Vs. Ram Veer Singh and others. See (2009) 10 SCC 206 titled Arulvelu and another Vs. State. see (2009) 16 SCC 98 titled Perla Somasekhara Reddy and others Vs. State of A.P. See:(2010) 2 SCC 445 titled Ram Singh @ Chhaju Vs. State of Himachal Pradesh.

19. Submission of learned Additional Advocate General appearing on behalf of State that learned trial Court has given importance to minor contradictions and on this ground appeal be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire oral as well as documentary evidence placed on record. It is held that there is material contradiction between testimonies of prosecution witnesses and it is further held that learned trial Court has properly appreciated the oral as well as documentary evidence placed on record. In view of above stated facts point No. 1 is answered in negative.

Point No. 2 (Final Order)

20. In view of findings upon point No.1 judgment of learned trial Court is affirmed by way of giving benefit of doubt to accused persons. Appeal filed by State of H.P. is dismissed. File of learned trial Court along with certified copy of judgment be sent back forthwith. Criminal appeal No. 177 of 2006 is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

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

Cr. Appeal No. 83 of 2016.
Reserved on: March 04, 2016.
Decided on: March 16, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was seen carrying a bag in his hand- the search of the bag was conducted during which 1.800 kgs charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that there is contradiction in the prosecution case- police officers stated that charas was found in the form of sticks, whereas, in FSL charas was found in the form of poly wrapped sticks and balls in two transparent zip poly packets- police witnesses have not stated that charas was in the form of poly wrapped sticks and balls in two transparent zip poly packets- thus, identity of the case property also becomes doubtful – houses are located on either side of the road and buildings are also situated nearby- I.O. had not made any efforts to associate any independent witness - seal was handed over to PW-6 who stated that he had lost the same but no rapat was got recorded by him regarding the loss of seal- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was rightly acquitted by the trial court– appeal dismissed. (Para-6 to14)

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

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 24.9.2015, rendered by the learned Special Judge (I), Kullu, H.P., in Sessions trial No. 133/2013, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 24.5.2013, at 4:00 AM, a team of Special Investigation Unit, Kullu headed by ASI Gangbir Singh was present at Talogi Mod, which falls within the jurisdiction of PS Kullu. They saw accused coming on foot from Jia-Bhunter side carrying a bag in his hand. PW-5 ASI Gangbir Singh asked the accused to explain the reason of his presence at the spot, at such early hours of the day, but accused could not reply satisfactorily. On inquiry, accused disclosed his name and address. The place where the accused was apprehended was secluded and no independent witnesses were available. PW-5 ASI Gangbir Singh associated HHC Uttam Singh (PW-4) and Const.

Nikka Ram (PW-6) as witnesses and in their presence, the carry bag, being carried by the accused, was searched. It contained two transparent polythene packets in which transparent plastic wrappings was found which was in the shape of sticks and on smelling and testing, the substance was found to be charas. I.O. PW-5 ASI Gangbir Singh prepared the identification memo Ext. PW-4/A and the recovered charas was weighed. It weighed 1.800 kgs. Thereafter, the recovered charas was again put in the same plastic wrappers and then in same polythene packets and thereafter in carry bag. The carry bag was then sealed in a cloth parcel with eight seals of impression "A" and then taken into possession vide recovery memo Ext. PW-4/C, which was signed by accused as well as witnesses. PW-5 ASI Gangbir Singh took sample of seals of "A" on pieces of cloth, one of which is Ext. PW-4/B. PW-5 ASI Gangbir Singh also filled in the NCB-I form in triplicate vide Ext. PW-3/D. Rukka was scribed and sent to Police Station through HHC Uttam Singh (PW-4), on which FIR Ext. PW-3/A was registered by SI Shiv Singh. PW-3 SI Shiv Singh handed over the case file to HHC Uttam Singh with the direction to take the same to the I.O. The site plan Ext. PW-5/B was prepared by the I.O. and statements of the witnesses were recorded. The accused was apprised about the grounds of arrest. The accused was arrested vide memo Ext. PW-5/C. SI/SHO Shiv Singh resealed the parcel with seal "R" by affixing six seal impressions thereon. He also filled in the relevant columns of NCB-I form and drew sample of seal "R" vide Ext. PW-3/C and thereafter deposited the case property with PW-7 MHC Ram Krishan. MHC Ram Krishan made entries in register No. 19 of the Malkhana at Sr. No. 49, the abstract of which is Ext. PW-7/A. Special report Ext. PW-2/A was prepared. The case property was sent to FSL Junga. The report of FSL Junga is Ext. PW-3/E. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 7 witnesses. The accused was also examined under Section 313 Cr.P.C. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned Addl. Advocate General for the State and gone through the judgment and records of the case carefully.

6. According to PW-4 HHC Uttam Singh, PW-5 ASI Gangbir Singh and PW-6 Const. Nikka Ram, the charas was found in the form of sticks, however, as per the report of the FSL Ext. PW-3/E, on opening the sealed cloth parcel, charas was found in the form of poly wrapped sticks and balls in two transparent zip poly packets. The witnesses have not stated that the charas was in the form of poly wrapped sticks and balls containing two transparent zip poly packets. Thus, the identity of the case property also becomes doubtful.

7. The case of the prosecution is that no independent witness was available on the spot. However, it is evident on perusal of rukka Ext. PW-5/A that there is no reference given that the place was isolated and no independent witness was available. PW-5 ASI Gangbir Singh has admitted that there is no mention to this effect in the rukka Ext. PW-5/A or in the statement of witnesses. According to PW-4 HHC Uttam Singh, a path leads to village Talogi from the alleged spot of occurrence. Village Talogi is situated on either side of the road. It is clear from the photographs (Mark DA-1 to Mark DA-5) that in Mark DA-1, there is bus stop and Mark DA-2 to Mark DA-5 there are buildings and houses. It is, thus, evident that there was village Talogi nearby the occurrence and houses and buildings were also situated nearby and despite that no independent witness was joined. PW-6 Const. Nikka Ram has also deposed that the I.O. did not make any attempt to associate

independent witnesses in the investigation. It has also come in the investigation that vehicles after every half an hour used to pass through the spot.

8. There is no evidence as to who took the case property from FSL Junga and there is no rapat qua the production of case property before the Court. According to the prosecution case, the seal after use was handed over to PW-6 Const. Nikka Ram. The seal was lost by him but no rapat, whatsoever, was recorded by him regarding the loss of seal. It was for the prosecution to prove that the case property remained in safe custody from its seizure till its production in the Court.

9. With the assistance of Mr. M.A. Khan, learned Addl. Advocate General for the State, we have perused the records of the instant case. The case property was produced while recording the statement of PW-4 HHC Uttam Singh. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

> **"22.70. Register No. XIX- This register shall be maintained in Form 22.70.**
>
> **With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.**
>
> **The register may be destroyed three years after the date of the last entry."**
>
> **The register is to be maintained in Form 22.70. It reads as under.**
>
> **"FORM NO. 22.70.**
>
> **POLICE STATION_____ ____DISTRICT**
>
> **Register No. XIX.-Store-Room Register (Part-I)**
>
> **Column 1.- Serial No.**
>
> **2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.**
>
> **3. Date of deposit and name of depositor.**
>
> **4. Description of property.**
>
> **5. Reference to report asking for order regarding disposal of property.**
>
> **6. How disposed of and date.**
>
> **7. Signature of recipient (including person by whom dispatched).**
>
> **8. Remarks.**
>
> **(To be prepared on a quarter sheet of native paper)."**

10. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it

is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

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

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

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

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

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

"27.18. Safe custody of property.-

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

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

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

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the

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

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

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

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

15. The prosecution has failed to prove case against the accused under Section 20 of the Act. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 24.9.2015.

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

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

State of HP and others .....Appellants

Versus

Rakesh Rana .....Respondent.

LPA No. 154 of 2015
Date of decision: 16th March, 2016.

Constitution of India, 1950- Articles 226 & 227- Petitioner was appointed as driver on contract basis- he was transferred and was appointed as a driver- petitioner is entitled to be regularized after five years in terms of policy- respondents directed to regularize the petitioner w.e.f. the date of transfer to the second department. (Para-5 to 7)

For the appellants: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General.

For the respondent: Mr. R.L. Chaudhary and Mr. H.R. Sidhu, Advocates.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the judgment dated 13.5.2015, made by the learned Single Judge of this Court in ***CWP No.5911*** of 2014 titled ***Rakesh Rana versus State of HP and others,*** whereby the writ petition filed by the petitioner came to be allowed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. The petitioner, in the writ petitioner had sought following reliefs.

(i) That writ of certiorari may kindly be issued, quashing order dated 23.7.2014 (Annexure P-9), since the same has been passed without taking into consideration the fact that petitioner w.e.f. 13.7.2005 till date is serving the office of respondent No.2 as a driver and w.e.f. 1.2.2010, respondent No. 2 is paying the salary of the petitioner from State head.

(ii) That writ of mandamus may kindly be issued, directing the respondent No. 1 and 2 to regularize the services of the petitioner in view of regularization policy of contractual employees (Annexure P-5), since the petitioner has completed his 9 years service as driver on contract basis and as per the

regularization policy, the employees who have completed 6 years service are entitled for regularization."

3. The respondents resisted the writ petition.

4. The Writ Court, without marshalling the facts and merits of the case, directed the respondents to regularize the services of the petitioner from the date of completion of five years.

5. The moot question is to which relief, the petitioner is entitled to.

6. Admittedly, the petitioner was appointed as driver on 29.6.2005 by the Principal, Panchayati Raj, Training Institute, Mashobra (Craigneno), Shimla on contract basis and his pay was to be drawn from the recurring grant. Thereafter he came to be transferred on 1.2.2010 vide Annexure P3 to the Directorate of Panchayati Raj and appointed as driver right from 1.2.2010 in the said department. The Director-cum-Special Secretary, Panchayati Raj Department H.P. Shimla issued office order dated 26.2.2010 (Annexure P4) whereby he came to be appointed as driver on contract basis and he has received the pay as a contract driver right from 26.2.2010. It is admitted that he is still holding the post. In terms of the policy dated 7th May, 2015, the petitioner is entitled to be regularized after five years service. It is apt to reproduce relevant portion of policy dated 7th May, 2015 herein.

"……In continuation of this Department letter number Per (AP)-C-B (2)-3/2012 dated 28th June, 2014, I am directed to say that the matter regarding regularization of services of contractual employees working in various Departments was under consideration of the Government for some time past. Now, it has been decided by the Government to regularize the services of the contractual appointees after completion of five years service as on 31.3.2015, provided that they have been engaged, as such, after observing all codal formalities……."

7. Worst come worst, the petitioner is entitled to regularization after completion of five years w.e.f. 26.2.2010.

8. Accordingly, the respondents are directed to regularize the services of the petitioner in terms of the policy dated 7th May, 2015, quoted supra, w.e.f. 26.2.2015, with all consequential benefits.

9. Accordingly, the LPA is dismissed alongwith pending applications, if any, and the impugned judgment is modified as indicated hereinabove.

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

Subhash Sharma son of Shri Jagan Nath ....Revisionist

Versus

Anil Kumar son of late Shri Bishamber Lal. ....Non-Revisionist

Civil Revision No. 34 of 2015
Order Reserved on 24th February 2016
Date of Order 16 March, 2016

Himachal Pradesh Urban Rent Control Act, 1987- Section 15- Landlord filed a petition for eviction of the tenant on the ground that he is a specified landlord and requires accommodation for his personal use and occupation – petition was allowed- during the execution, objections were taken that due to subsequent development namely sale by the co-sharers and landlord, execution petition was not maintainable- objections were dismissed and tenant was directed to hand over the vacant possession- held, that tenant had specifically pleaded that sale had taken place which fact was denied by the landlord- therefore, it was necessary to frame issues and to record the findings on the same- issues framed and Rent Controller directed to dispose of the execution after taking the evidence.

(Para-11 to 19)

Cases referred:

Om Prakash Rawal vs. Mr.Justice Amrit Lal Bahri, AIR 1994 H.P High Court 27

Kaniz Fatima (deceased) and another vs. Shah Naim Ashraf, AIR 1983 Allahabad 450 (DB)

Leela Devi and another vs. Ram Lal Rahu and another, SLJ 1988 HP 882

For the Revisionist:	Mr. G.C. Gupta Sr. Advocate with Ms. Meera Advocate.
For the Non-Revisionist:	Mr. Neeraj Gupta, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present civil revision petition is filed under Section 24 of H.P. Urban Rent Control Act 1987 against order dated 19.2.2015 passed by learned Rent Controller-cum-Executing Court whereby learned Rent Controller-cum- Executing Court dismissed the objections filed under Section 47 read with Section 151 CPC by revisionist.

Brief facts of the case

2. Shri Anil Kumar landlord filed petition under Section 15 of H.P. Urban Rent Control Act 1987 for eviction of tenant. It is pleaded that Anil Kumar Sood is owner/landlord of middle flat Below shop 120/2 lower market Shimla and Subhash Sharma was inducted as tenant in aforesaid premises by predecessor-in-interest of Anil Kumar at the rent of Rs. 720/- (Rupees seven hundred twenty only) per annum. It is pleaded that premises consists of two bed rooms, one drawing-cum-dinning, one kitchen and one toilet. It is pleaded that Anil Kumar filed eviction petition in the capacity of specified owner who was posted in Agro Industries Corporation Ltd Nigam Vihar Shimla and government accommodation was provided to him. It is pleaded that after retirement Anil Kumar require accommodation for his personal use and occupation.

3. Petition was contested by tenant namely Subhash Sharma. Learned Rent Controller framed following issues:-

1. Whether premises in question is bonafide required by the landlord for his own residence, as alleged? OPP

2. Whether there is no relationship of landlord and tenant between parties as alleged? OPR

3. Whether petition is not maintainable in the present form as alleged? OPR

4. Whether petition is bad for non-joinder of necessary parties as alleged? OPR

5. Whether petition is pre mature as alleged? .....OPR

6. Whether petitioner is not specified landlord as alleged? .....OPR

7. Whether petition is malafide as landlord has got ample accommodation at Prince of Wales Building Shimla as alleged? .....OPR

8. Relief.

4. Learned Rent Controller decided issue No. 1 in affirmative and decided issues Nos. 2 to 8 in negative. Learned Rent Controller passed eviction order against tenant on ground of bonafide requirement by landlord for his own use.

5. Feeling aggrieved against order of learned Rent Controller dated 15.3.2012 tenant Subhash filed Civil Revision No. 4 of 2013 titled Subhash vs. Anil Kumar before Hon'ble High Court of H.P. and on 19.8.2014 Hon'ble High Court dismissed the civil revision filed by tenant. Thereafter SLP was filed by tenant before Apex Court of India and same was also dismissed by Apex Court of India. Thereafter execution petition was filed by landlord against tenant before learned Rent Controller exercising the powers of Executing Court with prayer that notice be issued to tenant and warrant of possession of premises be issued in favour of landlord. Further prayer sought that tenant be placed in civil imprisonment.

6. During the pendency of execution petition tenant filed objections under Section 47 CPC read with 151 CPC pleaded therein that certain subsequent new developments took place and execution petition is not executable. It is pleaded that Smt. Pushpa Devi, Smt. Poonam have sold their 1/3rd share on 16.12.2013 in favour of Joginder Singh son of late Shri Darbara Singh resident of 120 lower market Shimla vide sale deed registered in office of Sub Registrar (Urban) Shimla. It is pleaded that another co-owner Smt. Reeta also sold her share on 27.12.2013 in favour of Joginder Singh vide sale deed dated 27.12.2013. It is pleaded that landlord Anil Kumar has also sold his share in favour of Joginder Singh but said transaction has not been depicted in red and white with an ulterior motive to continue execution petition. It is pleaded that in view of subsequent developments execution petition has become in-executable. It is pleaded that objection petition be allowed after affording opportunity to objector to lead evidence to prove the said contention and further pleaded that execution petition be dismissed with costs.

7. Anil Kumar landlord filed response pleaded therein that objection petition is not maintainable and further pleaded that objections filed just to delay the execution proceedings. It is denied that new developments took place. It is pleaded that purchasers have stepped into the shoes of co-owner and have not stepped into the shoes of tenant. It is pleaded that landlord is entitled to file execution petition and to recover the possession of premises. It is denied that landlord Anil Kumar has sold his 1/3rd share in favour of Joginder Singh. It is pleaded that landlord has not sold his share and prayer for dismissal of objection petition sought.

8. Tenant filed rejoinder and re-asserted the allegations mentioned in objection petition.

9. Learned Rent Controller-cum-Executing Court dismissed objections of tenant on 19.2.2015 and directed tenant to hand over vacant possession of premises to landlord on or before 21.3.2015. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused entire record carefully.

10. Following points arise for determination in civil revision petition:-

1. Whether civil revision is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2. Relief.

Findings upon point No.1 with reasons

11. Submission of learned Advocate appearing on behalf of revisionist that revisionist filed objection petition before executing Court and executing Court without framing any issue on objection petition and without giving opportunity to objector to prove disputed facts alleged in objection petition dismissed the objection petition of objector and on this ground revision petition be allowed is accepted for the reasons hereinafter mentioned.

12. As per Section 26 of H.P. Urban Rent Control Act 1987 there is specific provision of execution of orders. Section 26 of H.P. Urban Rent Control Act 1987 is quoted in toto:-

> ***"26. Execution of orders-****Save as otherwise provided in Section 31 any order made by the Controller or an order passed on appeal under this Act shall be executable by the Controller as a decree of a civil Court and for this purpose the Controller shall have all the powers of a civil court."*

13. It is settled law that any order made by Rent Controller or an order passed on appeal under H.P. Urban Rent Control Act shall be executable by Controller as decree of civil Court and for this purpose the Controller shall have power of civil Court. It is well settled law that in execution proceedings under H.P. Urban Rent Control Act Order XXI of Code of Civil Procedure 1908 would apply for execution of order passed under HP Urban Rent Control Act 1987.

14. As per Section 47 of Code of Civil Procedure 1908 all questions arising between the parties or their representatives relating to execution discharge or satisfaction would be determined by executing Court and not by separate suit.

15. In objection petition tenant has specifically mentioned that 1/3rd share of property has been sold by landlord Anil Kumar in favour of Joginder Singh but said transaction has not been depicted in red and white with ulterior motive to continue the execution petition. In response landlord Anil Kumar has specifically mentioned that he did not sell his share of property in favour of Joginder Singh son of Darbara Singh as mentioned in objection petition. Tenant has also specifically pleaded in objection petition that Pushpa Devi, Punam and Rita have sold their share in premises in favour of Joginder Singh son of late Darbara Singh.

16. As per Order XIV of the Code of Civil Procedure 1908 when material proposition of facts are affirmed by one party and denied by other party then Courts are under legal obligation to frame issues. It is well settled law that issues are of two kinds. (1) Issues of facts. (2) Issues of laws. In present case tenant has pleaded material proposition of facts in objection petition and same proposition of facts is denied by landlord namely Anil Kumar. Court is of opinion that framing of issues upon objection petition filed by tenant is essential in ends of justice in order to dispose of objection petition properly and in order to impart justice to parties. ***See AIR 1994 H.P High Court 27 titled Om Prakash Rawal vs. Mr.Justice Amrit Lal Bahri.*** It was held in case reported in ***AIR 1983 Allahabad 450 (DB) titled Kaniz Fatima (deceased) and another vs. Shah Naim Ashraf*** that if no issue frame then findings could not be given qua material disputed facts. It was held in case. ***SLJ 1988 HP 882 titled Leela Devi and another vs. Ram Lal Rahu and another*** that if

issue not framed upon material disputed facts then same would amount to material illegality and irregularity.

17. Submission of learned Advocate appearing on behalf of non-revisionist landlord that there is no necessity to frame issues by learned executing Court in objection petition is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that material proposition of facts have been asserted by one party and denied by other party in objection petition. It is held that framing of issues and giving opportunity to objector to lead evidence and also giving opportunity to non-objector to adduce rebuttal evidence is essential in present case in the ends of justice.

18. In view of above stated facts following issues are framed upon objection petition filed by tenant.

(A) Whether landlord Anil Kumar has sold his 1/3rd share in favour of Joginder Singh son of Shri Darbara Singh as alleged in objection petition if so its effect? ….Onus placed on objector

(B) Whether Pushpa Devi, Poonam Devi and Reeta co-owners have also sold their shares in favour of Joginder Singh as alleged in objection petition if so its effect? ….Onus placed on objector

(C) Whether objector has no cause of action to file objection petition as alleged? ….Onus placed on Non-objector

(D) Relief.

Point No. 1 is decided accordingly.

Point No. 2 (Relief)

19. In view of findings upon point No.1 civil revision is partly allowed and order of learned Rent Controller-cum-Executing Court dated 19.2.2015 announced in objection petition No.8/11 of 2015 is set aside and case is remanded back to learned trial Court for limited purpose only with direction to dispose of objection petition filed by objector within two months from the receipt of file after giving due opportunities to both the parties to lead evidence in support of their case in accordance with law on issues mentioned in para No. 18 A,B,C & D framed supra and thereafter decide execution petition expeditiously for the reasons that execution petition is pending since March 2013 and required expeditious disposal. Observations will not affect merits of case in any manner and will be strictly confined for disposal of revision petition. Parties are directed to appear before learned Rent Controller-cum-Executing Court on 31.3.2016**.** Registrar(Judicial) will ensure that file of learned Rent Controller-cum-Executing Court along with certified copy of this order should reach the court of concerned learned Rent Controller-cum-Executing Court on or before 31.3.2016**.** No order as to costs. Revision petition is disposed of. 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 TARLOK SINGH CHAUHAN, J.

Surjeet Kumar and others ….. Petitioners.

Versus

State of H.P. and others ……Respondents

Review Petition No. 115 of 2015.
Date of decision: 16th March, 2016.

Code of Civil Procedure, 1908- Section 115- Order 47 Rule 1- Writ petition was allowed by the Court- Review petition has been filed on the ground that petitioners were not parties in the writ petition before the Writ Court - however, it was not shown as to what error was apparent on the face of the record- review does not fall within the parameters of the Law laid down by the High Court and Supreme Court- petitioners are at liberty to seek appropriate remedy- review petition dismissed. (Para-2 to 5)

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

For the petitioners:	Mr. Avneesh Bhardwaj, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General, for respondent-State.

The following judgment of the Court was delivered:

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

Petitioners, by the medium of this Review Petition, are seeking review of the judgment dated 31.12.2014 made by this Court in CWP No. 9266 of 2014 titled Harish Kumar and another versus State of H.P. and others alongwith connected writ petition No.8368 of 2014 titled Sudha and others versus State of H.P. and others. It is apt to reproduce paras 12 and 13 of the said judgment herein.

> *"12.Accordingly, the writ petitions are allowed. The Tentative Seniority List issued vide office order No.EDN-SLN-Elem.(E.III) Sty—1/ 2014-15925-32 and office order No. EDN-H (2) 7/2014-Pro-JBT-NM dated 21.10.2014, in both the writ petitions, so far it relate to private respondents and the persons who are ranking below in the merit list, is quashed and respondents are directed to issue fresh seniority list, strictly as per the merit obtained, in terms of the selection process and make the promotions, strictly, as per the Rules, occupying the field.*
>
> *13.It goes without saying that promotions of the persons, who are ranking above in the merit, to the writ petitioners, be kept in tact and the cases of only those persons, who are ranking below in the merit list, be considered, afresh while making exercise for promotions alongwith the writ petitioners and other persons eligible for consideration. The entire exercise be done within two months from today."*

2. It is stated that the petitioners were not parties in the writ petition before the Writ Court. The learned counsel for the petitioners was not able to show what is the error apparent on the face of the record and also how the judgment made by this Court is illegal. However, the Review Petition is not in tune with the law laid down by this Court and the apex Court. The learned counsel for the petitioners is not able to carve out a case for review in terms of Section 114 read with Order 47 of the Code of Civil Procedure.

3. It is apt to record herein that this Court has already laid down the parameters in the judgments rendered in **Review Petition No. 56 of 2014**, titled as **Ranjeet Khanna versus Chiragu Deen and another**, decided on 8th August, 2014 and

Review Petition No. 65 of 2015, titled as **Union of India & others versus Paras Ram**, decided on 25th June, 2015.

4. The learned counsel for the petitioners further argued that the respondents have passed orders Annexures R1 and R5, in terms of the judgment under review. The petitioners are at liberty to seek appropriate remedy, if they are aggrieved by the follow up orders.

5. No case for review is made out. The Review petition is accordingly dismissed, alongwith pending applications, if any.

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

The Accounts Officer (Cash) ...Appellant(s).
Versus
Income Tax Officer (TDS) ...Respondent(s).

ITA No. 13 of 2012 a/w ITAs
No. 12, 26 and 27 of 2012
Decided on: 16.03.2016

Precedent- Every High Court must give due deference to the law laid down by other High Courts- Punjab & Haryana, High Court had passed the judgment on the issue raised before the High Court- hence, appeals are disposed of in view of judgment of the Punjab & Haryana, High Court. (Para-2 to 5)

Case referred:
Neon Laboratories Limited versus Medical Technologies Limited and others, (2016) 2 Supreme Court Cases 672

For the appellant(s): Mr. Vishal Mohan, Mr. Sushant Kaprate and Mr. Aditya Sood, Advocates.
For the respondent(s): Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

The following judgment of the Court was delivered:

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

Mr. Vishal Mohan, learned counsel for the appellant(s), stated at the Bar that the issue involved in all these four appeals is similar and the Punjab and Haryana High Court in a batch of ITAs, **ITA No. 261 of 2012,** titled as **The Commissioner of Income Tax (TDS), Chandigarh versus M/s Bharat Sanchar Nigam Limited,** being the lead case, decided on 13th February, 2013, has determined the issue. Further prayed that these appeals may also be determined accordingly. His statement is taken on record. He has also made available copy of the judgment made by the Punjab and Haryana High Court in ITA No. 261 of 2012 and other connected matters across the Board, made part of the file.

2. All these appeals are clubbed and are being determined by this common judgment.

3. We have gone through the judgment made by the Punjab and Haryana High Court in batch of appeals, lead case of which is ITA No. 261 of 2012 and perused all the appeals. We are also of the same view.

4. It is apt to record herein that the Apex Court in a latest judgment in the case titled as **Neon Laboratories Limited versus Medical Technologies Limited and others,** reported in **(2016) 2 Supreme Court Cases 672,** has directed that every High Court must give due deference to the law laid down by other High Courts. It is profitable to reproduce para 7 of the judgment herein:

> *"7. The primary argument of the Defendant-Appellant is that it had received registration for its trademark ROFOL in Class V on 14.9.2001 relating back to the date of its application viz. 19.10.1992. It contends that the circumstances as on the date of its application are relevant, and on that date, the Plaintiff-Respondents were not entities on the market. However, the Defendant-Appellant has conceded that it commenced user of the trademark ROFOL only from 16.10.2004 onwards. Furthermore, it is important to note that litigation was initiated by Plaintiff-Respondents, not Defendant-Appellant, even though the latter could have raised issue to Plaintiff-Respondents using a similar mark to the one for which it had filed an application for registration as early as in 1992. The Defendant- Appellant finally filed a Notice of Motion in the Bombay High Court as late as 14.12.2005, in which it was successful in being granted an injunction as recently as on 31.3.2012. We may reiterate that every High Court must give due deference to the enunciation of law made by another High Court even though it is free to charter a divergent direction. However, this elasticity in consideration is not available where the litigants are the same, since Sections 10 and 11 of the CPC would come into play. Unless restraint is displayed, judicial bedlam and curial consternation would inexorably erupt since an unsuccessful litigant in one State would rush to another State in the endeavour to obtain an inconsistent or contradictory order. Anarchy would be loosed on the Indian Court system. Since the Division Bench of the Bombay High Court is in seisin of the dispute, we refrain from saying anything more. The Plaintiff-Respondents filed an appeal against the Order dated 31.3.2012 and the Division Bench has, by its Order dated 30.4.2012, stayed its operation." (Emphasis added)*

5. In view of the above, all these appeals are disposed of in view of the judgment made by the Punjab and Haryana High Court in ITA No. 261 of 2012 and other connected matters. Pending applications, if any, are also disposed of accordingly.

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

RSA Nos. 01 & 41 of 2008
Reserved on: 15.3.2016.
Decided on: 17.3.2016.

1. **RSA No. 01 of 2008**
Bhag Mal
Versus
Ram Krishan
2.**RSA No. 41 of 2008**
Ram Krishan
Versus
Bhag Mal.

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration and permanent prohibitory injunction- he pleaded that defendant had sold the suit land to the plaintiff in the year 1974 for a consideration of Rs. 2,000/- orally- possession was delivered to the plaintiff- plaintiff raised construction of the house in the year 1978- defendant avoided the execution of the sale deed with a malafide intention- plaintiff applied for correction of revenue entries but his application was rejected on the ground that plaintiff is a resident of Punjab and land could not have been entered in his favour without permission from State Government- plaintiff filed a suit seeking declaration regarding his ownership- defendant denied the case of the plaintiff and stated that possession of two biswas of land was given to the plaintiff- suit was dismissed by the trial Court- appeals were also dismissed- held, that no tangible evidence was placed on record by the plaintiff that he was an agriculturist- plaintiff belonged to Schedule Caste but in a different state namely Punjab- cause of action had arisen in favour of the land in the year 1974 on the date of the sale but the suit was filed in the year 1994- suit was hopelessly barred by limitation- no oral sale could have been made in the year 1974- suit for declaration cannot be filed on the basis of adverse possession- parties knew that agreement was void from the very beginning- hence, defendant is not entitled for any relief- the Courts had rightly dismissed the suit and the counter-claim- appeal dismissed. (Para-25 to 42)

Cases referred:
Gurdwara Sahib vs. Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669
Kuju Collieries Ltd. vs. Jharkhan Mines Ltd. and others, AIR 1974 SC 1892, Kanuri Sivaramakrishnaiah vs. Vemuri Venkata narahari Rao (died), AIR 1960 AP 186
Joginder Singh vs. The Asstt. Registrar Co-operative Societies Jammu and others, AIR 1965 J & K 39
Inderjit Singh vrs. Sunder Singh, AIR 1969 Rajasthan 155,
The life Insurance Corporation of India madras vs. K. A. Madhava Rao, AIR 1972 Madras 112

For the appellant(s):	Mr. Ajay Sharma for appellant in RSA No. 1 of 2008. Mr. Ashok Kumar Sood, Advocate, for appellant in RSA No. 41 of 2008.
For the respondent(s):	Mr. Ashok Kumar Sood, Advocate for respondent in RSA No. 1 of 2008. Mr. Ajay Sharma, Advocate, for respondent in RSA No. 41 of 2008.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these appeals, the same were taken up together for hearing and are being disposed of by a common judgment to avoid repetition of evidence.

2. These regular second appeals are directed against the common judgment and decree of the learned Addl. District Judge (FTC), Shimla, H.P. dated 19.11.2007, passed in Civil Appeal No. 102-S/13 of 04/2000 titled as Bhag Mal vs. Ram Krishan and Civil Appeal No. 101-S/13 of 04/2000, titled as Ram Krishan vs. Bhag Mal.

2. Key facts, necessary for the adjudication of these regular second appeals are that the appellant-plaintiff in RSA No. 1 of 2008 has filed a suit against the respondent-defendant (hereinafter referred to as the defendant) in respect of land comprised in Kh. No. 1032/927/187, measuring 4 biswas and one storeyed house standing thereon, situated at village Chamiyana (Neri-Dhar), Shimla, H.P. (hereinafter referred to as the suit land) for declaration as well as permanent prohibitory injunction. According to the plaintiff, he is a blacksmith (Lohar) by caste and it comes under the definition of Scheduled Caste. The plaintiff had come to Shimla in the year 1958 for earning his livelihood as carpenter and worked at Chamiyana, Shimla. The defendant had sold suit land in favour of the plaintiff in the year 1974 for consideration of Rs. 2,000/- orally and handed over the possession to him. He constructed his house over the suit land in the year 1978. The defendant had received the entire amount of consideration from the plaintiff and assured him to execute sale deed and get it registered in favour of the plaintiff. Since the defendant was not owner at the time of oral sale, the sale deed could not be executed at that time. The defendant avoided the execution of the sale deed with his malifide intention. The defendant advised the plaintiff that he is non-Himachali and sale deed could not be executed in his favour. The plaintiff thereafter moved an application for correction of revenue entries before the A.C. IInd Grade, Shimla, which was rejected on 17.3.1994 on the ground that plaintiff is resident of Village Panwa Ropar (Punjab) and land could not be entered in his favour without the permission from the State Government. The defendant has also raised loan worth Rs. 90,000/- against the suit land. The defendant executed an agreement of sale in the year 1992 in favour of the plaintiff. The plaintiff is owner-in-possession of the suit land alongwith one storyed house and revenue entries in favour of defendant are illegal, wrong, void and inoperative and as such not binding on the plaintiff. The defendant has no right in the suit land and house existing thereon. The defendant could not create any kind of charge over the suit land after 1974. The revenue entries in respect of the suit land in favour of defendant may be declared illegal, void and inoperative against the right of the plaintiff. The plaintiff may be declared owner-in-possession of the suit land alongwith the house existing thereon.

3. The suit was contested by the defendant. According to him, the suit was not properly valued. It was barred by limitation. It was denied that any oral sale transaction took place of the suit land in the year 1974. It was pleaded that the suit land was purchased by the defendant from its previous owner in the year 1980 and on persuasion of the plaintiff, the defendant entered into an agreement of sale with the plaintiff in respect of the two biswas of land only for consideration of Rs. 800/-. The plaintiff was put in possession over two biswas of land which falls towards Sanjauli side. The remaining portion of the two biswas of land remained with the defendant till 1992 and the defendant started encroachment in the year 1993. The revenue authority has rightly rejected the application of the plaintiff regarding correction of the revenue entry. The plaintiff is non-agriculturist

within the meaning of Section 118 of the H.P. Land Reforms and Tenancy Act, 1971 (hereinafter referred to as the Act). It was averred that the agreement with the plaintiff in respect of two biswas of land be declared null and void as per the prayer made in the counter claim. The defendant is entitled to recover possession of entire suit land from the plaintiff. The oral agreement did not pass any title in favour of the plaintiff when consideration was Rs. 800/-. The oral agreement could not be enforced under the law. The defendant was ready and willing to refund Rs. 800/- if the plaintiff delivers the possession to the defendant.

4. The replication to the written statement was filed by the plaintiff. The defendant also filed counter claim in civil suit No. 342/1 of 95/94. The gist of the counter claim of the defendant is that in the year 1980, the plaintiff persuaded to sell two biswas of land out of the suit land in his favour. The defendant agreed to sell the same for consideration of Rs. 800/-. Thereafter, the plaintiff has constructed two room single storey over the portion of two biswas of land. The sale deed could not be executed in favour of the plaintiff because of bar under Section 118 of the Act. The plaintiff, in good faith, on 20.9.1992 got signed one document. The plaintiff filed written statement to the counter claim wherein preliminary objections were taken. On merits, it is stated that the defendant was owner of the suit land in the year 1974 and had sold the same in favour of the plaintiff for consideration of Rs. 2000/- with possession. It is further alleged that the defendant with malafide intention had written two biswas instead of 4 biswas in agreement dated 20.9.1992. It was denied that the plaintiff was debarred by Section 118 of the Act and by Town and Country Planning Act to purchase the land in the State of Himachal Pradesh. It was denied that agreement of sale was entered between the parties in the year 1980. It was further averred that oral agreement was translated into writing on 20.9.1992 and now defendant was barred for filing counter claim by Section 53-A of the Transfer of Property Act.

5. The replication was filed. The learned Sub Judge (II), Shimla, H.P., framed the issues on 26.12.1995 and suit of the plaintiff as well as counter claim of the defendant were dismissed on 14.1.2000. Feeling aggrieved, the plaintiff and defendant preferred appeals before the learned Addl. District Judge (FTC), Shimla. The learned Addl. District Judge (FTC), Shimla, dismissed the appeals vide judgment dated 19.11.2007. Hence, these regular second appeals.

6. The Regular Second Appeal No. 1 of 2008 was admitted on the following substantial questions of law on 27.2.2008:

> "1. Whether the learned courts below erred in appreciating the provisions of law applicable, pleadings of the parties and evidence adduced by them in its right perspective, thereby vitiating the impugned judgments and decrees?
>
> 2. Whether the findings as returned by courts below in the impugned judgments and decrees stand vitiated owing to misreading and mis-appreciation of provision of sections 115 and 118 of the H.P. Tenancy and Land Reforms Act?
>
> 3. Whether findings returned by the learned courts below in impugned judgments and decrees stand vitiated owing to misread and mis-appreciation of oral and documentary evidence with special reference to the statement of defendant and document Ext. PW-2/A dated 20.9.1992?"

7. RSA No. 41 of 2008 was admitted on 29.2.2008, though without framing substantial questions of law and thus the same would be deemed to have been admitted on all the substantial questions of law framed at pages 14 & 15 of the paper book.

8. Mr. Ajay Sharma, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the Courts below have not properly appreciated the provisions of law applicable to the pleadings of the parties. He also contended that Sections 115 and 118 of the H.P. Tenancy and Land Reforms Act, have not been properly interpreted. He lastly contended that the document Ext. PW-2/A dated 20.9.1992 has also been misread. On the other hand, Mr. Ashok Sood, Advocate, has vehemently argued that the agreement of sale Ext. PW-2/A was illegal. The plaintiff has not become owner of the suit land by way of adverse possession. He should have filed suit for specific performance. He also contended that the suit land was properly identified and there was no need for preparation of separate tatima.

9. Since all the substantial questions of law are interconnected, all are taken up together for discussion in order to avoid repetition of evidence.

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

11. PW-1 Sucha Singh deposed that plaintiff belongs to village Samudri Distt. Ropar, Punjab. He is Scheduled Caste. He is residing at Shimla for the last 35-40 years. In his cross-examination, he deposed that wife and children of plaintiff use to reside earlier at Samudri village and now at Shimla.

12. PW-2 Bhag Mal deposed that he is Lohar (Scheduled Caste). He belongs to village Samudri Distt. Ropar, Punjab. He is at Shimla since 1958 and is doing work of blacksmith at Chamiyana. He was tenant of Balak Ram at Chamiyana. In the year 1974, he purchased 4 biswas of land from the defendant. He paid Rs. 1000/- and has taken possession from the defendant. He levelled the land and constructed house over the same. Rs. 1000/- was paid to the defendant in the year 1977. He has constructed 7 rooms in the year 1978. He has inducted tenant at the rate of Rs. 250/- per month. He requested defendant to execute the sale deed. Thereafter, he requested the defendant to give something in writing. Ext. PW-2/A was entered into between the parties. He also deposed that no one has objected when he raised construction. He also filed application for correction of the revenue entries. The defendant has also raised loan over the suit land worth Rs. 90,000/-. His possession over the suit land was open and continuous since 1974. He should be declared owner-in-possession over the suit land. In his cross-examination, he admitted that he has not issued any notice to defendant to execute the sale deed. He orally requested him but could not tell date, month and year. He also could not tell the name of person in whose presence plaintiff was requested to execute the sale deed. He has not got registered document Ext. PW-2/A. He also admitted that Kanungo has recorded his statement Ext. D-1 on 18.6.1993. He mentioned in the application for correction of revenue entry that he has purchased land in the year 1977. Ext. PW-2/A was written at the house of Ram Krishan and Tulsi Ram and Krishan Datt were also present. He never visited the office of Tehsildar for registration of the sale deed. He has no other agricultural land in Himachal except this land. He admitted that non-agriculturist could not purchase land in the State of H.P. He has never resided in any other village of Himachal. He could not say that who had prepared documents Ext. PW-2/C to PW-2/J and Ext. PW-2/H-1 to Ext. PW-2/H-7. He denied that defendant has sold only two biswas of land. He denied the suggestion that he has made encroachment over the remaining area.

13. PW-3 Ram Rattan deposed that the plaintiff has constructed his house at Neri-Dhar about 20-24 years ago. He belongs to Scheduled Caste. In his cross-examination, he deposed that he had given statement as instructed by the plaintiff.

14. PW-4 Tulsi Ram deposed that he remained Pradhan of Gram Panchayat Chamiyana from 1978 to 1985. He knew the parties to the suit. The plaintiff belongs to Scheduled Caste and is residing at Chamiyana for the last 30 years. He has constructed his house. The plaintiff is in possession of his house and workshop. He had no knowledge about coming of plaintiff from Punjab to Himachal. He had no knowledge as to how much land was purchased by the plaintiff from the defendant.

15. PW-5 Prabhu Ram testified that he knew the parties to the suit and plaintiff has constructed his house of 7 rooms in the year 1970-78.

16. PW-6 Roshan Lal testified that he has seen the possession of the plaintiff over the suit land. In his cross-examination, he testified that he could not say that who has put the plaintiff in possession.

17. PW-7 Sukh Dev testified that the defendant has seen them while raising construction but he has not objected. The D.C. Shimla has initiated proceedings against his father and copy of order is Ext. PW-7/A. In his cross-examination, he stated that they came to Himachal from Punjab in the year 1973. They have purchased the suit land orally in the year 1974 and one document was prepared in this regard in the year 1992.

18. DW-1 Hari Nand deposed that he had sold 4 biswas of land in favour of Ram Krishan. Copy of sale deed is Ext. DW-1/A. In his cross-examination, he deposed that he sold this land 25-26 years ago. He admitted that now the possession of the suit land is with Bhag Mal.

19. DW-2 Mohinder Singh did not produce the requisitioned record.

20. DW-3 Shiv Singh deposed that khasra girdawari Mark-A-1 to A-4 had not been prepared by him.

21. DW-4 Amar Chand deposed that electricity meter No. H-266-D and H-153-D are in the name of Sukh Dev.

22. DW-5 Krishan Datt deposed that he knew the parties to the suit. An agreement to sell has taken place between the parties to the suit vide Ext. PW-2/A. He signed the same at circle “A”. He knew nothing more about this agreement.

23. DW-6 Balbir Singh deposed that he has visited the spot and has prepared report Ext. DW-6/A.

24. The defendant has appeared as DW-7. He testified that he has purchased 4 biswas of land in the year 1979 vide Ext. DW-1/A. He has tendered in evidence jamabandi Ext. DW-7/A to Ext. DW-7/F and Khasra girdawari Ext. DW-7/G to Ext. DW-7/J. He took the possession of the suit land. He orally sold two biswas of land to the plaintiff in the year 1980 for consideration of Rs. 800/- with possession. He signed the writing in the year 1992 without going through the contents of the same. He testified that now the possession has been taken by the plaintiff of the entire suit land. The plaintiff has no right to purchase land being non-agriculturist.

25. The defendant has come to Himachal Pradesh from Distt. Ropar, Punjab. The case of the plaintiff is that he being scheduled caste could purchase land in the State of Himachal Pradesh. Mr. Ashok Kumar Sood, Advocate, has vehemently argued that the plaintiff being non-agriculturist could not purchase land in view of bar imposed under Section 118 of the H.P. Tenancy and Land Reforms Act, 1972.

26. Section 2(1) of the Act defines "agricultural labourer" as a person whose principal means of livelihood is manual labour on land. Section 2(8) of the Act defines "landless person" to be a person who, holding no land for agricultural purposes, whether as an owner, or a tenant, earns his livelihood principally by manual labour on land and intends to take the profession of agriculture and is capable of cultivating the land personally. Section 118(2) of the Act provides that nothing in sub-section (1) shall be deemed to prohibit the transfer of land by any person in favour of.-

"(a) a landless labourer, or

(b) a landless person belonging to a scheduled caste or a scheduled tribe; or

(c) a village artisan; or

(d) a land less person carrying on an allied pursuit; or....."

27. Section 122 of the Act empowers the State Government to frame rules for carrying out the purposes of this Chapter. The State Government has framed the Rules called the H.P. Tenancy and Land Reforms Rules, 1975. Rule 38 provides that where transfer of land by way of sale, gift, exchange, lease or mortgage with possession, of which registration is not compulsory under the Registration Act, 1908 (16 of 1908) in favour of a person, who is not an agriculturist as defined in the Act or comes within the exemptions given in clauses (a) to (g) of sub-section (2) of section 118, such a person intending to secure a transfer of land in his favour shall swear an affidavit before the Revenue Officer, attesting the mutation, to the effect that he is eligible to secure transfer of land in his favour being an agriculturist. There is no tangible evidence placed on record by the plaintiff that he was an agriculturist to come within the ambit of rule 38 of the H.P. Tenancy and Land Reforms Rules, 1975. The Revenue Officer is required to satisfy himself about the contents of an affidavit by the aforementioned person and shall attest a mutation only if that person is found to be an eligible person.

28. It appears from the record that a complaint was made against the plaintiff about the illegal transaction of land in violation of Section 118 of the Act. It was decided by the Collector on 28.11.1995 vide Ext. PW-7/A. The learned Collector has concluded that the plaintiff belongs to Lohar community and earns his livelihood by doing the work of Blacksmith in the said village, the proceedings were dropped. However, the fact of the matter is that in order to purchase the suit land, he had to sworn in an affidavit before the competent authority under Rule 38 of the H.P. Tenancy and Land Reforms Rules, 1975. Moreover, there has to be conclusive proof that the plaintiff was landless labourer, though he belonged to Lohar community, but not of Himachal Pradesh. The plaintiff in his statement has categorically admitted that the non-agriculturist could not purchase land in the State of Himachal Pradesh and he has never resided in any other village of the Himachal Pradesh except the suit land. He has no other agriculture land in Himachal except the suit land. The Collector has not carefully gone through Section 118(2) (a) to (i) of the Act as well as Rule 38 of the Rules framed thereunder. The plaintiff was also required to prove that he was landless scheduled caste.

29. The case of the plaintiff is that the land was sold to him by the defendant on the basis of oral agreement. The consideration was Rs. 2000/-. He has not filed suit for specific performance of agreement Ext. PW-2/A. The parties could not take advantage of Section 53-A of the Transfer of property Act, 1882 for the simple reason that the sale was not in writing. The case of the plaintiff, precisely, is that the cause of action has arisen in his favour in the year 1974. However, the fact of the matter is that the suit was filed for declaration and permanent prohibitory injunction only in the year 1994. Thus, it was

barred by limitation. The alleged sale deed was in contravention of Section 118 of the Act. Even suit for specific performance could not be filed for the simple reason that the contract which is illegal cannot be enforced either by granting relief of specific performance or by awarding damages for its breach. The Court should not give effect to an agreement which is contrary to law.

30. The case of the plaintiff is also that he has purchased the land somewhere in the year 1974. However, the fact of the matter is that the defendant has purchased the suit land from DW-1 Hari Nand only in the year 1979. Since the land has been purchased by the defendant in the year 1979, there could not be oral sale deed in the year 1974 with the plaintiff. The case of the defendant is that he has only sold 2 biswas of land and handed over the possession to the plaintiff and thereafter the plaintiff has started encroachment upon remaining 2 biswas of land in the year 1993-94. The plaintiff's case is also that he has handed over the possession of two biswas of suit land in the year 1980. In view of this, the counter claim was not maintainable in the year 1994 in the form of relief of possession. Moreover, the defendant has not proved as to when the encroachment was made by the plaintiff.

31. The defendant has claimed possession of the suit land but he has not led any evidence to identify the same. The land could only be identified by preparing tatima and not by merely general directions.

32. Ext. PW-2/L is copy of jamabandi for the year 1983-84. The land was owned by Hari Nand (DW-1). It was shown in possession of Ram Krishan (defendant) as a purchaser. In the jamabandi for the year 1978-79 Ext. DW-7/C, in the remarks column, a note has been appended with red ink that Sh. Hari Nand has sold four biswas of land (out of the total land) to Ram Krishan (defendant) and mutation No. 412 has been attested in the name of the purchaser. The defendant in fact has also raised loan of Rs. 90,000/- from the LIC and mortgaged the land in favour of the LIC.

33. Now, as far as agreement Ext. PW-2/A is concerned, the defendant while appearing as DW-7 has admitted his signatures on Ext. PW-2/A. He has admitted that he has signed the agreement in the presence of witnesses. He has also admitted that on the entire suit land, the plaintiff has raised construction. Thus, it cannot be believed that the defendant was misled by the plaintiff to enter into agreement vide Ext. PW-2/A.

34. The plaintiff has also taken a plea of adverse possession. It is settled law by now that suit for possession cannot be filed by claiming adverse possession. Their Lordships of the Hon'ble Supreme Court in ***Gurdwara Sahib*** vs. ***Gram Panchayat Village Sirthala and another***, reported in ***(2014) 1 SCC 669*** have held as under:

> "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 use this adverse possession as a shield/defence."

35. Mr. Ashok Kumar Sood, Advocate has also placed strong reliance upon Section 65 of the Contract Act, 1882 to claim possession. His client cannot be permitted to take advantage since he knew from the very beginning that the agreement was illegal.

36. Their lordships of the Hon'ble Supreme Court in the case of ***Kuju Collieries Ltd. vs. Jharkhan Mines Ltd. and others,*** reported in ***AIR 1974 SC 1892,*** have held that

where a mining lease in favour of the plaintiff was contrary to the provisions of the Mines and Minerals (Regulation and Development) Act, 1948 and the Mineral Concession Rules, 1949 and void ab initio and there was proof to show that the plaintiff could not have been in ignorance of the legal position, it was held that this was not a case to which Section 65 applied and the plaintiff was not entitled to claim refund of the sum paid in pursuance of the lease, under that Section. Their lordships have further held that where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. It has been held as follows:

> "6. We are of the view that s. 65 of the Contract Act cannot help the plaintiff on the facts and circumstances of this case. Section 65. reads as follows :
>
> "When an agreement is discovered to Be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it to the person from whom he received it".
>
> The section makes a distinction between an agreement and a contract. According to s. 2 of the Contract Act an agreement which is enforceable by law is a contract and an agreement which is not enforceable by law is said to be void. Therefore, when the earlier part of the section speaks of an agreement being discovered to be void it means that the agreement is not enforceable and is, therefore, not a contract. It means that it was void. It may- be that the parties or one of the parties to the agreement may not have, when they entered into the agreement, known that the agreement was in law not enforceable. They might have come to know later that the agreement was not enforceable. The second part of the section refers to a contract becoming void. That refers to a case where an agreement which was originally enforceable and was, therefore, a contract,. becomes void due to subsequent happenings. In both these cases any person who has received any advantage under such agreement or contract is bound to restore such advantage, or to make compensation for it to the person from whom he received it. But where even at the time when the agreement is entered into both the parties knew that it was not lawful and, therefore, void, there was no contract but only an agreement and it is not a case where it is discovered to be void subsequently. Nor is it a case Of the contract becoming void due to subsequent happenings. Therefore, s. 65 of the Contract Act did not apply.
>
> 12. The further question is whether it could be said that this contract was either discovered to be void or became void. The facts enumerated above would show that the contract was void at its inception and this is not a case where it became void subsequently. Nor could it be said that the agreement was discovered to be void after it was entered into. As pointed out by the Trial Court the plaintiff was already in the business of mining and had the advantage of consulting its lawyers and solicitors. So there was no occasion for the plaintiff have been under any kind of ignorance of law under the Act and the Rules. Clearly, therefore this is not a case to which s. 65 of the Contract Act applies. Nor is it a case to which s. 70 or s. 72 of the Contract Act applies. The payment of the money was not made lawfully, nor was it done under a mistake or under coercion."

37. The Division Bench of the Andhra Pradesh High Court in the case of ***Kanuri Sivaramakrishnaiah vs. Vemuri Venkata narahari Rao (died),*** reported in ***AIR 1960 AP 186,*** has held that in order to invoke Section 65, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by the parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement i.e. without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal. It has been held as follows:

> "14. It is manifest that in order to invoke this section, the invalidity of the contract or agreement should be discovered subsequent to the making of it. This cannot be taken advantage of by parties who knew from the beginning the illegality thereof. It only applies to a case where one of the parties enters into an agreement under the belief that it was a legal agreement, i.e., without the knowledge that the agreement is forbidden by law or opposed to public policy and as such illegal.
>
> The effect of Section 65 is that, in such a situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante.
>
> 18 Coming now to Section 65 of the Contract Act, we feel that it also does not recognise the distinction between a contract being illegal by reason of its being opposed to public policy or morality or a contract void for other reasons. The section is couched in wide language and talks of void contracts in general. There does not seem to be any ground for differentiating one contract from the Other in regard to the applicability of that section.
>
> The only principle recognised is that agreements or contracts, which are forbidden by law, could not be enforced as Courts will not extend their aid to persons attempting to defeat the object o the Legislature by trying to carry out illegal contracts.
>
> At the same time, Courts will not render assistance to persons who induce innocent parties to enter into contracts of that nature by playing fraud on them to retain the benefit which they obtained by their wrong.
>
> 20. We are forfeited in our view regarding this differentiation by some of the decided cases. In Hughes v. Liverpool Victoria Legal Friendly Society, (1916) 2 KB 482, an agent of the defendant Insurance Company induced the plaintiff to take up policies which were effected on the lives of third parties by another person and which policies were not kept alive by reason of the insurer ceasing to pay the premiums, on the representation that everything would be all right.
>
> When it was discovered that the policies were not effectual and illegal for want of insurable interest, the plaintiff sued for recovery of the money paid in premium on the lives of third persons alleging that it was money obtained by fraud or alternatively paid on consideration that failed. Scnitton, J., dismissed the suit in the view that the plaintiff could not recover even if the premiums had been obtained by fraudulent misrepresentation as the Assurance Companies Act 1909, had prohibited under penalty the issue of such policies."

> This was reversed by the Court of Appeal on the ground that the plaintiff's right was not affected by the Assurance Companies Act, which imposed a penalty upon a Friendly Society issuing such a policy as the parties were not in pari delicto. We may here mention that this illustrates the principle that even agreements, the performance of which are attended with penal consequences, are not outside the scope of Section 65 of the Contract Act."

38. In the instant case, it has come in the statements of plaintiff as well as defendant that they knew that agreement could not be entered into in view of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 and despite that agreement was entered into. Thus, it cannot be said that the illegality was discovered by one of the parties subsequently.

39. In the case of ***Joginder Singh vs. The Asstt. Registrar Co-operative Societies Jammu and others,*** reported in ***AIR 1965 J & K 39,*** the Division Bench of the J & K High Court has held that Section 65 does not apply to a case where parties know it to be void at the time of entering into it. It has been held as under:

> "22. Our attention was drawn to S. 65 of the Contract Act which reads :-
>
> "When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for . if, to the person from whom he received it."
>
> It was argued and rightly so by the learned counsel for the respondent that that section has no application to the faces of this case because when the parties entered into this contract it was a contract which they knew to be void to start with. This section deals with two matters : an agreement which is discovered to be void and a contract which becomes void. The first matter is concerned with an agreement which never amounted to a contract because it was void ab initio the fact of its being void being discovered at a later stage. The word 'discovered' in the first part of the section is used in contradistinction to the word 'becomes' in the second part. The word 'discovered' connotes the pre-existence of that which is discovered. The second matter deals with a contract (i. e., with an agreement enforceable at law) which was good at its inception and which becomes void at some later stage by reason of some supervening circumstance. (See Sanjiva Row's Indian Contract Act, Vol.1, 1959 edn page 882). The following authorities state the law on the subject : AIR 1959 S. C. 490 ; AIR 1959 All. 681 ; AIR Kerala 239 ; AIR 1959 J & K 10 ; AIR 1960 All. 72."

40. The learned Single Judge of Rajasthan High Court in the case of ***Inderjit Singh vrs. Sunder Singh,*** reported in ***AIR 1969 Rajasthan 155,*** has held that the parties knew that even though the permit for plying the bus was in the name of the defendant and they were not going to get it transferred in their names, they effected its transfer to themselves in proportion to their respective shares, along with the transfer of the ownership of the vehicle covered by the permit in the same proportion to their respective shares and hence, the agreement could not be said to have been discovered to be void after its execution, and that it was void to the knowledge of the parties *ab initio*. Besides the parties were obviously in *pari lelicto* and they cannot claim restitution for that reason also. It has been held as follows:

> "24. As has been shown, the transaction was not honest from the inception because the parties knew that even though the permit for plying the bus was in the name of the defendant and they were not going to get it transferred in

> their names, they effected its transfer to themselves in proportion to their respective shares, along with the transfer of the ownership of the vehicle covered by the permit in the same proportion, and also entered into an arrangement by which each of them acquired the right to use the vehicle in the manner authorised by the permit for their joint benefit even though such a right vested exclusively in Sunder Singh. I would therefore unhesitatingly hold that the agreement cannot be said to have been discovered to be void after its execution, and that it was void to the knowledge of the parties ab initio. The plaintiff is not therefore entitled to the benefit of Section 65 of the Contract Act.
>
> Besides the parties were obviously in *pari lelicto* and they cannot claim restitution for that reason also. There is no question of *locus poenitentiae* because it has been admitted in the plaint that the parties implemented the agreement and actually plied the vehicle covered by the permit for some time and it was only when the defendant became recalcitrant that a dispute arose between them resulting in the present litigation. The plaintiff has also not pleaded any other circumstance like oppression or fraud land he has not established his right or title to the money paid by him without relying on the illegal agreement (Ex. 1). The general rule that money paid or property transferred under an illegal agreement cannot be recovered, would therefore apply. The claim for restitution was therefore not enforceable and should have been dismissed. In taking a contrary view and in giving the benefit of Section 65 of the Contract Act to the plaintiff the learned Judge of the lower appellate court committed a serious error of law and that error has to be corrected."

41. The learned Single Judge of the Madras High Court in the case of ***The life Insurance Corporation of India madras vs. K. A. Madhava Rao,*** reported in ***AIR 1972 Madras 112,*** has held that a person procuring insurance business before he is issued licence to act as an insurance agent is not entitled to commission on the business so procured even if he has been promised such commission on such business by any officer of the Life Insurance Corporation. The learned Single Judge has further held that Section 65 states that when an agreement is discovered to be void, or when a contracts becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. It is well established that the said Section 65 cannot be invoked when the agreement or contract was known to the parties to be void *ab initio* and that it applies to cases in which the contract is discovered to be void or becomes void after the agreement had been entered into. It has been held as follows:

> "10. The learned counsel for the respondent then contends that even if the agreement to pay commission is held to be void, the respondent is entitled to the benefit of Section 65 of the Contract Act and therefore, entitled to commission for the work done by him to the petitioner. Section 65 states that when an agreement is discovered to be void, or when a contracts becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. It is well established that the said Section 65 cannot be invoked when the agreement or contract was known to the parties to be void ab initio and that it applies to cases in which the contract is discovered to be void or becomes void after the agreement had been entered into. In this case both the parties were aware that the contract

is prohibited by law or will defeat the statutory provisions of the Insurance Act. I therefore hold that Section 65 of the Contract Act cannot be invoked in this case. Taking all the facts and circumstances of the case, I hold that the decisions of the courts below are erroneous. They are therefore set aside and the respondent's suit will stand dismissed. There will, however, be no order as to costs."

42. The Courts below have correctly appreciated all the documents including Ext. PW-2/A dated 20.9.1992 and the oral evidence led by the parties. The Courts below have also correctly interpreted Sections 115 and 118 of the Act. The plaintiff, being non-agriculturist, without taking recourse to the procedure laid down under the Act and rules framed thereunder, could not purchase the suit land. The substantial questions of law are answered accordingly.

43. Consequently, there is no merit in these appeals and the same are dismissed, so also the pending application(s), if any.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

H.P. State Electricity Board Ltd. and another ...Appellants.

Versus

Baini Prashad Sharma ...Respondent.

LPA No. 499 of 2011
Decided on: 17.03.2016

Constitution of India, 1950- Article 226- Original application does not disclose that any role was played by the petitioner while fixing his pay- no such averment was made in appeal - original application allowed and respondents restrained from effecting recovery from the petitioner. (Para-3 to 6)

Cases referred:

H.P. State Electricity Board Ltd. Versus K.C. Aggarwal, I L R 2015 (II) HP 844 (D.B.)
State of Punjab and others etc. versus Rafiq Masih (White Washer) etc., reported in 2015 AIR SCW 501

For the appellants: Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate.
For the respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

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

Challenge in this appeal is to the judgment and order, dated 13th December, 2010, made by the learned Single Judge/Writ Court in CWP (T) No. 8691 of 2008, titled as Baini Prashad Sharma versus Himachal Pradesh State Electricity Board and another, whereby the Original Application filed by the petitioner came to be allowed (for short "the impugned judgment").

2. We have gone through the record read with the impugned judgment and are of the considered view that the impugned judgment is bereft of reasons, merits to be set aside.

3. At this stage, Mr. Suneet Goel, learned counsel for the petitioner-respondent herein stated at the Bar that this Court has already decided a case involving similar issue being **LPA No. 47 of 2012,** titled as **H.P. State Electricity Board Ltd. Versus K.C. Aggarwal,** decided on 16th April, 2015. His statement is taken on record. He has also produced copy of the said judgment across the Board, made part of the file.

4. A perusal of the Original Application as well as the pleadings does disclose that it is not the case of the writ respondents-appellants that any role was played by the petitioner-respondent herein while fixing his pay. Moreover, no such averment is contained in the instant appeal.

5. This Court in LPA No. 47 of 2012 (supra), while relying upon the judgment rendered by the Apex Court in **State of Punjab and others etc. versus Rafiq Masih (White Washer) etc.,** reported in **2015 AIR SCW 501,** has quashed the recovery order. It is profitable to reproduce para 5 of the judgment in LPA No. 47 of 2012 herein:

> *"5. Admittedly, there is no averment contained in the appeal or in the reply filed in the writ petition that the fixation of pay was made at the behest of the writ petitioner or any role was attributed to him. The entire exercise was made by the respondent-Board at its own....."*

6. Having said so, the Original Application is allowed, Annexure A-1 to the Original Application is quashed and the appellants-writ respondents are restrained from effecting recovery from the petitioner.

7. The appeal is disposed of accordingly alongwith all pending applications.

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

Rahul S/o Sh. J.K. Chandel ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 94 of 2016
Order Reserved on 10.3.2016
Date of Order 17.3.2016

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for commission of offence punishable under Section 8 of Prevention of Corruption Act 1988 along with 120 B of IPC – petitioner pleaded that he is innocent and has been falsely implicated- he will be abide by all the terms and conditions imposed by Court – held, that the fact that whether petitioner is innocent or not cannot be decided at the stage of granting bail but will be decided after the conclusion of the trial- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being

tampered with and the larger interest of the public and State- allegations against the petitioner are heinous and grave- investigation is under progress and it will not be proper to release the petitioner on bail- petitioner will induce and threaten the prosecution witnesses – petition dismissed. (Para-6 to 8)

Cases referred:

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

The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the petitioner: Mr. Pankaj Sharma, Advocate.
For the Non-petitioner: Mr. Rajiv Jiwan, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Code of Criminal Procedure for grant of bail relating to RC No. 2 of 2016 dated 28.1.2016 registered under Section 8 of Prevention of Corruption Act 1988 along with 120 B of IPC in Police Station CBI Shimla H.P.

2. It is pleaded that case under Section 8 of the Prevention of Corruption Act 1988 and Section 120B of Indian Penal Code registered at Police Station CBI Shimla H.P. It is further pleaded that petitioner is innocent person and did not commit any criminal offence and petitioner has been falsely implicated in the present case. It is further pleaded that petitioner has been arrested by the police on 28.1.2016 and petitioner is in judicial custody. It is further pleaded that petitioner was produced on 29.1.2016 and was remanded to police custody till 1.2.2016. It is further pleaded that petitioner moved bail application No. 4-S/22 of 2016 and the same was dismissed as withdrawn. It is further pleaded that investigation is almost complete and petitioner is no longer required for investigation and no fruitful purpose will be served by keeping the petitioner in judicial custody. It is further pleaded that petitioner will abide by all the terms and conditions imposed by Court. It is further pleaded that petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer Prayer for acceptance of bail application is sought.

3. Per contra response filed on behalf of the non-petitioner pleaded therein that Sh. Anil Kumar Chaudhari S/o Sh. Anirudh Singh complainant filed his online application for issuance of passport from Passport Office Shimla H.P. It is further pleaded that Sh. Anil Kumar Chaudhari was given appointment to appear before the Passport authorities on 27.1.2016 at 10.00 hours. It is further pleaded that when Sh. Anil Kumar Chaudhari appeared before the Passport Officer along with his original documents including his old Passport No. F3751688 which was valid up to 8.6.2015 then Passport Officer verbally denied to accept the application and told complainant that his old passport is in damaged condition and complainant was asked to go out of passport office. It is further pleaded that when Sh. Anil Kumar Chaudhari came out from Passport Office Panchaghati Shimla then complainant was contacted by co-accused who promised complainant to get his work done from the Passport Office against the consideration of bribe amount of Rs. 15,000/- (Fifteen thousand). It is further pleaded that thereafter Sh. Anil Kumar Chaudhari on 27.1.2016

filed a complaint in the CBI Branch Shimla H.P. alleging demand of bribe. It is further pleaded that investigation of the case was entrusted to Deputy Superintendent of Police CBI Branch Shimla H.P. It is further pleaded that bribe amount of Rs. 15,000/- (Fifteen thousand) i.e. 15 government currency notes of the denomination of Rs. 1000/- (One thousand) each were treated with phenolphthalein power and distinctive numbers of the above currency notes were mentioned in the pre-trap memo and the same were kept in the pocket of the complainant to be handed over to co-accused. It is further pleaded that on completion of pre-trap proceedings CBI proceeded to Passport Office Panthaghati Shimla H.P. It is further pleaded that co-accused Rahul was caught red handed while demanding and accepting Rs. 15,000/- (Fifteen thousand) from the complainant in the presence of witnesses. It is further pleaded that hand wash of co-accused Rahul were took in the colorless solution of sodium carbonate which was turned into pink colour proving the acceptance of bribe. It is further pleaded that co-accused Rahul accepted his guilt and disclosed that he is an employee of Sh. Shyam Walia co-accused and used to contact the passport official to get favours against the consideration of bribe. It is further pleaded that co-accused Sh. Shyam Walia was called and he also confessed his guilt for getting passport prepared from the passport officials. It is further pleaded that both accused persons were arrested on 28.1.2016 and were produced before Court of learned Sessions Judge Shimla H.P. exercising powers of Special Judge CBI Shimla H.P. It is further pleaded that on the request of CBI learned Court below was pleased to grant three days police remand and on completion of police remand both the accused persons were produced before Court on 1.2.2016 and learned Court below was pleased to grant judicial custody to both the accused persons. It is further pleaded that on 1.2.2016 both the accused persons moved bail application before learned court below and the same was dismissed as withdrawn. It is further pleaded that co-accused Rahul was caught red handed while demanding and accepting bribe of Rs. 15,000/- (Fifteen thousand) from the complainant at the behest of his employer co-accused and passport officers. It is further pleaded that case is in the investigation stage and it is further pleaded that important documents of passport office are yet to be taken and examine. It is further pleaded that accused persons are having influence in the passport office and there is every likelihood that petitioner would influence the officials in order to distort the evidence. It is further pleaded that till the completion of investigation petitioner be not released on bail.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Advocate appearing on behalf of the non-petitioner and also perused the entire record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section 439 Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of petitioner that petitioner is in judicial custody and not required for investigation purpose and on this ground bail application be allowed is rejected for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In the present case allegations against the petitioner are very heinous and grave in nature qua taking of bribe of Rs. 15,000/- (Fifteen thousand). Case has been registered against the petitioner under Prevention of Corruption Act 1988. Allegations against the petitioner are that petitioner demanded Rs. 15,000/- (Fifteen thousand) as bribe for preparation of passport of the complainant. Passport authority is public authority. Court is of the opinion that offence under Prevention of Corruption Act is an offence against public at large. In the present case investigation is still under progress and report under Section 173 Cr.P.C. not filed before the competent Court of law. Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on bail at this stage till the investigation is not completed and till investigation report under Section 173 Cr.P.C. is not filed before the competent Court of law. Court is also of the opinion that investigation will be adversely affected if petitioner is released on bail at this stage. Court is also of the opinion that interest of State and general public will also be adversely affected if petitioner is released on bail at this stage.

8. Submission of learned Advocate appearing on behalf of non-petitioner CBI that investigation is in the initial state and if the petitioner is released on bail at this stage then investigation will be adversely affected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witnesses. Court is of the opinion that it is not expedient in the ends of justice to release petitioner on bail till the investigation is completed and till the investigation report is not filed under Section 173 Cr.P.C. before competent court of law. Point No.1 is answered in negative.

Point No. 2 (Final Order):

9. In view of findings upon point No.1 bail application filed by petitioner is dismissed. However petitioner will be at liberty to file subsequent bail application after completion of investigation and after filing of investigation report under Section 173 Cr.P.C. before the competent court of law. Observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. Bail application is disposed of. All pending application(s) if any also disposed of.

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

Shridhar Sharma .....Petitioner.

Versus

Mukesh Thakur and others .....Respondents

Review Petition No. 23 of 2016.
Date of decision: 17th March, 2016.

Code of Civil Procedure, 1908- Section 114- Review petition has been filed seeking review of the judgment passed by the Court- no error apparent on the face of the record was shown – review petition is not in accordance with law laid down by Hon'ble High Court and the Apex Court –held, that no case for review is made out- hence, review is dismissed.

(Para-3 to 5)

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

For the petitioner:	Mr. Prem Parkash Chauhan, Advocate.
For the respondents:	Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General, for respondent-State.

The following judgment of the Court was delivered:

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

CMP(M) No.126/2016.

This application has been filed for condonation of delay in filing the present Review Petition. We have gone through the application. We are of the considered view that the applicant has carved out sufficient cause to condone the delay. Accordingly, the application is granted and the delay in filing the present Review petition is condoned. The application is disposed of.

Review Petition No. 23 of 2016.

2. The Review petition is taken for disposal today itself.

3. Petitioner, by the medium of this Review Petition, is seeking review of the judgment dated 5.11.2015 made by this Court in LPA No. 198 of 2014, titled Shridhar Sharma vs. Mukesh Thakur and others. The learned counsel for the petitioner was not able to show what is the error apparent on the face of the record and also how the judgment made by this Court is illegal. However, the Review Petition is not in tune with the law laid down by this Court and the apex Court. The learned counsel for the petitioner is not able to carve out a case for review in terms of Section 114 read with Order 47 of the Code of Civil Procedure.

4. It is apt to record herein that this Court has already laid down the parameters in the judgments rendered in **Review Petition No. 56 of 2014**, titled as **Ranjeet Khanna versus Chiragu Deen and another**, decided on 8th August, 2014 and **Review Petition No. 65 of 2015**, titled as **Union of India & others versus Paras Ram**, decided on 25th June, 2015.

5. No case for review is made out. The Review petition is accordingly dismissed, alongwith pending applications, if any.

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

Shyam Walia S/o late Sh. Karam Chand ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 93 of 2016
Order Reserved on 10.3.2016
Date of Order 17.3.2016

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for commission of offence punishable under Section 8 of Prevention of Corruption Act 1988 – petitioner pleaded that he has been falsely implicated- he is in judicial custody and no recovery is to be effected from him- he will join the investigation of the case whenever and wherever required to do so– held, that the fact that whether petitioner is innocent or not cannot be decided at the stage of granting bail but will be decided after the conclusion of the trial- while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- allegations against the petitioner are serious- investigation has not been completed and the petitioner will influence the prosecution witnesses- hence, petition dismissed.

(Para-6 to 8)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.
For the Non-petitioner: Mr. Rajiv Jiwan, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Code of Criminal Procedure for grant of bail relating to FIR No. RC No. 2 of 2016 dated 28.1.2016 registered at Police Station CBI Shimla H.P. under Section 8 of Prevention of Corruption Act 1988.

2. It is pleaded that case under Section 8 of the Prevention of Corruption Act 1988 and Section 120B of Indian Penal Code registered at Police Station CBI Shimla H.P. It is further pleaded that petitioner is a private businessman who is running his business for last many years at Shimla. It is further pleaded that petitioner did not demand any money from the complainant at any point of time. It is further pleaded that petitioner is in judicial custody and nothing is to be recovered from the petitioner in the present case. It is further pleaded that petitioner will join the investigation of the case whenever and wherever required to do so. It is further pleaded that petitioner would not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer. Prayer for acceptance of bail application sought.

3. Per contra response filed on behalf of the non-petitioner pleaded therein that Sh. Anil Kumar Chaudhari S/o Sh. Anirudh Singh filed his online application for

issuance of passport from Passport Office Shimla. It is further pleaded that Sh. Anil Kumar Chaudhari was given appointment to appear before the Passport authorities on 27.1.2016 at 10.00 hours. It is further pleaded that Sh. Anil Kumar Chaudhari appeared before the Passport Officer along with his original documents including his old Passport No. F3751688 which was valid up to 8.6.2015. It is further pleaded that when petitioner appeared before the Passport authority Shimla H.P. then Passport Officer verbally denied to accept the application and told complainant that his old passport is in damaged condition and complainant was asked to go out of passport office. It is further pleaded that when Sh. Anil Kumar Chaudhari came out from Passport Office Panchaghati Shimla H.P. he was contacted by accused who promised the complainant to get his work done from the Passport Office against the consideration of bribe amount of Rs. 15,000/- (Fifteen thousand). It is further pleaded that thereafter Sh. Anil Kumar Chaudhari complainant on 27.1.2016 filed complaint in the CBI Branch Shimla alleging demand of bribe. It is further pleaded that investigation of the case was entrusted to Deputy Superintendent of Police CBI Branch Shimla. It is further pleaded that bribe amount of Rs. 15,000/- (Fifteen thousand) i.e. 15 government currency notes of the denomination of Rs. 1000/- (One thousand) each were treated with phenolphthalein power and distinctive numbers of the above currency notes were mentioned in the pre-trap memo and the same were kept in the pocket of the complainant to be handed over to accused. It is further pleaded that on completion of pre-trap proceedings CBI proceeded to Passport Office Panthaghati Shimla. It is further pleaded that accused Rahul was caught red handed while demanding and accepting Rs. 15,000/- (Fifteen thousand) from complainant in the presence of witnesses. It is further pleaded that hand washes of co-accused Rahul were took in the colorless solution of sodium carbonate which was turned into pink colour proving the acceptance of bribe. It is further pleaded that accused Rahul accepted his guilt and disclosed that he is an employee of Sh. Shyam Walia co-accused and used to contact the passport official to get favours against the consideration of bribe. It is further pleaded that thereafter co-accused Sh. Shyam Walia was called and he also confessed his guilt. It is further pleaded that both the accused persons were arrested on 28.1.2016 and were produced before Court of Sessions Judge Shimla exercising powers of Special Judge CBI Shimla. It is further pleaded that on the request of CBI learned Court below was pleased to grant three days police remand and on completion of police remand both the accused were produced before Court on 1.2.2016 and learned Court below was pleased to grant judicial custody to both the accused persons. It is further pleaded that on 1.2.2016 both the accused persons moved bail application before learned court below and the same was dismissed as withdrawn. It is further pleaded that co-accused Rahul was caught red handed while demanding and accepting bribe of Rs. 15,000/- (Fifteen thousand) from the complainant at the behest of his employer co-accused. It is further pleaded that case is in the investigation stage and it is further pleaded that important documents of passport office are yet to be taken and examine. It is further pleaded that accused persons are having influence in the passport office and there is every likelihood that petitioner would influence the officials in order to distort the evidence. It is further pleaded that till the completion of investigation petitioner be not released on bail.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Advocate appearing on behalf of the non-petitioner and also perused the entire record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section 439 Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of petitioner that petitioner is in judicial custody and not required for investigation purpose and on this ground bail application be allowed is rejected for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** In the present case allegations against the petitioner are very heinous and grave in nature qua taking of bribe of Rs. 15,000/- (Fifteen thousand) through co-accused Rahul employee of petitioner. Case has been registered against the petitioner under Prevention of Corruption Act 1988. Allegations against the petitioner are that petitioner demanded Rs. 15,000/- (Fifteen thousand) as bribe for preparation of passport of the complainant through his employee co-accused Rahul. Passport authority is public authority. Court is of the opinion that offence under Prevention of Corruption Act is offence against public at large. In the present case investigation is still under progress and investigation report under Section 173 Cr.P.C. not filed before competent Court of law. Court is of the opinion that it is not expedient in the ends of justice to release the petitioner on bail at this stage till the investigation is not completed and till investigation report under Section 173 Cr.P.C. is not filed before the competent Court of law. Court is also of the opinion that investigation will be adversely affected if petitioner is released on bail at this stage. Court is also of the opinion that interest of State and general public will also be affected adversely if petitioner is released on bail at this stage.

8. Submission of learned Advocate appearing on behalf of non-petitioner CBI that investigation is in the initial state and if the petitioner is released on bail at this stage then investigation will be adversely affected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witnesses. Court is of the opinion that it is not expedient in the ends of justice to release petitioner on bail till the investigation is completed and till the investigation report is not filed under Section 173 Cr.P.C. Point No.1 is answered in negative.

Point No. 2 (Final Order):

9. In view of findings upon point No.1 bail application filed by petitioner is dismissed. However petitioner will be at liberty to file subsequent bail application after completion of investigation and after filing of investigation report under Section 173 Cr.P.C. before the competent court of law. Observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. Bail application disposed of. All pending application(s) if any also disposed of.

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

Thakur Singh S/o Sh. Bharat Singh ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 68 of 2016
Order Reserved on 10.3.2016
Date of Order 17.3.2016

Code of Criminal Procedure, 1973- Section 439- An FIR has been registered against the petitioner for commission of offences punishable under Sections 366, 370, 376 and 506 IPC and Section 8 of POCSO Act– it was pleaded that there is no evidence to connect the petitioner with the commission of offences- investigation is complete and no recovery has to be effected- held, while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- allegations against the petitioner are heinous and grave in nature and it is not expedient to release the petitioner on bail at this stage- release of the petitioner on bail before the testimony of the prosecutrix is recorded will affect the trial adversely- petitioner will induce and threaten the prosecution witnesses in case of release- petition dismissed.

(Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 Supreme Court page 922

For the petitioner: Mr. Dalip K. Sharma, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 439 Code of Criminal Procedure for grant of bail relating to FIR No. 39 of 2015 dated 12.9.2015 registered at Police Station Rekong-Peo District Kinnaur H.P. under Sections 366, 370, 376 and 506 IPC and Section 8 of POCSO Act.

2. It is pleaded that there is no iota of evidence on record to connect the petitioner in the alleged offence in any manner. It is further pleaded that bail application was filed before learned Special Judge Kinnaur Sessions Division and same was dismissed on 26.9.2015. It is further pleaded that thereafter Cr.MP(M) No. 1492 of 2015 was filed before the Hon'ble High Court and the same was also dismissed on 18th November, 2015. It is further pleaded that investigation of the case is complete and nothing is to be recovered from the petitioner. It is further pleaded that challan has been filed by the Investigating Agency. It is further pleaded that petitioner undertakes to abide all conditions imposed by the Court and it is further pleaded that petitioner will not tamper with the prosecution witnesses. Prayer for acceptance of bail application is sought.

3. Per contra police report filed. There is recital in police report that petitioner Thakur Singh and co-accused Rajesh Kumar took two un-married girls in a Maruti vehicle having registration No. HP-25A-2363 and thereafter petitioner Thakur Singh had committed rape upon prosecutrix. There is further recital in police report that co-accused Rajesh had committed criminal offence under Section 366, 370 and 354A IPC and under Section 8 of POCSO Act 2012 with another minor prosecutrix. There is further recital in police report that statement of prosecutrix under Section 164 Cr.PC also recorded before learned Chief Judicial Magistrate. There is further recital in police report that as per location shown by prosecutrix site plan was prepared. There is further recital in police report that birth certificate of prosecutrix also obtained from gram panchayat Pangi. There is further recital in police report that accused persons Thakur Singh and Rajesh Kumar are married persons. There is further recital in police report that as per SFL report human semen was detected upon pant, vaginal slide, cervical slide, vaginal swab, cervical swab of prosecutrix. There is further recital in police report that human semen was detected upon glans penis slices of underwear of co-accused Thakur Singh. There is further recital in police report that challan filed in the Court on 14.12.2015. There is further recital in police report that report of SFSL is still awaited qua DNA. There is further recital in police report that allegations against petitioner are very heinous and grave in nature and prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of non-petitioner and also perused the entire record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section 439 Code of Criminal Procedure is liable to be accepted as mentioned in memorandum of grounds of bail application?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of petitioner that investigation is complete and petitioner is not required for investigation purpose and petitioner will abide all terms and conditions imposed by the Court and on this ground bail application be allowed is rejected being devoid of merit for the reason hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** Allegations against the petitioner are very heinous and grave in nature qua commission of criminal offence punishable under Sections 366, 370, 376 and 506 IPC. Petitioner is a married person and prosecutrix at the time of commission of offence was unmarried girl and was school going student. Court is of the opinion that it is not expedient in the ends of

justice to release the petitioner on bail at this stage till the statement of prosecutrix is not recorded by learned trial Court in trial proceedings. As of today statement of prosecutrix is not recorded in regular trial. Court is of the opinion that if petitioner is released on bail before recording the statement of prosecutrix during the trial then interest of State and general public will be adversely affected. Court is of the opinion that if petitioner is released on bail before the testimony of the prosecutrix is recorded by the trial Court during the trial proceedings then trial of the case will be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then petitioner will induce and threat the prosecution witnesses and will also commit similar offence and on this ground bail application be rejected is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if petitioner is released on bail then petitioner will induce and threat the prosecution witnesses. Allegations against the petitioner are very heinous and grave in nature. It is well settled law that murder destroys the body of victim but rapist degrades the soul of prosecutrix. It is also well settled law that rape is not only a crime against the victim but it is crime against the entire society. It is also well settled law that rape destroys the entire psychology of a woman and pushed her into deep emotional crises. It is also well settled law that rape is crime against basic human rights and is violative of the fundamendal rights granted under Article 21 of the Constitution of India. It is well settled law that rape is most hated crime. ***See AIR 1996 Supreme Court page 922 titled Sh. Bodhisattwa Gautam vs. Miss Subhra Chakraborty.*** In view of the grave allegations against the petitioner relating to sexual assault upon unmarried school going student and in view of the fact that petitioner was married person, Court is of the opinion that it is not expedient in the ends of justice to release the petitioner till the testimony of prosecutrix is not record by learned trial Court during trial proceedings. Point No.1 is answered in negative.

Point No. 2 (Final Order):

9. In view of findings upon point No.1 bail application filed by petitioner is dismissed. Observations made in this order will not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of.

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

Balbir Kumar .....Appellant

Versus

Ajay Kumar & another .....Respondents

FAO No. 497 of 2009
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 166- Claimant has proved that driver was driving the vehicle rashly and negligently – an FIR was registered against him- respondents did not lead any evidence, thus, it was duly proved that driver had driven the vehicle rashly and negligently at the relevant point of time and had caused accident- Tribunal had wrongly held that claimant had failed to prove this fact- a strict proof is not required in motor accident case- prima facie proof is sufficient- claimant remained admitted in the hospital and had

suffered 5% disability- hence, amount of Rs.50,000/- was awarded under the medical expenses' and Rs.1,00,000/-, under the head of 'loss of amenities of life and pain and sufferings'. (Para- 7 to 22)

Cases referred:

N.K.V. Bros. (P.) Ltd. vs M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. vs Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

For the appellant : Mr. Neel Kamal Sharma, Advocate.
For the respondents: Respondent No. 1 already deleted.
Mr. A.K. Sharma, Advocate for respondent No. 2.
Mr. G.D. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Subject matter of this appeal is the award dated 12th October, 2009, passed by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. No. 91 of 2005/04, whereby the claim petition came to be dismissed (hereinafter referred to as 'the impugned award').

2. Claimant Balbir Kumar had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

3. Precisely, the case of the appellant-claimant was that on 4th March, 2004, he was traveling in jeep bearing registration No HP-23-3144, at place near Ghagas, Tehsil Sadar, District Bilaspur, H.P., at about 7.30 p.m., which was being driven by respondent No. 2, Ajay Kumar, rashly and negligently, hit it on the right side of the road, resulting in multiple injuries to him. He was taken to District Hospital, Bilaspur, where he remained admitted for about 19 days.

4. The respondents resisted and contested the claim petition on the grounds taken in the memo of their objections.

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

"*i). Whether the petitioner has sustained injuries in the accident which has taken place due to the rash and negligent driving of vehicle No. HP-23-3144 driven by respondent No. 2 as alleged? …OPP*

ii). If issue No. 2 is proved in affirmative, to what amount of compensation the petitioner is entitled to and from whom? …OPP

iii) Whether the driver of the offending vehicle was not having a valid and effective driving license at the time of the accident, if so, its effect? …OPR-3

iv) Whether the petitioner was traveling as gratuitous passenger, if so, its effect? ….OPR-3

(v) Relief."

6. The claimant has examined Hem Raj (PW-2), Sita Ram (PW-3) and also appeared himself in the witness box as PW-1. The owner and insurer have not examined any witness. Only driver appeared in the witness box as RW-1. Thus, the evidence led by the claimant has remained unrebutted.

Issue No. 1.

7. The claimant has proved that on 4th March, 2004, driver, namely, Ajay Kumar, has driven the offending vehicle, rashly and negligently, at place near Ghagas, Tehsil Sadar, District Bilaspur, H.P., at about 7.30 p.m., caused the accident and FIR No. 93/2004, dated 4.3.2004, under Sections 279 & 337 of the Indian Penal Code, Police Station, Sadar, District Bilaspur (Ext. C-1) was registered. The respondents have not led any evidence. Thus, the evidence led by the claimant has remained unrebutted. Having said so, the claimant has proved that the driver has driven the offending vehicle, rashly and negligently, at the relevant point of time and caused the accident.

8. The Tribunal has fallen in an error in holding that the claimant has failed to prove issue No. 1. It appears that the Tribunal has taken this case as a civil case or a criminal case.

9. It is a beaten law of the land that strict proof is not required, but the claimant has *prima-facie* to prove, that the accident is outcome of rash and negligent driving of the driver.

10. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases*

> *resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)*

11. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

12. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

13. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

14. The same principle has been laid down by this Court in a series of cases.

15. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the

medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

> *"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.*
>
> *xxx xxx xxx*
>
> *12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.*
>
> *13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.*
>
> *14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.*

> *15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."*

16. The claimant has *prima facie* proved that the driver of the offending vehicle had driven the same, rashly and negligently, at the relevant point of time and had caused the accident, in which the claimant sustained injuries. Accordingly, the issue No. 1 is decided in favour of the claimant and respondent No. 2 and the findings returned by the Tribunal on issue No. 1 are set aside.

Issues No. 3 & 4.

17. Before I deal with issue No. 2, I deem it proper to deal with Issues 3 & 4.

18. It was for the insurer to discharge onus to prove issues No. 3 to 4, have not led any evidence, thus have failed to discharge the onus. Accordingly, the issues No. 3 & 4 are decided against the insurer and in favour of the driver, owner and the claimant. Having said so, the findings returned by the Tribunal on issues No. 3 & 4 are set aside.

Issue No. 2

19. Now the question is, to what amount of compensation, the claimant is entitled to. Admittedly, the claimant was admitted in the hospital. He has placed on record disability certificate Ext. C-14, which does disclose that he has suffered permanent disability to the extent of 5%. The discharge slip (Ext. C-11) is also on the record which shows that the claimant remained admitted in the hospital w.e.f. 4th March, 2004 to 23rd March, 2004. He has also placed on record medical bills, Ext. C-2 to Ext. C-10.

20. In view of the above, I am of the considered view that at least Rs.50,000/- should have been awarded to the claimant under the head of 'medical expenses' and Rs.1,00,000/-, under the head of 'loss of amenities of life and pain and sufferings'.

21. The factum of insurance is admitted. Accordingly, I deem it proper to saddle the insurer-insurance company with the liability.

22. Viewed thus, I deem it proper to award the compensation to the tune of Rs.1,50,000/-, in *lump sum*, in favour of the claimant and direct the insurer to deposit the same before the Registry of this Court within six weeks from today. In default, the interest at the rate of 7.5% per annum shall be paid by the insurer from the date of filing of the claim petition till its realization. On deposit, the same be released in favour of the claimant through payees' account cheque or by paying the same in his account.

23. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

ICICI Lombard General Insurance Co. Ltd. ....Appellant

Versus

Rattna Karir and others ...Respondents

FAO (MVA) No. 18 of 2010.
Date of decision: 18th March, 2016.

Motor Vehicles Act, 1988- Section 149- Insurer contended that the accident was outcome of contributory negligence- however no evidence was led to prove that the accident was outcome of contributory negligence- factum of insurance was not disputed- it was not established that driver did not have a valid driving licence- copy of driving licence also discloses that driver was competent to drive the vehicle- monthly income of the house wife cannot be less than Rs. 4,000/- - she has lost source of dependency to the tune of Rs. 2000/- per month- age of the injured was 50 years – Tribunal applied multiplier of '9', whereas, multiplier of '11' is applicable – thus, claimant had lost source of dependency to the extent of Rs. 2000x12x9= Rs. 2,16,000/- along with interest. (Para-11 to 24)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant:	Mr. Jagdish Thakur, Advocate.
For the respondents:	Mr. Naveen K. Bhardwaj, Advocate, for respondent No.1.
	Mr. S.M. Goel, Advocate, for respondents No. 2 and 3.
	Mr.B.S. Chauhan, Sr. Advocate with Mr. Baibhav Tanwar, Advocate, for respondent No.4.
	Mr. G.D. Sharma, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 4.9.2009, made by the Motor Accident Claims Tribunal Kullu, H.P. in Claim Petition No. 67/2006, titled *Smt. Rattna Karir versus Shri Jog Dhian and others*, for short "the Tribunal", whereby compensation to the tune of Rs.7,04,500/- alongwith interest @ 7.5% per annum was awarded in favour of the claimant and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants and other respondents have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

3. Insurer/appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. The claimant had filed claim petition for the grant of compensation to the tune of Rs.15 lacs, as per the break-ups given in paras 21 and 24 of the claim petition, which was resisted and contested by the respondents and following issues came to be framed.

(i) Whether the claim petitioner suffered injuries in a motor accident on account of rash and negligent driving of respondent no.2 while driving TATA Indica no. HP-34-9015?OPP

(ii) Whether the accident occurred due to the contributory negligence of respondent NO. 2 and respondent No. 4, the driver of marutia Zen car No.HP-24-7171?OPP

(iii) If issues No. 1 and 2 are proved, to what amount of compensation, the petitioner is entitled and from whom? OPP.

(iv) Whether the petition is bad for non-joinder of necessary parties as alleged? OPR1 and 2.

(v) Whether the petition is not legally maintainable as alleged? OPR1 and 2.

(vi) Whether the vehicle NO. HP-34-9015 is not insured with respondent No. 3 as alleged? OPR3.

(vii) Whether the respondent NO. 2 was not holding a valid and effective driving licence at the time of accident ?OPR-3

(viii) Whether the petition has been filed in connivance by the petitioner and respondents no. 1 and 2, if so, its effect? OPR-3.

(ix) Relief.

5. Claimant examined Sh. Chamcli Devi as PW2, Tajinder Kumar, PW3, Chander Singh, PW4, Dr. Baldev Singh PW5 and claimant herself stepped into the witness-box as PW1.

6. On the other hand, respondents examined Davinder Singh RW1, Pardeep Kumar RW2 and driver Leela Dhar also stepped into the witness-box as RW3. Some documents were also placed on record, details of which are given in list of witness appended to the impugned award.

7. The Tribunal has held that the accident was caused by driver Leela Dhar while driving Tata Indica car rashly and negligently.

8. The learned counsel for the appellant argued that the accident was outcome of contributory negligence. There is no evidence, oral or documentary, on the file, which can be made basis for holding that the accident was outcome of contributory negligence. The Tribunal has discussed Issue No.1 in paras 14 to 28 of the impugned award. The findings returned are perfectly correct, need no interference. Accordingly, the findings returned on issue No. 1 are upheld.

9. In view of the findings returned on issue No.1, findings returned on Issue No. 2 are also upheld.

10. Before I deal with issue No. 3, I deem it proper to deal with issues No. 4 to 8 at the first instance.

11. It was for respondents No.1 and 2 in the claim petition to discharge onus on these issues, failed to do so. Thus, findings returned on these issues are to be upheld.

12. Respondents have not led any evidence to prove whether the claim petition is bad for non-joinder of necessary parties and is not legally maintainable. The Tribunal has rightly determined all these issues in favour of the claimants.

13. It is apt to record herein that the law on motor accidents claims has gone through a sea change. Now copy of FIR or police report can be treated as claim petition, in terms of the mandate of Sections 158 (6) and 166 (4) of the Motor Vehicles Act, for short "the Act".

14. Accordingly, the findings returned on issues No. 4 and 5 are upheld.

Issue No.6.

15. The factum of insurance is not in dispute which has not been questioned before this Court. However, the Tribunal has rightly recorded the findings that the offending vehicle was duly insured with the insurer, i.e, appellant herein. Accordingly, the findings returned on issue No. 6 are upheld.

Issue No.7.

16. It was for respondent No. 3 to discharge the onus, has not led any evidence that the driver was not having a valid and effective driving licence. The copy of driving licence is on the record as Ext. RW-3/B which do disclose that the driver was competent to driver the offending vehicle. The findings returned on issue No. 8 are misconceived. However, respondent No. 3 has not led any evidence. Accordingly, the findings returned on issues No. 7 and 8 are upheld.

Issue No.3.

17. The claimant has suffered and has to suffer throughout his life being spine injuries; who is not in a position to sit. The injury is permanent in nature. The Tribunal has made discussion on issue No. 3 right from paras 30 to 46 of the impugned award. The discussion made is perfectly right. Only the Tribunal has fallen in an error in applying the multiplier and assessing the income of the injured.

18. In the injury cases, the compensation has to be awarded under two heads "pecuniary damages" and "non-pecuniary damages."

19. 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,** had discussed all aspects and laid down guidelines how a guess work is to be made and how compensation is to be awarded under various heads. It is apt to reproduce paras 9 to 14 of the judgment hereinbelow:

> *"9. Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary*

damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

10. It cannot be disputed that because of the accident the appellant who was an active practising lawyer has become paraplegic on account of the injuries sustained by him. It is really difficult in this background to assess the exact amount of compensation for the pain and agony suffered by the appellant and for having become a life long handicapped. No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame.

11. In the case Ward v. James, 1965 (1) All ER 563, it was said:

"Although you cannot give a man so gravely injured much for his "lost years", you can, however, compensate him for his loss during his shortened span, that is, during his expected "years of survival". You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet Judges and Juries have to do the best they can and give him what they think is fair. No wonder they find it well-nigh insoluble. They are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. The Judges have worked out a pattern, and they keep it in line with the changes in the value of money."

12. In its very nature whenever a Tribunal or a Court is required to fix the amount of compensation in cases of accident, it involves some guess work, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

13. This Court in the case of C.K. Subramonia Iyer v. T. Kunhikuttan Nair, AIR 1970 SC 376, in connection with the Fatal Accidents Act has observed (at p. 380):

"In assessing damages, the Court must exclude all considerations of matter which rest in speculation or fancy though conjecture to some extent is inevitable."

14. In Halsbury's Laws of England, 4th Edition, Vol. 12 regarding non-pecuniary loss at page 446 it has been said :-

"Non-pecuniary loss : the pattern. Damages awarded for pain and suffering and loss of amenity constitute a conventional sum which is taken to be the sum which society deems fair, fairness being interpreted by the courts in the light of previous decisions. Thus there has been evolved a set of conventional principles providing a provisional guide to the comparative severity of different injuries, and indicating a bracket of damages into which a particular injury will currently fall. The particular circumstances of the plaintiff, including his age and any unusual deprivation he may suffer, is reflected in the actual amount of the award.

The fall in the value of money leads to a continuing reassessment of these awards and to periodic reassessments of damages at certain key points in the pattern where the disability is readily identifiable and not subject to large variations in individual cases."

20. The said judgment was also discussed by the Apex Court in case titled as **Arvind Kumar Mishra** versus **New India Assurance Co. Ltd. & another,** reported in **2010 AIR SCW 6085**, while granting compensation in such a case. It is apt to reproduce para-7 of the judgment hereinbelow:

"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."

21. 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. 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."

22. 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. It is apt to reproduce paras 16 & 18 of the judgment hereinbelow:

"16. *In Raj Kumar v. Ajay Kumar (2011) 1 SCC 343, this Court considered large number of precedents and laid down the following propositions:*

"The provision of the motor Vehicles Act, 1988 ('the Act', for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or the Tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, medicines, transportation,nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

v) (Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

17. .....

18. In light of the principles laid down in the aforementioned cases, it is suffice to say that in determining the quantum of compensation payable to the victims of accident, who are disabled either permanently or temporarily, efforts should always be made to award adequate compensation not only for the physical injury and treatment, but also for the loss of earning and inability to lead a normal life and enjoy amenities, which would have been enjoyed but for the disability caused due to the accident. The amount awarded under the head of loss of earning capacity are distinct and do not overlap with the amount awarded for pain, suffering and loss of enjoyment of life or the amount awarded for medical expenses."

23. The Tribunal has rightly awarded a sum of Rs.1,70,000/- under the head "medical expenses", Rs.50,000/- for "future treatment", Rs.10,000/- under the head "attendant charges" Rs.36,000/- under the head "Attendant charges for one year period", Rs.54,000/- under the head "Taxi/transportation charges" and Rs.1,00,000/- under the head "Pain and suffering. However the Tribunal has fallen in an error in awarding compensation under the head "Loss of future income. *Prima facie*, it can be said that the monthly income of a house wife would not be less than Rs.4000/-. Thus, it can be safely said that she has lost source of dependency to the tune of Rs.2000/- per month. The Tribunal has also fallen in an error in applying multiplier of "11". The age of the injured given in the claim petition is "50" years, in FIR the age is given as "51" years and in other documents the age is given as 51 years. Accordingly the deceased is held to be 51 years of age at the time of the accident. Thus, the multiplier applicable is "9" as per the 2nd Schedule of the Motor Vehicle Act, for short the Act read with the ratio laid down in ***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***. Accordingly, multiplier of "9" is applied instead of "11".

24. Thus the claimant has lost source of dependency to the tune of Rs.2000x12x9. Total Rs. 2,16,000/-.

25. Thus, the claimant is entitled to compensation as follows:

(i)	*"Loss of future income"*	*Rs.2,16,000/-*
(ii)	*"Medical expenses."*	*Rs.1,70,000/-*
(iii)	*"Future treatment*	*Rs. 50,000/-*
(iv)	*"Attendant charges",*	*Rs.10,000/-*
(v)	*"Attendant charges"*	*Rs.36,000/-*
(vi)	*"Attendant charges for one year period",*	*Rs.54000/-*
(vii)	*"Taxi/Transportation charges"*	*Rs.1,00,000/-*
	Total	Rs.6,36,000/-

26. The interest was to be awarded under all heads except under the head "future income" from the date of claim petition. Thus interest @ 7.5% is payable for all heads except for "future income", from the date of the claim petition, and for future income it is payable from the date of the award.

27. Accordingly, the impugned award is modified as indicated hereinabove.

28. The Registry to release the awarded amount, in favour of the claimant, through payees' cheque account or by depositing the same in his bank account, strictly as per the terms and conditions contained in the impugned award and excess amount, if any, be released to the appellant, through payees, cheque account.

29. The appeal stands disposed of. Send down the records forthwith, after placing a copy of this judgment.

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

Lal Singh .....Appellant
Versus
Davinder Singh & others .....Respondents

FAO No. 498 of 2009
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 166- Claimant led evidence to prove that driver was driving the vehicle in a rash and negligent manner- an FIR was registered against the driver of the offending vehicle- challan was presented against him before the Court- respondents had not led any evidence and evidence led by the claimant remained unrebutted- Tribunal had erred in holding that the claimant had failed to prove the rashness and negligence of the driver- Tribunal had wrongly held that claimant had not proved the rashness and negligence of the driver- Driver was holding valid driving licence- deceased was 22 years at the time of

accident- he was bachelor and was earning Rs. 2500/- per month as Conductor and Rs. 100/- per day, when he used to be on tour – his monthly income can be taken as Rs. 3,000/- by guess work- 50% amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 1500/- per month- multiplier of '15' is applicable and the claimant is entitled to Rs. 1500/- x 12 x 15 = 2,70,000/- under the head 'loss of dependency' along with interest @ 7.5% per annum from the date of filing of the claim petition till its realization. (Para-7 to 16)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 310

For the appellant :	Mr. Rupinder Singh, Advocate.
For the respondents:	Mr. Rajesh Verma, Advocate, for respondent No. 1. Nemo for respondent No. 2. Mr. G.D. Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 23rd July, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmour, District at Nahan (hereinafter referred to as 'the Tribunal'), in M.A.C. No. 95-MAC/2 of 2006, whereby the claim petition came to be dismissed (hereinafter referred to as 'the impugned award').

2. Claimant Lal Singh had filed the claim petition before the Tribunal for grant of compensation to the tune of 8.00 lacs, as per the break-ups given in the claim petition.

3. The respondents resisted and contested the claim petition on the grounds taken in the memo of their objections.

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

"*1. Whether Kamal Bahadur died on account of the injuries sustained in a vehicular accident involving truck Canter No. HP-16-1492 being driven by respondent No. 2 in a rash and negligent manner on dated 04-6-2005 at about 6.45 p.m. at place Karganu under Police Station, Rajgarh, as alleged? …OPP*

2. If issue No. 2 is proved in affirmative, whether the petitioner being L.R. of deceased is entitled to receive compensation, if so, to what amount and from whom? …OPP

3. Whether the petition is not maintainable in the present form, as alleged? …OPR-3

4. Whether the truck was being plied in violation of the terms and conditions of the insurance policy, as alleged? ….OPR-3

5. Whether the petition has been filed in collusion with respondents No. 1 and 2, as alleged? …OPR-3

6. Relief."

5. The claimant has examined Shri Balbir Singh (PW-1) and Shri Sanju (PW-3) and also appeared himself in the witness box as PW-1. The insurer has examined Shri Tota Ram as RW-1.

Issue No. 1.

6. The Tribunal has held that the claimant has failed to prove that driver, namely, Heeru Ram had driven the offending vehicle, rashly and negligently, at the relevant time and decided issue No. 1 against the claimant.

7. The claimant has led evidence and proved that driver, namely, Heeru Ram, has driven the offending vehicle i.e. Truck Canter bearing registration No. HP-16-1492, rashly and negligently, on 4.6.2005, at about 6.45. p.m. at place Karganoo. FIR No. 68 of 2005, dated 04.06.2005, under Sections 279 and 304-A of the Indian Penal Code was registered against the driver in Police Station, Rajgarh, District Sirmour, H.P. and final report under Section 173 of the Code of Criminal Procedure was presented against him before the Court of competent jurisdiction. The respondents have not led any evidence. Thus, the same has remained unrebutted. Having said so, it is proved that the driver has driven the offending vehicle, rashly and negligently, at the relevant point of time and caused the accident. Accordingly, Issue No. 1 is decided in favour of the claimant and the findings returned by the Tribunal on the said issue are set aside.

Issues No. 3 to 5

8. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5.

9. It was for the insurer to prove that the claim petition is not maintainable, the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the claim petition has been filed in collusion with respondents No. 1 & 2. It has not led any evidence, thus, has failed to discharge the onus. However, the insurer has examined Shri Tota Ram as RW-1, who has failed to prove that the driver has driven the offending vehicle in collusion with anyone or that the driver was not holding a valid and effective driving licence, at the relevant time. The copy of driving licence is exhibited as Ext. R-A on record, which does disclose that the driver was having a valid and effective driving licence at the relevant point of time. Accordingly, issues No. 3 to 5 are decided in favour of the claimant and against the insurer.

Issue No. 2.

10. Now the question is, to what amount of compensation, the claimant is entitled to.

11. Claimant, Lal Singh has deposed before the Tribunal that deceased Kamal Bahadur was his son; was of the age of 22 years at the time of accident; was a bachelor, was earning Rs.2500/- per month as Conductor and Rs.100/- per day, when he used to be on tour. By exercising the guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs.3,000/- at the relevant time. 50% was to be deducted towards his personal expenses, in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.** Thus, it can be safely held that the claimant has lost source of dependency to the tune of Rs. 1500/- per month.

12. The multiplier of '15' is applicable in this case, as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in the judgments, *supra.*

13. Accordingly, the claimants are held entitled to the tune of Rs.1500/- x 12 = Rs.18,000 x 15 = Rs.2,70,000/- under the head 'loss of dependency'.

14. The factum of insurance is admitted. Accordingly, I deem it proper to saddle the insurer-insurance company with the liability.

15. Viewed thus, the claimant is held entitled to a total compensation to the tune of Rs.2,70,000/-.

16. The insurer is directed to deposit the award amount before the Registry of this Court within six weeks from today. In default, the interest at the rate of 7.5% per annum is to be paid by the insurer from the date of filing of the claim petition till its realization. On deposit, the same be released in favour of the claimant through payees' account cheque or by paying the same in his account.

17. It is made clear that the amount paid by owner-insured Davinder Singh, as *no fault liability*, is awarded as cost in favour of the claimant.

18. Accordingly, the impugned award is set aside, and the appeal stands disposed of.

19. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Managing Director HRTC ....Appellant

Versus

Sh. Khem Chand and another .....Respondents

FAO (MVA) No. 14 of 2010.
Date of decision: 18th March, 2016

Motor Vehicles Act, 1988- Section 168- Mandate of Section 168 is to determine the amount of compensation which appears to be just- it is the duty of the Tribunal or the Appellate Court to assess the just compensation and they can award more compensation than claimed - Tribunal had awarded less amount under the head and loss of amenities and pain and suffering- compensation enhanced to Rs. 60,000/- under the head 'pain and suffering' and loss of amenities of life. (Para- 6 to 17)

Cases referred:

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174
Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674
State of Haryana and another vs Jasbir Kaur and others, AIR 2003 Supreme Court 3696
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172

A.P.S.R.T.C. & another versus M. Ramadevi & others, n 2008 AIR SCW 1213
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

For the appellant: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr.J.L. Bhardwaj, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This appeal is directed against the judgment and award dated 31.8.2009, made by the Motor Accident Claims Tribunal –cum-Presiding Officer Fast Track Court, Mandi, H.P. in Claim Petition No. 105/2002 (237/2005), titled *Khem Chand versus Himachal Road Transport Corporation and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,91,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimant and insurer was saddled with the liability, hereinafter referred to as "the impugned award", for short.

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

3. HRTC has questioned the impugned award on the ground of adequacy of compensation.

4. The Tribunal has awarded the compensation as follows:

1.	*Expenditure of medicine Transportation & attendants Charges.*	*Rs.30,000/-*
2.	*Loss of Salary*	*Rs.11,000/-*
3.	*Pain and suffering*	*Rs.30,000/-*
4.	*Loss of amenities*	*Rs.30,000/-*
5.	*Loss of income from Agricultural land*	*Rs.90,000/-*
	Total.	Rs.1,91,000/-

5. The learned counsel for the appellant argued that the Tribunal has fallen in an error in awarding Rs.90,000/- under the head "Loss of income from agricultural land." The argument is attractive and forceful but I deem it proper to record herein that the Tribunal has fallen in an error in awarding compensation under the heads "pain and suffering", "loss of amenities of life" and "loss of salary".

6. The moot question is-whether the amount awarded can be enhanced without filing objections or without questioning by the claimants?

7. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> "***168. Award of the Claims Tribunal.*** *- On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the*

provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be:
....."

8. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to it to be just'.

9. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed and can enhance the same.

10. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed.

11. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded

to it as an application for compensation even though no such claim is made or no specified amount is claimed.

8. .....

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.

10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."

12. In the case titled as **State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696,** the Apex Court has discussed the expression 'just'. It is apt to reproduce para 7 of the judgment herein:

"7. It has to be kept in view that the Tribunal constituted under the Act as provided in S. 168 is required to make an award determining the amount of compensation which is to be in the real sense "damages" which in turn appears to it to be 'just and reasonable'. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate the compensation must be "just" and it cannot be a bonanza; nor a source of profit; but the same should not be a pittance. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See Helen C. Rebello v. Maharashtra State Road Transport Corporation (AIR 1998 SC 3191)."

13. The same view has been taken by the Apex Court in a case titled as **The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172**.

14. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was

within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

15. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as *Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.*

16. Having said so, this Court has power to grant compensation on other heads even if the same is not claimed by the claimant.

17. Admittedly, the claimant has suffered and is still suffering. The amount awarded under the head "pain and suffering" and "loss of amenities of life" is meager. I deem it proper to grant Rs.60,000/- under the head "pain and suffering" and Rs.60,000/- under the head "loss of amenities of life" because the claimant has been deprived of amenities of life throughout and has to suffer throughout his life. The compensation awarded under the other heads, except "loss of amenities of life" is maintained. It is held that the claimant is not entitled to compensation under head "loss of income from agricultural land."

18. In view of the above stated position, the claimant is held entitled to Rs.30,000/- under the head "Expenditure of medicine",Rs.11,000/- under the head "loss of salary", Rs.60,000/- under the head "Pain and suffering" and Rs.60,000/- under the head "loss of amenities of life." Total compensation thus, comes to Rs.1,61,000/- with interest @7.5% per annum from the date of claim petition till its realization.

19. Accordingly, the impugned award is modified as indicated hereinabove.

20. The Registry to release the amount, in favour of the claimant, through payees' cheque account or by depositing the same in his bank account, strictly as per the terms and conditions contained in the impugned award and excess amount, if any, be released to the appellant, through payees, cheque account.

21. The appeal stands disposed of. Send down the records forthwith, after placing a copy of this judgment.

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

National Insurance Co. Ltd. .....Appellant
Versus
Dhaman Dutt Sharma and others .....Respondents

FAO No.7 of 2010.
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that the risk of 2nd driver was not covered and the award is contrary to the facts of the case- the claimant had pleaded in

the claim petition that he was travelling in the vehicle as a 2nd driver but when he appeared before the Tribunal, he stated that he was travelling in the vehicle as conductor- his statement has remained unrebutted – driver also admitted that the claimant was working as conductor, hence, plea of the insurer that claimant was second driver was not proved- amount of compensation was awarded in accordance of the facts- appeal dismissed.

(Para-4 to 10)

For the appellant: Mr.Deepak Bhasin, Advocate.

For the respondents: Mr.Sandeep Chauhan, Advocate, vice Mr.Karan Singh Kanwar, Advocate, for respondent No.1.
Mr.Deepak Kaushal, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 14th September, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the Tribunal), in Claim Petition No.86-MAC/2 of 2005, titled Dhaman Dutt Sharma vs. Rajesh Kumar and others, whereby compensation to the tune of Rs.5,90,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

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

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal, on two grounds, namely – i) Risk of second driver was not covered; and ii) The impugned award has been passed contrary to the facts of the case.

4. Thus, the only question to be determined in this appeal is – Whether the insurer came to be rightly saddled with the liability?

5. It is the admitted case of the parties that the offending vehicle was duly insured. The owner and the driver (original respondents No.1 and 2) have filed the reply to the claim petition, wherein, in paragraphs 1 and 3, they have specifically stated that the claimant, on the day of accident, was performing the duties of conductor-cum-cleaner. It is apt to reproduce paragraphs 1 and 3 of the reply hereunder:

> *"1. That the introductory para contents are admitted so far as the accident is concerned. However, the petitioner was not a traveler on the ill fated truck. He was on his duty as conductor cum cleaner. Seriatim wise reply to particulars of claim petition is given as here-in-below:-*
>
> ....
>
> *3. Para No.4 of the petition is denied being incorrect. The petitioner was employed as conductor-cum-cleaner on the truck. It is specifically denied that he was a co driver."*

6. No doubt, the claimant has pleaded in the Claim Petition that he was traveling in the offending vehicle as second driver, but, when he appeared in the witness box as PW-1, he clearly stated that, on the day of accident, he was traveling in the said vehicle as conductor. The statement of the claimant as PW-1 has remained un-rebutted. He was cross examined at length, but the insurer was not able to extract anything which could adversely affect the case of the claimant.

7. Respondent No.1 i.e. the driver of the offending vehicle appeared into the witness box as RW-1, who, instead of supporting the case of the insurer, has supported the case set up by the claimant. To draw an inference that the owner had committed willful breach, it was imperative for the insurer to plead and prove by leading evidence that the claimant was not working as conductor on the offending vehicle, at the time of accident, but was working as co-driver or second driver, or that the claimant was traveling in the offending vehicle as gratuitous passenger, which fact was never proved by the insurer. Therefore, the insurer has not discharged the onus cast upon it.

8. In view of the above, the arguments advanced by the learned counsel for the appellant are repelled, being devoid of any force.

9. As far as amount of compensation is concerned, the same cannot be said to be excessive in any way, rather the same appears to be meager. However, the claimant has not questioned the impugned award on that count. Therefore, the impugned award is reluctantly upheld.

10. Having said so, the appeal merits to be dismissed and the same is dismissed. As a consequence, the impugned award is upheld.

11. The Registry is directed to release the amount in favour of the respective claimants, alongwith interest accrued thereon, forthwith, after proper identification.

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

FAO No.3 of 2010 with FAO No.4 of 2010.
Decided on : 18.03.2016

1.	**FAO No.3 of 2010**	
	National Insurance Co. Ltd.	.....Appellant
	Versus	
	Savitri Devi and another	.....Respondents
2.	**FAO No.4 of 2010**	
	National Insurance Co. Ltd.	.....Appellant
	Versus	
	Sheela Devi and another	.....Respondents

Motor Vehicles Act, 1988- Section 149- Insurer contended that the deceased and injured were gratuitous passengers, owner had committed willful breach and has to be saddled with liability- insurance policy shows that passengers carrying capacity of the vehicle is 1+2 which means that the vehicle was authorized to carry one driver and two passengers- deceased and injured were travelling in the vehicle along with their goods and cannot be called to be gratuitous passengers- appeal dismissed. (Para-6 to 12)

Case referred:
Nand Lal & another vs. Meena Devi & others, Latest HLJ 2014 (HP) Suppl.414

For the appellant:	Mr. Suneet Goel, Advocate.
For the respondents:	Mr. Rakesh Thakur, Advocate, vice Mr. Digvijay Singh, 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)

Both these appeals are taken up together for final disposal as the same arise out of one accident caused by Suresh Kumar on 27th August, 2005 while driving Mahindra Jeep bearing No.HP-31-2782 rashly and negligently. Claimant Savitri Devi and son of claimant Sheela Devi were traveling in the said vehicle alongwith their goods at the time accident. As a result of the accident, Savitri Devi sustained injuries while son of claimant Sheela Devi, namely, Master Rajneesh, sustained multiple injuries and lateron succumbed to the same.

2. Claimant Savitri Devi filed claim petition bearing No.55 of 2006, titled Savitri Devi vs. Suresh Kumar and another, before the Motor Accident Claims Tribunal, Mandi, (hereinafter referred to as the Tribunal), which was allowed vide award dated 29th July, 2009 and Rs.45,221/-, alongwith interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant, (subject matter of FAO No.3 of 2010).

3. Claimant Sheela Devi, on account of the death of her son Master Rajnish, invoked the jurisdiction of the Tribunal by the medium of Claim Petition No.51 of 2006, titled Sheela Devi vs. Suresh Kumar and another, which was also allowed vide award dated 29th July, 2009, and compensation to the tune of Rs.1,90,000/-, with interest at the rate of 7.5% per annum, came to be awarded in favour of the claimant, (subject matter of FAO No.4 of 2010).

4. The Tribunal, vide the impugned awards, saddled the insurer with the liability.

5. Feeling aggrieved, the insurer has filed the instant appeals. The claimants and the driver/owner have not questioned the impugned awards on any count, thus, the same have attained finality so far as they relate to them.

6. The main ground projected by the insurer in both the appeals is that the deceased as well as the injured were gratuitous passengers. It was submitted that the owner has committed willful breach and the owner has to be saddled with the liability.

7. Thus, the point for consideration in both the appeals is – Whether the owner has committed willful breach of the terms and conditions contained in the insurance policy?

8. The insurance policy of the vehicle has been proved on record as Ext.RA, wherein, the "passenger carrying capacity" of the vehicle has been mentioned to be "1+2", which means that the offending vehicle was authorized to carry one driver and two passengers.

9. Moreover, there is ample evidence on the file, oral as well as documentary, led by the claimants that the deceased and the injured were traveling in the said vehicle alongwith their goods. The deceased and the injured cannot be termed as gratuitous passenger since the insurance policy/agreement was covering the risk of two persons and the driver of the vehicle. The insurer-appellant has admitted that the offending vehicle was duly insured. The insurer has sought exoneration only on the ground that the deceased and the injured were gratuitous passengers, which plea, in view of the above discussion, is not available to the insurer.

10. In view of the above, by no stretch of imagination, the deceased and the injured can be termed to be gratuitous passengers.

11. This Court, in **Nand Lal & another vs. Meena Devi & others, Latest HLJ 2014 (HP) Suppl.414,** and catena of other judgments, has held that once the deceased was traveling in the vehicle as owner of goods, he cannot be termed as gratuitous passenger.

12. Having said so, both the appeals merit to be dismissed and the same are dismissed. Consequently, the impugned awards are upheld.

13. The Registry is directed to release the amount in favour of the respective claimants, alongwith interest accrued thereon, forthwith, after proper identification.

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

National Insurance Company Ltd. .....Appellant

Versus

Sh. Krishanu Ram .....Respondents

FAO No. 34 of 2010
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 149- Insurer had not led any evidence to prove that there was breach of the terms and conditions of the insurance policy- Driver deposed before the Tribunal that he had a valid and effective driving licence at the time of accident- copy of driving licence also shows that driver had a valid and effective driving licence at the relevant point of time- hence, plea that driver did not have a valid driving licence cannot be accepted- further, claimant had averred in the claim petition that he had hired the vehicle and was travelling with the tomato crates in the vehicle –hence the plea that claimant was a gratuitous passenger cannot be accepted. (Para-13 to 15)

Motor Vehicles Act, 1988- Section 166- Claimant had pleaded that his income was Rs.15,000/- per month - by guess work, Tribunal had assessed his income as Rs.8,000/- per month - by exercising the guess work, it can be safely held that monthly income of the deceased would not have been less than Rs.8,000/-- he had suffered 25% disability which affected his earning capacity to the extent of 50%- thus, loss of source of income can be taken as 50%- the age of the injured was 62 years- Tribunal had applied multiplier of 8- held, that multiplier of '5' is applicable and the claimant is entitled to the compensation of Rs.4,000 x 12 x 5= 2,40,000/- under the head of loss of earning- Tribunal had awarded interest @ 12% per annum, whereas, amount of interest has to be awarded @ 7.5% per annum. (Para-16 to 22)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

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

For the appellant : Mr. Ashwani K. Sharma, Senior Advocate with Mr. Nishant Sharma, Advocate.

For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondent No. 1.
Mr. T.S. Chauhan, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 29th September, 2009, passed by the Motor Accident Claims Tribunal-II, Solan, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. No. 11/S/2 of 2008, whereby compensation to the tune of Rs.4,99,000/- came to be awarded in favour of the claimant and the insurer-National Insurance Company, appellant herein was saddled with liability (hereinafter referred to as 'the impugned award').

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

3. The insurer has questioned the impugned award on the following three grounds:

1. *The claimant has failed to prove the rash and negligent driving of the driver;*
2. *The claimant was traveling in the offending vehicle as a gratuitous passenger;*
3. *The compensation amount is excessive.*

4. In order to return findings on the aforesaid points, it is necessary to give brief resume of the case, the womb of which has given birth to the present appeal.

5. The claimant had filed the claim petition before the Tribunal for grant of compensation to the tune of Rs.7,00,000/-, as per the break-ups given in the claim petition. It is averred in the claim petition that on 5th July, 2007, the claimant was traveling in the hired vehicle i.e. Mahindra Pick-up Van bearing registration No. HP-14-A-7209, with the tomato crates, which were to be taken from village Ghalayna to Sabji Mandi Solan, for sale. The said vehicle was being driven, rashly and negligently, by driver, namely Satish Kumar Goyal and met with an accident. The claimant sustained injuries, was taken to the hospital, has suffered permanent disability.

6. The respondents resisted and contested the claim petition on the grounds taken in the memo of their objections.

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

"1. *Whether the injuries were suffered by the petitioner on account of rash and negligent driving of the offending vehicle by the respondent No.2,as allege? …OPP*
2. *If issue No. 2 is proved in affirmative, whether the petitioner is entitled for compensation if so amount thereof? …OPP*
3. *Whether the respondent No.3 is liable to indemnify the compensation if awarded, there being a valid insurance as alleged?*
4. *Whether the respondent No.2 was not having valid and effective driving licence at the time of the accident, if so effect thereof? OPR-3*

5 *Whether the vehicle was being plied in violation of terms and conditions of the insurance policy, as alleged, if so effect thereof? OPR-3*

6 *Whether the petitioner was gratuitous passenger as alleged, if so the effect thereof? OPR-3*

7 *Relief."*

8. The claimant has examined Dr. Ashish Sharma (PW-2) and also appeared himself in the witness box as PW-1. The respondents have not examined any witness, only driver-Satish Goyal stepped into the witness box as RW-1. The claimant has placed on record the medical bills, discharge slip, taxi bills, disability certificate and other documents. Thus, the evidence led by the claimant has remained unrebutted.

9. The Tribunal after scanning the evidence, held that driver-respondent No. 2 has driven the offending vehicle, rashly and negligently, at the relevant time and caused the accident.

Issue No. 1.

10. I have gone through the claim petition. I am of the considered view that the claimant has proved that driver-Satish Goyal, has driven the offending vehicle, at the relevant time, rashly and negligently and caused the accident. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

11. Before I deal with Issue No. 2, I deem it proper to deal with issues No. 3 to 6.

Issue No. 3.

12. The Tribunal has held that the offending vehicle was insured, which is not in dispute. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4.

13. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence. However, respondent No. 2-driver deposed before the Tribunal that he was having a valid and effective driving licence at the time of accident. The copy of driving licence is exhibited as Ext. RW-1/D on record, which does disclose that the driver was having a valid and effective driving licence at the relevant point of time. Accordingly, the findings returned by the Tribunal on Issue No. 4 are upheld.

Issues No. 5 & 6

14. Issues No. 5 & 6 are inter-linked, thus, I deem it proper to determine both the issues together.

15. It was for the insurer to plead and prove that the offending vehicle was being driven in violation of the terms and conditions of the insurance policy and the claimant-injured was traveling in the offending vehicle as a gratuitous passenger, has not led any evidence. Thus, it has failed to discharge the onus. However, it is apt to record herein that the claimant has specifically averred in the claim petition that he hired the offending vehicle and was traveling with tomato crates in the said vehicle. There is no rebuttal to this effect. Accordingly, it is held that the claimant was not traveling in the offending vehicle as a gratuitous passenger. Viewed thus, the findings returned by the Tribunal on issues No. 5 & 6 are also upheld.

Issue No. 2.

16. The claimant-injured has pleaded in the claim petition that his income was Rs.15,000/- per month, at the relevant time. The Tribunal has assessed his income as

Rs.8,000/- per month. While exercising the guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs.8,000/-. He has suffered 25% permanent disability, which affected his earning capacity to the extent of 50%, as held by the Tribunal in para-8 of the impugned award. The disability certificates Mark-A and Ext. PW-2/A are on record. Thus, it can safely be held that the claimant has lost source of income to the extent of 50%.

17. The Tribunal has fallen in an error in applying the multiplier of '8'. Admittedly, the age of the injured was 62 years at the time of accident. The multiplier of '5' was applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar Sharma & others,** reported in **2015 AIR SCW 3105.**

18. Accordingly, it is held that the claimant is entitled to the compensation to the tune of ` Rs.4,000 x 12 = Rs.48,000 x 5 = Rs.2,40,000/-, under the head 'loss of earning'/'future income'.

19. The Tribunal has also fallen in an error in awarding cost, is set aside.

20. The Tribunal has awarded interest @ 12% per annum from the date of filing of the claim petition, is on the higher side. The amount of interest at the rate of 7.5% per annum was to be awarded for all heads except for future income, from the date of the claim petition and for future income, it was to be awarded from the date of impugned award.

21. Having said so, it is held that the claimant is entitled to compensation as under:

i)	*Loss of earning i.e. future income*	Rs.*2,40,000/-*
ii)	*Medical expenses;*	Rs.*14,715/-*
iii)	*Expenses of diet and attendant;*	Rs. *20,000/-*
iv)	*For pain and suffering;*	Rs. *25,000/-*
v)	*Loss of future discomfiture and enjoyment;*	Rs. *50,000/-*
vi)	*Transportation charges*	Rs. *5,000/-*
	Total	Rs.*3,54,715*

On the aforesaid amount of compensation, interest @ 7.5% per annum is payable for all heads except for future income from the date of the claim petition and under the head 'loss of earning/future income', it is payable from the date of impugned award.

22. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account. The excess amount be refunded to the insurance company through payees' cheque account or by depositing it in its bank account.

23. Accordingly, the impugned award is modified and the appeal is disposed of.

24. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

Oriental Insurance Co. .....Appellant
Versus
Bholi and others .....Respondents

FAO No.10 of 2010.
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that it was averred in the claim petition that vehicle bearing registration No. HP 12- 1572 was involved in the accident- however, claimants specifically pleaded and proved that vehicle was Mahindra Jeep bearing registration No. HR 68- 1572 which shows that offending vehicle was falsely implicated- held, that claimants had clarified that number of offending vehicle was recorded as HP 12-1572 by mistake, the fact that vehicle bearing registration No. HP 68 1572 was involved in the accident, has been proved by leading oral and documentary evidence- an FIR was registered against the driver of the vehicle bearing registration No.HR 68 1572 – challan was also presented against the driver of the vehicle bearing registration No. HR 68 1572- hence, plea of the insurer that false case was filed against the driver of the vehicle bearing registration No. HR 68 1572 is without any force. (Pare- 4 and 5)

Motor Vehicles Act, 1988- Section 166- Monthly income of the deceased was Rs. 5,524- after deducting 1/3rd income towards personal expenses, Tribunal had rightly held that claimant had lost of source of dependency to the extent of Rs. 3,682/-, or say, Rs. 3700/- per month- age of the deceased was 39 years- multiplier of '15' is applicable – Tribunal fell in error in applying multiplier of '16'- claimants are entitled to Rs. 3700 x 15 x 12 = Rs. 6,66,000/- under the head 'loss of source of dependency'- claimants are also held entitled to Rs. 10,000/- each under the heads 'funeral expenses', 'loss of consortium', 'loss of love and affection' and 'loss of estate'- thus, total amount of Rs. 7,11,000/-, under the different heads. (Para- 7 to 12)

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

For the respondents: Mr.Rakesh Thakur, Advocate, for respondent No.1.
Mr.Parveen Chandel, Advocate, Court Guardian, for respondents No.2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Subject matter of this appeal is the award, dated 13th April, 2009, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, the Tribunal), in Claim Petition No.14-NL/2 of 2006, titled Bholi and others vs. Inderjit Singh and another, whereby compensation to the tune of Rs.8,20,400/- with interest at the rate of 12% per annum from

the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the insurer was saddled with the liability, (for short, the impugned award).

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

3. Feeling aggrieved, the insurer has challenged the impugned award by the medium of instant appeal, on the ground that initially it was averred in the claim petition that the vehicle involved in the accident was HP-12-1572, but lateron the claimants pleaded and proved that the vehicle, which hit the scooter of the deceased, was Mahindra Jeep bearing No.HR-68-1572. Thus, the learned counsel for the appellant/insurer submitted that the offending vehicle has been falsely implicated in the accident.

4. The argument, though attractive, is devoid of any force for the simple reason that the claimants had clarified that earlier, by mistake, the number of the offending vehicle was recorded as HP-12-1572, instead of HR-68-1572. The factum that vehicle bearing No.HR-68-1572 was involved in the accident has been proved by the claimants by leading oral as well as documentary evidence. Even, in regard to the accident, the FIR was lodged against the driver of the offending vehicle (HR-68-1572). After investigation, the police had also filed the chargesheet against the driver of the offending vehicle (HR-68-1572) before the Court of Additional Chief Judicial Magistrate, Panchkula.

5. Thus, there is clinching evidence that the accident was caused by the driver, namely, Inderjit Singh, who, at the relevant point of time, had driven the offending vehicle (HR-68-1572) rashly and negligently. The Tribunal has rightly concluded that the accident had taken place on account of rash and negligent driving of the offending vehicle bearing No. HR-68-1572 by its driver Inderjit Singh. Accordingly, the argument advanced by the learned counsel for the appellant is repelled being without any force and the findings recorded by the Tribunal on issue No.1 are upheld.

6. Learned counsel for the appellant further argued that the amount of compensation awarded by the Tribunal is excessive.

7. The Tribunal in paragraph 8 of the impugned award has categorically held, on the basis of the oral as well as documentary evidence produced by the claimants in that behalf, that the monthly income of the deceased was Rs.5524/-. After deducting 1/3rd amount towards the personal expenses of the deceased, the Tribunal has rightly held that the claimants have lost source of dependency to the tune of Rs.3,682/-, or say, Rs.3700/- per month.

8. Admittedly, the age of the deceased at the time of accidental death was 39 years. Therefore, keeping in view the age of the deceased, I am of the opinion that the Tribunal has fallen in error in applying the multiplier of 16, rather multiplier of 15 was applicable. Accordingly, the multiplier of 15 is applied.

9. In view of the above, the claimants are held entitled to a sum of Rs.3700 x 15 x 12 = Rs.6,66,000/- under the head 'loss of source of dependency'.

10. In addition to above, the Tribunal has rightly awarded Rs.5,000/- under the head 'medical expenses', but has fallen in error in awarding Rs.5,000/- under the head 'funeral expenses', Rs.50,000/- each under the heads 'loss of consortium' and 'love and affection'. The Tribunal has also wrongly not awarded any compensation under the head 'loss of estate'. Accordingly, the claimants are held entitled to Rs.10,000/- each under the heads 'funeral expenses', 'loss of consortium', 'loss of love and affection' and 'loss of estate'.

11. Having said so, the Claimants are held entitled to a sum of Rs.7,11,000/-, under the different heads, as under:

i) Loss of source of dependency – Rs.6,66,000/-
ii) Medical expenses – Rs.5,000/-
iii) Funeral expenses – Rs.10,000/-
iv) Loss of consortium – Rs.10,000/-
v) Loss of love and affection – Rs.10,000/-
vi) Loss of estate – Rs.10,000/-

Total Rs.7,11,000/-

12. As far as interest is concerned, the Tribunal has awarded the interest at the rate of 12% per annum, which, appears to be on the higher side. Accordingly, the rate of interest is reduced to 7.5% per annum and 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.

13. Apart from the above, the claimants are also held entitled to Rs.5,000/- as litigation costs, as awarded by the Tribunal.

14. In view of the above discussion, the appeal is allowed and the impugned award is modified to the extent as indicated above.

15. The Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award and the excess amount, if any, alongwith interest, be refunded to the insurer through payee's account cheque.

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

Ranjot Singh Thakur & ors. .....Petitioners.

Versus

Virender Singh & ors. .....Respondents.

CMPMO No. 375 of 2015.
Reserved on: 08.03.2016.
Decided on: 18.03.2016.

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendants filed an application for seeking amendment of the written statement- application was contested by the plaintiffs- trial Court dismissed the same- it was pleaded in the application that inadvertently one document could not be produced and some material facts could not be mentioned- documents were shown to the original counsel who has since expired- the documents were also shown to subsequent advocate and the application was filed at her instance- held that suit was instituted in the year 2012- issues were framed in the year 2013- plaintiffs had led evidence and the case was listed for recording defendants' evidence- no suggestion was made to the plaintiffs' witnesses regarding the agreement dated 16.10.1996- documents ought to have been mentioned in the written statement- trial had already commenced- it was necessary to prove that amendment could not be made prior to the commencement of trial

in spite of due diligence- even new counsel did not put any suggestion regarding the documents- amendment at this belated stage will change the nature of the suit and will cause prejudice to the plaintiff- hence, application was rightly dismissed by the trial Court- revision dismissed. (Para-8 to 12)

Cases referred:
State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268
J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioners: Mr. Rajneesh K. Lall, Advocate.
For the respondents: Mr. Bhupender Singh Advocate for respondents No. 1 to 6.
Mr. Lalit K. Sharma, Advocate, for respondent No. 7.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 7.8.2015, rendered by the learned Civil Judge (Jr. Divn.), Chopal, Distt. Shimla, H.P., in application case No. 57-6 of 2015 in case No. 26-1 of 2012.

2. Key facts, necessary for the adjudication of this petition are that respondents-plaintiffs (hereinafter referred to as the plaintiffs) have filed a suit under Sections 34 and 38 of the Specific Relief Act against the petitioners-defendants as well as proforma defendants for declaration. The petitioner-defendant No. 3 was proceeded ex parte and petitioners-defendants No. 1, 2, 4 & 5 contested the suit by filing written statement. Defendant No. 6 also filed separate written statement. The issues were framed and the plaintiffs have led their evidence. The case was listed for 9.9.2015 for defendants/petitioners' evidence.

3. Petitioner No. 1, namely Ranjot Singh Thakur moved an application under Order 6 Rule 17 CPC on 22.12.2014 before the learned trial Court for carrying out amendment in para 6 of the written statement already filed by defendants No. 1, 2, 4 & 5. The application was contested by the plaintiffs. The learned trial Court dismissed the same on 7.8.2015. Hence, this petition.

4. According to the averments made in the application preferred under Order 6 Rule 17 CPC, some material facts could not be mentioned and pleaded in the written statement filed by defendant No. 1 due to inadvertence. One document (*Ikrarnama*) regarding the agreement to sell the suit property also could not be produced alongwith the written statement. According to the applicant, Chet Ram, father of plaintiffs No. 1 to 5 and husband of plaintiff No. 6 had sold his land and house i.e. suit property to the defendant No. 1 for consideration of Rs. 47,500/- in the presence of witnesses. Out of the total consideration amount, half of the amount was paid by the applicant to Chet Ram. The rest of the remaining half amount was to be paid at the time of execution of the sale deed. Earlier he was represented by Advocate S.S.Khimta. He has expired. He showed original documents to his counsel. The applicant engaged Smt. Seema Mehta Advocate. The documents were shown to her. It is, in these circumstances, application was filed seeking amendment.

5. According to the plaintiffs, the proposed amendment was not necessary for the complete adjudication of the lis. Neither any agreement to sell was executed nor any

part consideration was paid. The applicants intended to grab the suit land by fabricating false story. The applicant defendant No. 1 has signed the written statement after reading and understanding its contents. According to the plaint, the plaintiffs were owners-in-possession of the suit land, as detailed in the plaint. They have constructed residential house over it. The nature of the suit property was ancestral. They have also filed civil suit for declaration and partition which was decreed in their favour vide judgment dated 28.8.1999. The defendants with intention to deprive the plaintiffs from their valuable ancestral and coparcenary property in the wrongful and illegal manner executed a false, fake and forged document (General Power of Attorney) on behalf of Chet Ram in favour of defendant No. 1 with a motive to grab the land. No such General Power of Attorney was ever executed. With the intention to obtain loan benefits from the Scheduled Caste and Scheduled Tribe Development Corporation, the defendants No. 1 to 5 hatched a conspiracy in connivance with each other to procure frivolous document for purchasing vehicle in the name of Basti Ram defendant No. 3.

6. According to the averments made in the written statement, the General Power of Attorney was executed by Sh. Chet Ram in sound state of mind in favour of defendant No. 1 in the presence of reliable witnesses. It was registered and attested by Sub Registrar Rajgarh. The raising of the loan is admitted.

7. I have heard learned counsel for the parties and gone through the impugned order dated 7.8.2015, carefully.

8. In this case, the suit was instituted in the year 2012. The written statement was filed and issues were framed on 22.8.2013. The plaintiffs have already led their evidence. The matter was listed for recording defendants' evidence. There is no mention of alleged agreement dated 16.10.1996 in the written statement filed by defendants No. 1, 2, 4 & 5 jointly. No suggestions were put to the witnesses produced by the plaintiffs qua the agreement dated 16.10.1996. The document ought to have been mentioned in the written statement. The application under Order 6 Rule 17 CPC has been preferred to delay the proceedings. The trial has already commenced. It was necessary for the applicants to prove that inspite of due diligence they could not amend the written statement before the commencement of the trial.

9. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Union of India and another,*** reported in ***(2011) 12 SCC 268***, have held that when application is filed after the commencement of the trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. Their lordships have held as under:

> "7). The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> 8). The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right

and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

9) Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules, 1966 (in short `the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

> "8. The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10) This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

> "16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments

ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

"13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05) "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

"15. The object of the rule is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

16. Order 6 Rule 17 consists of two parts. Whereas the first part is discretionary (may) and leaves it to the court to order amendment of pleading. The second part is imperative (shall) and enjoins the court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bona fide or mala fide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;

and (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."

The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

10. Their lordships in the case of ***J.Samuel and others vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that omission of specific plea that inspite of due diligence the party could not have raised the matter before the commencement of the trial, mandatorily amounts to negligence and lack of due diligence. Their lordships have explained the term "due diligence". It has been held as under:

"15) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states that:

"... no application for amendment shall be allowed after the trial has commenced, unless the court comes to the

conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

11. Mr. Rajnish K. Lall, Advocate, has vehemently argued that new counsel was engaged after the death of Sh. S.S. Khimta, Advocate. However, the fact of the matter is that new counsel Smt. Seema Mehta has also not put any suggestion to the witnesses of the plaintiffs during their cross-examination. The amendment, at this belated stage, would definitely change the nature of the suit and would cause prejudice to the plaintiffs. The plaintiffs have already led their evidence.

12. Consequently, there is neither any illegality nor perversity in the order dated 7.8.2015 passed by the learned trial Court. The petition is accordingly dismissed. Order dated 8.9.2015 is vacated. The learned Civil Judge (Jr. Divn.) Chopal, is directed to decide the lis within a period of six months from today. The parties, through their counsel, are directed to appear before the learned trial Court on 30.3.2016. No costs.

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

Rita Mohil & others .....Appellants

Versus

Imran Khan & another .....Respondents

FAO No.381 of 2012
Date of decision: 18.03.2016

Motor Vehicles Act, 1988- Section 166- Salary certificate shows that last pay drawn by the deceased was Rs.17,977/-- 1/3rd amount is to be deducted towards personal expenses- thus, claimants had lost source of dependency to the tune of Rs. 11984/-, or say Rs. 12,000/- per month- multiplier of '17' was applied, whereas, multiplier of '16' is applicable- thus, claimants are entitled to Rs. 12,000/-x12 x 16 = Rs. 23,04,000/- under the head 'loss of dependency'- amount of Rs.10,000/- each is awarded under the heads of 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses'- thus, total amount of Rs. 23,44,000/- is awarded along with interest. (Para-7 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

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

For the appellants: Mr. Rupinder Singh, Advocate.
For the respondents: Mr. Vishal Bindra, Advocate, for respondent No.1.
Mr. P.S. Chandel, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Appellants-claimants, being the victims of motor vehicular accident, have invoked the jurisdiction of this Court under Section 173 of the Motor Vehicles Act, 1988 (for short "the MV Act") and prayed for enhancement of compensation on the grounds taken in the memo of appeal.

2. Subject mater of this appeal is the award dated 12th March, 2012, made by the Motor Accident Claims Tribunal-1, Sirmaur, District at Nahan, H.P., (hereinafter referred to as 'the Tribunal') in M.A.C. Petition No. 40-MAC/2 of 2010, titled Smt. Rita Mohil & others versus Shri Imran Kahan & another, whereby compensation to the tune of Rs.12,23,720/- with interest @ 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants-appellants herein and the insurer-the Oriental Insurance Company-respondent No. 2 herein, was saddled with the liability, (hereinafter referred to as 'the impugned award').

3. The insurer and the insured-owner have not questioned the impugned award on any count, thus has attained finality so far it relates to them.

4. Thus, the only question to be determined in this appeal is-whether the amount awarded is inadequate? The answer is in affirmative for the following reasons.

5. The claimants had filed the claim petition before the Tribunal, for grant of compensation to the tune of Rs.30.00 lacs, as per the break-ups given in the claim petition.

6. It is specifically averred in the claim petition that the deceased Shri Sandeep Mohil became the victim of vehicular accident on 15.6.2010 and was taken to the hospital where he succumbed to the injuries. F.I.R No. 130 of 2010, under Sections 279, 304 A of the Indian Penal Code, Police Station, Nahan, was lodged against the driver of the offending vehicle-bus bearing registration No.HP-02-7786. It is further pleaded in the claim petition that the deceased was a JBT teacher and was likely to be promoted as TGT, details of which are given in para-22 of the claim petition.

7. The claimants have placed on record salary certificate Ext. PW-2/A, which does disclose that the last pay drawn by the deceased was Rs.17,977/- and the age of the deceased was 35 years at the time of the accident, as the accident had taken place on 15.06.2010 and his date of birth is recorded in his service book (Ext. PW-2/B) as 13.06.1975.

8. It is held that the monthly salary/income of the deceased was Rs.17,977/-. 1/3rd was to be deducted towards personal expenses of the deceased in view of the ratio laid down by the Apex Court in case tilted as **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the judgment rendered by the Apex Court in case titled as **Munna Lal Jain & another versus Vipin Kumar**

Sharma & others, reported in **2015 AIR SCW 3105.** Thus it can safely be held that the claimants have lost source of dependency to the tune of Rs.11984/-, roughly Rs.12,000/- per month.

9. The Tribunal has also fallen in error in applying the multiplier of '7' in view of the age of the deceased. The age of the deceased was 35 years at the time of the accident and the multiplier of '16' was applicable in this case in view of Schedule II appended to the MV Act read with the ratio laid down by the Apex Court in ***Sarla Verma, Reshma Kumari and Munna Lal Jain's*** cases, supra.

10. Accordingly, it is held that the claimants are entitled to compensation to the tune of Rs.12,000/-x12= Rs.1,44,000/- x 16 = Rs. 23,04,000/- under the head 'loss of dependency'.

11. The Tribunal has also fallen in an error in awarding Rs.20,000/- under various heads, which is not legally correct. In view of the recent judgment of the Apex Court, a sum of Rs.10,000/- each is awarded in favour of the claimants, under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses.

12. Viewed thus, the claimants are held entitled to the total amount of compensation to the tune of Rs.23,04,000/- + Rs.40,000/- = Rs.23,44,000/- along with interest as awarded by the Tribunal.

13. Accordingly, the amount of compensation is enhanced. The insurer is directed to deposit the entire award amount, minus the amount if already deposited or paid, before the Registry of this Court within eight weeks from today. On deposit, the same be released in favour of the claimants, strictly as per the terms and conditions contained in the impugned award, through payees' account cheque or by paying the same in their accounts.

14. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

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

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

CMPMO Nos. 277, 278 and 279 of 2015
Date of decision: 18.3.2016

1.*CMPMO No. 277 of 2015*
Sohan Singh & others. ...Petitioners
Versus
Ranjeet Singh and others. ...Respondents
2.*CMPMO No. 278 of 2015*
Sohan Singh & others. ...Petitioners
Versus
Ranjeet Singh and others. ...Respondents
3.*CMPMO No. 279 of 2015*
Sohan Singh & others. ...Petitioners
Versus
Ranjeet Singh and others. ...Respondents

Code of Civil Procedure, 1908- Order 6 Rule 17- Application for amendment of written statement-cum-counter claim was rejected by the trial Court in terms of proviso to order 6 Rule 17- held, that proviso clearly provides that amendment cannot be allowed after the commencement of trial- trial had not only commenced but decree had also been passed which was assailed before the Appellate Court and the matter was remanded to the trial Court- trial Court had rightly dismissed the application- petition dismissed. (Para-4 to11)

For the Petitioners: Mr. Ajay Chandel, Advocate.
For the Respondents: Mr.Mohit Thakur, Advocate, for respondents No. 1 to 8.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (oral).

Since common question of law and fact arises for consideration, therefore, all these petitions are taken up together for decision.

2. The petitioners are the defendants and had moved applications for amendment of the written statement-cum-counter-claim which has been rejected by the learned Court below in terms of proviso to Rule 17 of Order 6, wherein it is stipulated that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.

3. Learned counsel for the petitioners has argued that the aforesaid proviso would only apply in case the suit had been instituted after the amendment carried out in the Code of Civil Procedure on 1.7.2002 and would not apply to the instant suit, which had been instituted prior to the said date.

4. On the other hand, Mr.Mohit Thakur, learned counsel for the respondents has vehemently argued that no doubt the suit was instituted prior to coming into force of the Amendment Act, but then the written statement-cum-counter-claim admittedly was filed after the amendment had already came into force. According to him, the Amendment Act uses the expression in respect of any pleadings and not "suit" and therefore, the mere fact that the suit has been instituted prior to the amendment would be of no consequence.

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

5. Before adverting to the relative merits of the case, it would be worthwhile to reproduce Section 16 (2) (b) of the (Amendment Act 2002), which reads thus:-

> *"16(2)(b). the provisions of rules 5, 15, 17 and 18 of Order VI of the First Schedule as omitted or, as the case may be, inserted or substituted by section 16 of the Code of Civil Procedure (amendment) Act, 1999 (46 of 1999) and by section 7 of this Act shall not apply to in respect of any pleadings filed before the commencement of section 16 of the Code of Civil Procedure (Amendment) Act, 1999 and section 7 of this Act."*

6. Order 6 Rule 17 CPC reads thus:-

> *"Amendment of pleadings.---The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as*

may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

7. Evidently the expression employed in Section 16(2)(b) of the Amendment Act with regard to applicability of the amending provisions is in respect to "any pleadings" and nowhere is the expression "suit" or "plaint used.

8. Pleadings is defined under Order 6 Rule 1 in the following terms:-

"Pleadings.---"Pleadings" shall mean plaint or written statement."

9. A conjoint reading of Section 16(2)(b) of the Amendment Act with Order 6 Rule 17 C.P.C. leaves no room for doubt that the aforesaid amended provisions would only apply in case the plaint or written statement as the case may be are filed before the amendment came into force i.e. 1.7.2002.

10. Now in so far as the interpretation of proviso to Rule 17 of Order 6 is concerned, the party has to satisfy the Court that it could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the Court to amend the pleadings at any stage of the proceedings. However, the proviso restricts that power once the trial has commenced.

11. Lastly, it may be necessary to add that the proviso to Order 6 Rule 17 provides that amendment of pleadings shall not be allowed when trial of the suit has already commenced. The record of the instant case reveals that not only the trial had commenced, but even a decree had initially been passed by the learned trial Court on 6.1.2014, which was assailed before the learned lower Appellate Court and upon remand the matter is now pending adjudication before the learned trial Court.

Having said so, I find no merit in these petitions and accordingly the same are dismissed, leaving the parties to bear their costs.

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

Smt. Tripta Devi ...Appellant.

Versus

General Manager, HRTC and others ...Respondents.

FAO No. 529 of 2009
Decided on: 18.03.2016

Motor Vehicles Act, 1988- Section 166- Witnesses consistently deposed that vehicle was being driven by the driver rashly and negligently in which E and I had lost their lives- an FIR was registered against the driver – final report was also filed against him- thus, claimants had discharged the onus prima facie by proving that driver was driving the vehicle rashly and negligently at the time of accident- claim petition cannot be dismissed on the ground of

mis-joinder and non-joinder of necessary parties - natural mother is entitled to get compensation regarding the death of her married daughter- deceased would have been earning not less than Rs. 3,000/- per month at the relevant point of time and it can be said that the claimant had suffered loss of source of dependency to the tune of Rs. 1500/- per month- age of the deceased was 25 years at the time of accident- multiplier of '15'is applicable – claimant is entitled to Rs. 1500 x 12 x 15= 2,70,000/- with interest.

(Para-9 to 25)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr. Vijay Verma, Advocate, for respondents No. 1 and 2.
Nemo for respondents No. 3 and 4.

The following judgment of the Court was delivered:

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

There is no representation on behalf of respondents No. 3 and 4. Hence, they are set ex-parte.

2. Challenge in this appeal is to the judgment and award, dated 1st September, 2009, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 12 of 2006, titled as Smt. Tripta Devi versus General Manager H.R.T.C. Shimla and others, whereby compensation to the tune of ₹ 65,000/- with interest @ 8% per annum from the date of institution of the claim petition till its realization came to be awarded in favour of the claimant (for short "the impugned award").

3. This appeal is on the Board of this Court for the last more than seven years.

4. The appellant-claimant invoked the jurisdiction of the Tribunal by the medium of claim petition for grant of compensation to the tune of ₹ ten lacs, 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 Jarm Singh, while driving HRTC bus, bearing registration No. HP-20 A-9005, rashly and negligently on 1st February, 2006, at about 4.15 P.M. near Village Katohar Kalan on Amb-Una National Highway, in which Ekta Sharma and Inderjeet Sharma sustained injuries and succumbed to the injuries.

5. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

6. On the pleadings of the parties, following issues came to be framed by the Tribunal on 3rd May, 2006:

> *"1. Whether Smt. Ekta Sharma died in a motor accident caused by rash and negligent driving of the bus (No. HP-20A-9005) by Jarm Singh (respondent No. 3) at the point known as Katohar Kalan Morh on February 1, 2006? OPP*
>
> *2. Whether the petitioner is entitled to compensation. If so, to what amount and from whom? OPP*

3. Whether the accident was attributable to the husband of the deceased? OPR-1&2

4. Whether the petition is bad for non-joinder of the owner and the insurer of the motorcycle which was alleged being driven by the husband of the deceased? OPR-1 to 3

5. Relief."

7. The appellant-claimant examined HC Kusha Dutt as PW-1, Satpal as PW-3, Narinder Kumar as PW-4, Dr. M.K. Pathak as PW-5 and the claimant herself appeared in the witness box as PW-2. The insurer and insured have not led any evidence. However, driver-Jarm Singh appeared in the witness box as RW-1.

8. I have perused the claim petition, the record and the impugned award and am of the considered view that the Tribunal has wrongly made the discussion and the conclusion.

Issue No. 1:

9. All the witnesses, i.e. Tripta Devi, Satpal and Narinder Kumar, have deposed that the offending vehicle was being driven by driver-Jarm Singh rashly and negligently on 1st February, 2006 at about 4.15 P.M. at Katohar Kalan, in which Ekta Sharma and her husband, Inderjeet Sharma, lost their lives. FIR was lodged against driver-Jarm Singh (respondent No. 3 in the claim petition) and final report in terms of Section 173 of the Code of Criminal Procedure (for short "CrPC") was filed against him under Section 279 and 304-A of the Indian Penal Code (for short "IPC") before the Court of competent jurisdiction.

10. Having said so, it can be safely said and held that the claimant has discharged the onus by, *prima facie,* proving that the driver, namely Jarm Singh, has driven the offending vehicle rashly and negligently at the time of the accident and caused the accident, in which Ekta Sharma sustained injuries and succumbed to the injuries. Accordingly, the findings returned by the Tribunal on issue No. 1 are set aside and the same is decided in favour of the claimant and against respondents No. 1 and 2.

11. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 and 4.

Issue No. 3:

12. Respondents No. 1 and 2 in the claim petition had to prove that the accident was caused by the husband of deceased-Ekta Sharma, have not led any evidence, thus, have failed to discharge the onus. Even otherwise, in view of the findings returned on issue No. 1, the findings returned by the Tribunal on issue No. 3 are set side and the same is decided against respondents No. 1 & 2 and in favour of the claimant.

Issue No. 4:

13. It was for the respondents in the claim petition to prove that the claim petition was suffering from mis-joinder and non-joinder of necessary parties, have not led any evidence.

14. Moreover, the Motor Vehicles Act, 1988 (for short "MV Act") has gone through a sea change in the year 1994 and in terms of Sections 158 (6) and 166 (4) of the MV Act, even the police report can be treated as a claim petition. So, claim petition cannot be dismissed on the ground of mis-joinder and non-joinder of necessary parties. Thus, it is held that the claim petition was maintainable and not suffering from any mis-joinder and non-joinder of necessary parties. Accordingly, issue No. 4 is decided in favour of the claimant and against respondents No. 1 to 3.

15. I wonder how the Tribunal has decided all the issues against the claimant and in favour of the respondents in the claim petition in one breath and in the second breath, has awarded compensation.

16. It is worthwhile to record herein that the Tribunal has decided almost all the issues against the claimant, but while deciding issue No. 2, has granted compensation. It is not known as to what research the learned Judge has undertaken.

17. Be it as it is, admittedly, deceased-Ekta Sharma was the daughter of the claimant-Tripta Devi. It is also admitted that she was married to Inderjeet Sharma, who was driving motorcycle at the time of the accident, which was hit by the offending vehicle and both of them have lost their lives in the said accident.

18. The question is – whether natural mother can claim compensation in lieu of the death of her daughter, who was married but without any child? The answer is in the affirmative for following reasons:

19. The relationship of a daughter and mother remains the same even after the daughter gets married. *Shoe wearer knows where the shoe pinches.* It is known to everyone that daughter is always affectionate to her parents and she takes care of her parents even after her marriage. The mother is deprived of the love and affection of her daughter and source of hope and help in her old age. Money cannot be a substitute for the loss of a daughter.

20. In the instant case, the husband and the wife, i.e. the couple, have died leaving behind only mother and no other legal representative.

21. The Tribunal, though, has awarded the compensation, but the same is very meagre. Even as a housewife, the deceased would have been earning not less than ₹ 3,000/- at the relevant point of time and it can be safely said and held that the claimant has suffered loss of source of dependency to the tune of ₹ 1500/- per month.

22. Admittedly, the age of the deceased was 25 years at the time of the accident. Thus, the multiplier of '15' is just and appropriate in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt) and others versus Delhi Transport Corporation and another,** reported in **(2009) 6 Supreme Court Cases 121,** which has been upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

23. Having said so, the claimant is held entitled to compensation to the tune of ₹ 1500 x 12 x 15 = ₹ 2,70,000/- with interest as awarded by the Tribunal.

24. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of accordingly.

25. The enhanced awarded amount be deposited before the Registry of this Court within six weeks. On deposition, the awarded amount be released in favour of the claimant strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account.

26. 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.

United India Insurance Company Ltd. .....Appellant
Versus
Kamal Sharma and others .....Respondents

FAO No. 516 of 2009.
Reserved on: 04.03.2016.
Pronounced on : 18.03.2016

Motor Vehicles Act, 1988- Section 149- Claimant was inside his cattle shed- a road was being constructed on the upper side of the cattle shed - a big boulder came from the upper side, as a result of which the right leg of the claimant got injured- the boulder came down because the JCB was being used rashly and negligently for the construction of the Road- it was contended that JCB does not fall within the definition of the motor vehicle – held, that JCB is a powerful motor vehicle with a long arm for digging and moving earth – vehicle was insured and, therefore, insurer was rightly held liable to pay compensation. (Para-12 to 28)

Cases referred:
New India Assurance Co. Ltd. Indore versus Balu Banjara and others 2008 (2) MPHT 252
Bose Abraham versus State of Kerala and another AIR 2001 SC 835
Nagashetty versus United India Insurance Co. Ltd and others, AIR 2001 SC 3356
M/s Natwar Parikh and Co. Ltd. versus State of Karnataka and others AIR 2005 SC 3428
National Insurance Co. Ltd. v. Baby Anjali & Ors., AIR 2008 Gujarat 12
State of Gujarat versus Danabhai Bhulabhai and Ors., 1991 (2) G.L.H. 404
Kusum and others versus Kamal Kumar Soni and another 2009 ACJ 1613
Rajasthan State Road Transport Corporation & Ors versus Smt. Santosh & Ors. 2013 AIR SCW 2791

For the appellant: Mr.Ashwani K. Sharma, Senior Advocate, with Ms.Monika Shukla, Advocate, for the appellant.
For the respondents: Mr.B.S. Chauhan, Senior Advocate, with Mr.Vaibhav Tanwar, Advocate, for respondent No.1.
Mr.Sanjay Sharma, Advocate, for respondent No.2.
Mr.Anupinder Rohal, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This appeal is directed against the award, dated 31st July, 2009, passed by the Motor Accident Claims Tribunal-II, Solan, H.P., (for short, the Tribunal), in Claim Petition No.14-S/2 of 2008, titled Kamal Sharma vs. Padam Chand Rohal and others, whereby compensation to the tune of Rs.4,50,000/- with interest at the rate of 12% per annum from the date of filing of the claim petition till realization, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimant, the owner and the driver have not questioned impugned award on any count, therefore, the same has attained finality so far as it relates to them. Feeling

aggrieved, the insurer has challenged the impugned award by the medium of instant appeal, on the grounds taken in the memo of appeal.

3. Facts of the case, in brief, are that on 26th January, 2007, at about 5.30 p.m., the claimant (respondent No.1 herein) was inside his cattle shed at Ded Gharat near Kandaghat. A road was being constructed on the upper side of the cattle shed and the machinery was in operation for the purpose. All of a sudden, a big boulder came from the upper side, as a result of which the right leg of the claimant got injured. The boulder came down because of the JCB being used for the construction of the Road. The JCB, at the relevant time, was being driven by driver namely Vijay Kumar. The claimant was shifted to the hospital. FIR bearing No.32/2007 was registered at Police Station Kandaghat under Sections 337, 338 and 34 of the Indian Penal Code. Thus, the claimant claimed compensation to the tune of Rs.20.00 lacs as per the break-ups given in the Claim Petition.

4. Respondents resisted the claim petition by filing replies.

5. On the pleadings of the parties, the following issues came to be settled:

"1. Whether the injuries were suffered by the petitioner on account of fall of a stone which was on account of operation of JCB bearing engine No.200850022 owned by the respondent N.1 as alleged? OPP

2. If issue No.1 is proved in affirmative, as to what amount of compensation the petitioner is entitled to? OPP

3. If issues No.1 and 2 are proved as to whether the respondent No.3 shall be responsible to make payment of amount if so as to what extent, as alleged? OPP

4. Whether the respondent No.2 was not holding valid and effective driving licence of JCB at time of the accident as alleged? OPR-3

5. Relief."

6. Parties led their evidence. The claimant, in order to prove his claim, examined PW-1 Dr.Ashish Sharma, PW-2 Dr.R.P. Singla, PW-4 Geeta Ram, PW-5 Devender Kumar, PW-6 Krishan Kumar and also stepped himself into the witness box as PW-3.

7. On the other hand, the owner of the offending vehicle i.e. JCB stepped into the witness box as RW-1. The insurer has not led any evidence.

8. The Tribunal, after scanning the evidence, has held that the driver, namely, Vijay Kumar, on the fateful day, had driven the vehicle rashly and negligently and had caused the injuries and since the offending vehicle was duly insured, saddled the insurer with the liability.

9. Feeling aggrieved, the insurer has challenged the impugned award by the medium of the instant appeal.

10. I have heard the learned counsel for the parties and have gone through the record of the case. My issue-wise findings are as under.

Issue No.1:

11. The Tribunal, after scanning the evidence and the pleadings of the parties, has categorically held that the accident had occurred due to the rash and negligent driving on the part of the JCB driver. A perusal of the record also discloses that qua the accident, FIR bearing No.32, dated 21.2.2007, Ext.PW-6/A, was registered at Police Station, Kandaghat. After investigation, challan was filed before the competent court of law against the driver. Even otherwise, the findings returned by the Tribunal on this issue are not in dispute. Accordingly, the findings returned by the Tribunal on this issue are upheld.

Issues No.3 and 4:

12. Before issue No.2 is taken up, I deem it proper to take up issues No.3 and 4. The onus to prove the said issues was on the insurer. A perusal of the record shows that the insurer has not led any evidence to prove the said issue.

13. However, during the course of the hearing, the learned counsel for the appellant/insurer argued that the JCB machine is not a motor vehicle in the eyes of law. The argument though attractive is devoid of any force for the following reasons.

14. Section 2 (28) of the Act defines a motor vehicle and while going through the said definition, it appears that JCB machine is a motor vehicle. It is apt to reproduce Section 2 (28) of the Act herein.

> *"2 (28) "motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding 4 [twenty-five cubic centimetres];"*

15. It is also profitable to reproduce the definition of JCB given in Oxford dictionary at page 695.

> *"A powerful motor vehicle with a long arm for digging and moving earth."*

16. The above quoted definition does disclose that the JCB is a powerful motor vehicle with a long arm for digging earth. In terms of the said definition, the JCB is a motor vehicle.

17. The same question arose before the Madhya Pradesh High Court in case titled ***New India Assurance Co. Ltd. Indore versus Balu Banjara and others*** reported in ***2008 (2) MPHT 252***. It is apt to reproduce relevant portion of para 8 of the said judgment herein.

> *"8. …… ……In the present case the JCB machine is running on the roads and is being used for construction of the roads. Only because it is not being registered by the Regional Transport Authority as motor vehicle and no registration number is being given, it cannot be said that the JCB was not a motor under the provisions of the Motor Vehicles Act. In the facts and circumstances of the case, this Court is of the view that the learned Tribunal has rightly held that the JCB machine is motor for the purpose of Motor Vehicles Act."*

18. The apex Court in ***Bose Abraham*** versus ***State of Kerala and another*** reported in ***AIR 2001 SC 835*** has discussed Section 2 (28) of the Act and held that the excavators and road rollers are motor vehicles. It is apt to reproduce para 7 of the said judgment herein.

> *"7. We hold that the excavators and road rollers are motor vehicles for the purpose of the Motor Vehicles Act and they are registered under that Act. The High Court has noticed the admission of the appellants that the excavators and road rollers are suitable for use on roads. However, the contention put forth now is that they are intended for use in the enclosed premises. Merely because a motor vehicle is put to a specific use such as being confined to an enclosed premises, will not render the same to be a different kind of vehicle. Hence, in our view, the High Court has correctly decided the matter and the impugned order does not call for any interference by us.*

However, the question whether any motor vehicle has entered into a local area to attract tax under the Entry Tax Act or any concession given under the local Sales Tax Act will have to be dealt with in the course of assessment arising under the Entry Tax Act".

19. The apex Court in another judgment rendered in case titled ***Nagashetty versus United India Insurance Co. Ltd and others,*** reported in ***AIR 2001 SC 3356,*** held that the trailer attached with the tractor is a motor vehicle.

20. The apex Court in another judgment in case ***M/s Natwar Parikh and Co. Ltd. versus State of Karnataka and others*** reported in ***AIR 2005 SC 3428*** discussed Sections 2 (28), 2 (14) and 2 (47) of the Act and held that tractor-trailer is a transport vehicle under Section 2 (47) of the Act. It is apposite to reproduce para 24 of the said judgment herein.

"24. Section 2(28) is a comprehensive definition of the words "motor vehicle". Although, a "trailer" is separately defined under Sec. 2(46) to mean any vehicle drawn or intended to be drawn by a motor vehicle, it is still included into the definition of the words "motor vehicle" under Sec. 2(28). Similarly, the word "tractor" is defined in Sec. 2(44) to mean a motor vehicle which is not itself constructed to carry any load. Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature. Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles, etc. A combined reading of the aforestated definitions under Sec. 2, reproduced hereinabove, shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor-trailer would constitute a "goods carriage" under Sec. 2(14), and consequently, a "transport vehicle" under Sec. 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for transporting goods, it can be stated that it is adapted for the carriage of goods. Applying the above test, we are of the view that the tractor-trailer in the present case falls under Sec. 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" under Sec. 2(47) of the M.V. Act, 1988."

21. The Gujarat High Court in case ***National Insurance Co. Ltd. v. Baby Anjali & Ors***., reported in ***AIR 2008 Gujarat 12,*** has discussed the definition in terms of Sections 2 (18) and 2 (19) of the Act and held that the trailer attached to the tractor falls within the definition of motor Vehicle.

22. The question arose before the Gujarat High Court in case titled ***State of Gujarat versus Danabhai Bhulabhai and Ors.,*** reported in ***1991 (2) G.L.H. 404***, whether the bulldozer is a motor vehicle and it was held that the same is a motor vehicle. It is appropriate to reproduce relevant portion of para 11 of the said judgment herein.

"11. .....Therefore, going by the definition of the expression 'Motor Vehicle' and keeping in mind the evidence on record, the submission that bulldozer cannot be said to be a motor vehicle must be said to have been rightly rejected by the Tribunal."

23. In case ***Kusum and others*** **versus** ***Kamal Kumar Soni and another*** reported in ***2009 ACJ 1613,*** the Madhya Pradesh High Court held that the power-tiller is a motor vehicle.

24. The apex Court in a latest judgment in case titled Chairman, ***Rajasthan State Road Transport Corporation & Ors versus Smt. Santosh & Ors.*** reported in ***2013 AIR SCW 2791*** has discussed the object of the Motor Vehicles Act and also Sections 2 (28) and 2(44). It is apt to reproduce relevant portion of para 22 of the said judgment herein.

> *"22. The Tractor is a machine run by diesel or petrol. It is a self- propelled vehicle for hauling other vehicles. It is used for different purposes. It is also used for agricultural purposes, along with other implements; such as harrows, ploughs, tillers, blade-terracers, seed- drills etc. It is a self-propelled vehicle capable of pulling alone as defined under the definition of Motor Vehicles. It does not fall within any of the exclusions as defined under the Act. Thus, it is a Motor Vehicle in terms of the definition under Section 2(28) of the Act, which definition has been adopted by the Act. So, even without referring to the definition of the Tractor, if the definition of the Motor Vehicle as given under the Act is strictly construed, even then the Tractor is a Motor Vehicle as defined under the Act. The Tractor is not only used for agricultural purposes but is also used for other purposes as stated above. Therefore, it cannot be said that the Tractor in its popular meaning is only used for agricultural purposes and, thus, is not a Motor Vehicle as defined under the Act. The Tractor is a Motor Vehicle is also proved by this definition under Section 2(44) of the Act. Different types of Motor Vehicles have been defined under the provisions of the Act, and the Tractor is one of them. Thus, considering the question from any angle, the Tractor is a Motor Vehicle as defined under the Act."*

25. Viewed thus, it is held that the JCB is a motor vehicle.

26. It is admitted fact that the offending vehicle was insured. It was for the insurer to plead and prove that the offending vehicle was being driven in contravention to the terms and conditions contained in the insurance policy or that the driver of the offending vehicle was not having a valid and effective driving licence in which the insurer has miserably failed.

27. The owner of the offending vehicle has categorically stated in his statement while appearing as RW-1 that the driver Vijay Kumar was having a valid and effective driving licence and was competent to drive the vehicle in question. The driving licence of the driver was placed on record as Ext.R-3, which does disclose that the driver was having a valid and effective driving licence.

28. Having said so, no fault can be found with the findings returned by the Tribunal on these issues and accordingly the same are upheld.

Issue No.3:

29. The claimant has examined Dr.Anish Sharma as PW-1 who has stated that he was the member of the Board constituted for assessing the disability suffered by the claimant. He further stated that the claimant had suffered 15% disability, which was permanent in nature, due to which the claimant might be facing problem in driving a heavy vehicle. The disability certificate has been proved on record as Ext.PW-1/A. The claimant has also examined PW-2 Dr.R.P. Singla who had stated that he operated upon the leg of the claimant and fixed a plate inside it.

30. The claimant specifically pleaded to be working as professional driver. To prove this factum, the claimant examined PW-5 Devinder who specifically stated that the claimant had been working as driver for the last 20-30 years with different owners and in the year 2007, the claimant was working as driver with vehicle No.HP-09-0321 owned by him. PW-5 Devinder further stated that the salary of the claimant was Rs.3,500/- per

month and the claimant was also getting Rs.100/- per say as daily allowance. The driving licence of the claimant has been proved on record as PW-3/B which does disclose that the claimant was having a valid and effective driving licence to drive heavy motor vehicles.

31. After taking into account the entire evidence, as discussed hereinabove, the Tribunal has rightly assessed the income of the claimant to be Rs.5,000/- per month. The Tribunal has further held, and rightly so, that, no doubt, the claimant suffered only 15% permanent disability, but due to the loss of his profession of driver from which he was earning his two ends bread, the claimant has to be compensated for at least 50% of his income. Thus, the Tribunal has rightly assessed the loss of income to the claimant to the tune of Rs.2500/- per month.

32. Coming to the multiplier, the age of the claimant, at the time of accident, was 55 years. The Tribunal, keeping in view the age of the injured, has rightly applied the multiplier of 11.

33. In addition to above, the Tribunal has again rightly awarded the compensation under the heads 'medical expenses', 'pain and suffering' and 'comforts and longevity of life'.

34. Having said so, the findings returned by the Tribunal on issue No.2 are liable to be upheld and the same are upheld accordingly.

35. In view of the above discussion, there is no merit in the appeal and the same is dismissed. The Registry is directed to release the entire amount, alongwith interest accrued thereon, to the claimant forthwith.

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

United India Insurance Company Ltd. .....Appellant

Versus

Sh. Surinder Singh & others .....Respondents

FAO No. 36 of 2010
Decided on : 18.03.2016

Motor Vehicles Act, 1988- Section 171- Tribunal had awarded interest @ 7.5% per annum from the date of filing of the claim petition – amount of interest @ 7.5% per annum was to be awarded for all heads except for future income from the date of the claim petition and for future income interest was to be awarded from the date of the award and not from the date of the claim petition. (Para-11)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787
Kavita versus Deepak and others, 2012 AIR SCW 4771

For the appellant : Mr. Virender Singh Chauhan, Advocate.

For the respondents: Mr. T.S. Chauhan, Advocate, for respondent No. 1.
Mr. Neel Kamal Sharma, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 27th November, 2009, passed by the Motor Accident Claims Tribunal, Ghumarwin, District Bilaspur, Himachal Pradesh, (Camp at Bilaspur) (hereinafter referred to as 'the Tribunal'), in M.A.C. No. 90 of 2005/04, whereby compensation to the tune of Rs.3,67,500/- came to be awarded with interest at the rate of 7.5 % per annum from the date of the claim petition, in favour of the claimant and the insurer-United India Insurance Company, respondent No -3 herein was saddled with liability (hereinafter referred to as 'the impugned award').

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

3. The insurer has questioned the impugned award on the ground that the award amount is excessive and the claimant himself had contributed in causing the accident.

Issue No. 1.

4. The Tribunal after examining the oral as well as documentary evidence, has rightly held that the accident was caused by respondent No. 2, driver of bus bearing registration No. HP-23-2921, while driving the same, rashly and negligently. The driver has not questioned the said findings. The Tribunal has rightly made the discussion in paras 9 to 18 of the impugned award.

5. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

Issue No. 3.

6. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence at the time of accident, has not led any evidence. The copy of driving licence is exhibited as Ext. R-2/A on record, which does disclose that the driver was having a valid and effective driving licence at the relevant point of time. Accordingly, the findings returned by the Tribunal on Issue No. 3 are upheld.

Issue No. 2

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. The claimant has suffered 25% disability to the lower limb, which has shattered his physical frame. The Tribunal has discussed all aspects of the case from paras 19 to 29 of the impugned award and awarded compensation, which appears to be reasonable and cannot be said be excessive.

12. The Tribunal has fallen in an error in awarding interest @ 7.5% per annum from the date of filing of the claim petition. The amount of interest at the rate of 7.5% per annum was to be awarded for all heads except for future income, from the date of the claim petition and for future income, was to be awarded from the date of impugned award and not from the date of the claim petition. Ordered accordingly.

13. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account. The excess amount be refunded to the insurance company through payees' cheque account or by depositing it in its bank account.

14. Accordingly, the impugned award is modified and the appeal is disposed of.

15. Send down the records after placing a copy of the judgment on the file of the claim petition.

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

CrMMO No. 235/2015 with
Cr. Revision No. 305/2015
Reserved on: March 1, 2016
Decided on: March 18, 2016

1. CrMMO No. 235/2015

Yog Raj @ Kaku ..... Petitioner
Versus
State of Himachal Pradesh and another .....Respondents

2. Cr. Revision No. 305/2015

Vikas Verma ..... Petitioner
Versus
State of Himachal Pradesh .....Respondent

Code of Criminal Procedure, 1973- Section 173(8) read with Section 193- Petitioner filed a final report under Section 173 Cr.P.C for the commission of offences punishable under Section 304 and 201 read with Section 34 of IPC and Section 25 of the Arms Act before JMIC- brother of the deceased moved an application for taking cognizance for the commission of offences punishable under Sections 302 and 382 IPC instead of 304 IPC- application was allowed by the Learned Additional Sessions Judge and the accused were charged for the commission of offences punishable under Section 302 of IPC instead of under Section 304 IPC- order passed by Additional Sessions Judge was challenged before the High Court- held, that if a case is based on the FIR and the charge-sheet is submitted after investigation, the correct stage for substitution of sections, would be at the time of framing of charge- Magistrate cannot add or subtract sections at the time of taking cognizance - it is open for the prosecution to contend only at the time of framing of charge that charge should be framed in some other sections- hence, order set aside- parties directed to raise all questions relating to addition or subtraction of sections at the time of framing of charge by the trial Court. (Para-4 to 8)

Cases referred:

State of Gujarat v. Girish Radhakrishnan Varde (2014) 3 SCC 659
Dharam Pal and others v. State of Haryana and another (2014)3 SCC 306

For the petitioner(s) : Mr. Hamender Singh Chandel, Advocate, for the petitioner in CrMMO No. 235/2015.

Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for the petitioner in Cr. Revision No. 305/2015.

For the respondent(s) : Mr. Parmod Thakur, Additional Advocate General, for the respondent-State in both the petitions.

Mr. Rakesh Manta, Advocate, for respondent No. 2 in CrMMO No. 235/2015.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

Since common facts and circumstances are involved in both the petitions, same were taken up together for hearing and are being disposed of by this common judgment.

2. "Key facts" necessary for the adjudication of the present petitions are that an FIR was registered under Section 279 IPC with Police Station, Suni. However, during the course of investigation, Yog Raj alongwith co-accused Vikas Verma was taken into custody by the police for commission of offence under Section 304 and 201 read with Section 34 IPC and Section 25 of the Arms Act. Police filed final report under Section 173 CrPC before JMIC (VII) Shimla on 22.3.2015. According to the prosecution case, accused Vikas Verma killed Harish Sharma on 18.12.2014 by gunshot when they had gone on hunting on the fateful day. Thereafter, Yog Raj was called by Vikas Verma and the dead body was disposed of by Vikas Verma with the assistance of Yog Raj. Hitesh Kumar, brother of the deceased (Harish Sharma), moved an application under Section 173(8) read with Section 193 CrPC with a prayer to take cognizance under Sections 302 and 382 IPC instead of 304 IPC. Learned Additional Sessions Judge allowed the application on 15.7.2015. Accused were charged for commission of offence under Section 302 IPC instead of under Section 304 IPC as per police report. It is in these circumstances, these petitions have been filed assailing Order dated 15.7.2015 passed by learned Additional Sessions Judge (II), in Sessions Case No. 14-S/07 of 2015.

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

4. Case of the prosecution is that the complainant Kanshi Ram, on 19.12.2014, at about 7.45 AM, at place Mungna, while going on morning walk had detected one vehicle stranded nearby river Sutlej. He reported the matter to the police. Dead body could not be traced. Vehicle No. HP62B-0303 was taken into custody. FIR No. 65 of 2014 dated 19.12.2014 under Section 279 IPC was lodged with Police Station Suni. During the course of investigation, one shoe mark of 'Adidas' containing blood stains was recovered on the spot. Shoe was identified to be belonging to one Sh. Harish Sharma, who could not be traced out alive or dead. It was revealed during investigation that Harish Sharma alongwith Vikas and Kaku had gone to the nearby forest for hunting. Hitesh, one of the witnesses, raised suspicion that accused persons namely Vikas and Kaku had murdered Harish. Penal Section 279 IPC was substituted with Sections 304 and 201 read with Section 34 IPC alongwith Arms Act. It was also revealed during investigation that deceased suffered firearm injury. Deceased was put inside the vehicle and thrown into river Sutlej. All the incriminating circumstances were collected. On closure of investigation, investigating agency filed final report under Section 173 CrPC under Sections 304, 201 and 34 IPC alongwith Section 25 of the Arms Act. Final report was produced before JMIC (VII). Same was assigned

by the order of learned Sessions Judge, after committal to the learned Additional Sessions Judge (II), Shimla.

5. An application under Section 173 (8) read with Section 193 CrPC was filed by Hitesh Kumar, brother of the deceased with a prayer to take cognizance of offence under Section 302 IPC instead of Section 304 IPC. It was also prayed, in the alternative, that directions be issued for further investigation of the case. Prosecution has not resisted the application. Application was allowed by the learned Additional Sessions Judge (II), Shimla on 15.7.2015. Case was fixed for framing of charge on 30.7.2015. According to the learned Additional Sessions Judge, there were sufficient grounds for framing charge against accused persons under Section 302 instead of Section 304 IPC.

6. Question raised in these petitions is no more *res integra* in view of the law laid down by their lordships of the Hon'ble Supreme Court in **State of Gujarat v. Girish Radhakrishnan Varde** reported in (2014) 3 SCC 659. Their Lordships have held that in cases based on FIR lodged before Police, correct stage for addition or subtraction of Sections will have to be determined at the time of framing of charge. Their lordships have further held that the affected parties have to apprise themselves that if a case is registered under Section 154 CrPC by the police based on the FIR and the charge-sheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the charge-sheet, would be determined only at the time of framing of charge before the appropriate trial Court. Magistrate, in a case which is based on a police report, cannot add or subtract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under Sections 216, 218 or under Section 228 CrPC, as the case may be, which means that after submission of the charge-sheet it will be open for the prosecution to contend before the appropriate trial Court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the charge-sheet. Their lordships have held as under:

> "13. But the instant matter arises out of a case which is based on a police report as a first information report had been lodged before the police at Deesa Police Station under Section 154 of the Cr.P.C. and, therefore, the investigation was conducted by the police authorities in terms of procedure prescribed under Chapter XII of the Cr.P.C. and thereafter chargesheet was submitted. At this stage, the Chief Judicial Magistrate after submission of the chargesheet appears to have entertained an application of the complainant for addition of three other sections into the chargesheet, completely missing that if it were a complaint case lodged by the complainant before the magistrate under Section 190 (a) of the Cr.P.C., obviously the magistrate had full authority and jurisdiction to conduct enquiry into the matter and if at any stage of the enquiry, the magistrate thought it appropriate that other additional sections also were fit to be included, the magistrate obviously would not be precluded from adding them after which the process of cognizance would be taken by the magistrate and then the matter would be committed for trial before the appropriate court.

14. But if a case is registered by the police based on the FIR registered at the Police Station under Section 154 Cr.P.C. and not by way of a complaint under Section 190 (a) of the Cr.P.C. before the magistrate, obviously the magisterial enquiry cannot be held in regard to the FIR which had been registered as it is the investigating agency of the police which alone is legally entitled to conduct the investigation and, thereafter, submit the chargesheet unless of course a complaint before the magistrate is also lodged where the procedure prescribed for complaint cases would be applicable. In a police case, however after submission of the chargesheet, the matter goes to the magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial in a case which is lodged before the police by way of FIR and the magistrate cannot exclude or include any section into the chargesheet after investigation has been completed and chargesheet has been submitted by the police.

15. The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating authorities for any reason whatsoever have failed to include all the offence into the chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or subtract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.

17. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which is to deal with a case based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. The affected parties

> have to apprise themselves that if a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed.
>
> 18. Since the instant case is based on the FIR lodged before the police, the correct stage for addition or subtraction of the Sections will have to be determined at the time of framing of charge.
>
> 23. We, therefore, dispose of this appeal by observing and clarifying the order of the High Court to the extent that the appellant State of Gujarat shall be at liberty to raise all questions relating to additions of the Sections on the basis of the FIR and material collected during investigation at the time of framing of charges by the Trial Court since the matter arises out of a police case based on the FIR registered under Section 154 of Cr. P.C. and not a complaint case lodged before the Magistrate under Section 190 of the Cr. P.C. Thus, the High Court although may be correct in observing in the impugned order that the Trial Court was not precluded from modifying the charges by including or excluding the sections at the appropriate stage during trial, it was duty bound in the interest of justice and fair play to specify in clear terms that the Trial Court would permit and consider the plea of addition of sections at the stage of framing of charge under Section 211 of Cr. P.C. since the matter emerged out of a police case and not a complaint case before the Magistrate in which event the Magistrate could exercise greater judicial discretion. Ordered accordingly."

7. Mr. Rakesh Manta, Advocate, has relied upon a decision rendered by their lordships of the Hon'ble Supreme Court in **Dharam Pal and others v. State of Haryana and another** reported in (2014)3 SCC 306. Their lordships have held that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, without recording evidence, upon committal under Section 209 CrPC, the Sessions Judge may summon those persons shown in Column 2 of the police report to stand trial alongwith those already named therein. The instant case pertains to addition/subtraction of sections, which can be determined at the time of framing of charge.

8. Accordingly, both the petitions are allowed. Order dated 15.7.2015 passed by learned Additional Sessions Judge (II), Shimla in Sessions Case No. 14-S/7 of 2015 is set aside. Respondents are directed to raise all questions relating to addition or subtraction of sections on the basis of FIR No. 65 of 2014 and material collected during investigation at the time of framing of charge by the trial Court.

9. Since the incident has taken place on 18.12.2014, trial Court is directed to conclude the trial within six months from today. All pending applications, are also disposed of.

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

H.P. University ...Appellant.
Versus
Swadesh Singh Thakur & anr ...Respondents

LPA N.127 of 2015
Reserved on: 16.3.2016
Date of decision: 19.3.2016

Constitution of India, 1950- Article 226- Petitioner retired as Finance Officer- his pension was fixed as per letter dated 30.9.2002- UGC framed a scheme on 30.12.2008, revised the pay scales of the post of Registrar, Deputy Registrar, Assistant Register, Controller of Examination, Finance Officer, Deputy Finance Officer and Assistant Finance Officer- State Government revised the pay scale of Controller of Examination, Addl. Controller of Examination, Planning and Development Officer, Secretary to VC, Deputy Registrar, Assistant Registrar, Public Relations Officer and Administrative Manager- however, pay scale or pension of Finance Officer was not revised- petitioner filed a writ petition- writ Court held that Finance Officer was one the Administrative Officers of the University- since, pay scale of all other officers had been revised, therefore, exclusion of the category of the writ petitioner amounted to discrimination- writ petition was allowed- appeal was filed by the University pleading that prerogative to grant a particular scale vests with the employer- held that Writ Court could not have fixed the pay scales especially when State Government was already seized of the matter- held, that the question relating to Constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service pertaining to the field of policy and are within the exclusive discretion and jurisdiction of the State- Court cannot direct the Government to have a particular method of recruitment or eligibility criteria- Court had wrongly ignored the fact that State Government was seized of the matter- Court could have direct the authorities to consider the case but could not have direct a writ of mandamus commanding the authorities to release a particular pay scale. (Para-7 to 13)

Case referred:
P.U.Joshi and others vs. Accountant General, Ahmedabad and others (2003) 2 SCC 632

For the Appellant: Mr.J.L. Bhardwaj, Advocate.
For the Respondents: Ms. Shikha Chauhan, Advocate for respondent No.1.
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.2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The moot question involved in this appeal is as to whether the learned Writ Court could have granted the revised pay scale to the respondent only on the ground that he was a senior citizen, more especially when the revision of pay scales of his category had not so far been decided by the appellant-University and the State.

The facts, in brief, may be noticed.

2. The writ petitioner/respondent herein retired as Finance Officer from the appellant University on 30.9.2002. His pension was fixed as per letter dated 30.9.2002. The University Grants Commission subsequently framed a scheme on 30.12.2008, whereby it revised the pay scales of the post of Registrar, Deputy Registrar, Assistant Register, Controller of Examination, Finance Officer, Deputy Finance Officer and Assistant Finance Officer following the revision of pay scales of Central Government Employees effected on the recommendations of the Sixth Pay Commission. The pay scales of the Registrar/Finance Officer/Controller of Examination was revised from Rs.16400-22400 to pay band of Rs.37400-67000 with the grade pay of Rs.10,000. Likewise, pay scale for the post of Deputy Registrar/Deputy Finance Officer/Deputy Controller of Examination was revised to pay band of Rs.15600-39000 with grade pay of Rs.7600 and whereas pay scale of the post of Assistant Registrar/Assistant Finance Officer/Assistant Controller of Examination was put in the pay band of Rs.15600-39100 with the grade pay of Rs.5400.

3. The State Government vide notification dated 1.7.2010 (Annexure P-2), revised the pay scales of the Controller of Examination, Addl. Controller of Examination, Planning and Development Officer, Secretary to VC, Deputy Registrar, Assistant Registrar, Public Relations Officer and Administrative Manager (IIHS), as per the following table:

Sl.No.	Category	Pre-revised pay scale	Revised pay structure Pay Band	Grade Pay
1.	Controller of Examination/Addl. Controller of Examination/ Planning & Development Officer/Secretary to VC	16400-450-20900-500-22400	37400-67000	8900
2.	Deputy Registrar	12000-420-18300	15600-39100	7800
3.	Asstt Registrar/Public Relations Officer/Administrative Manager (IIHS)	8000-275-13500	15600-39100	5400

4. It is not in dispute that though the pay scales of all other categories were revised, but the same qua the post of Finance Officer was not revised and, therefore, even the pension of the petitioner was not revised. The petitioner on 3.9.2010 got issued legal notice for the redressal of his grievance, but his case was rejected vide letter dated 18.4.2011, constraining the petitioner to approach this court by medium of Writ petition, wherein he prayed for the following reliefs:

> *"(i) That this Hon'ble Court be kindly pleased to call for the records of the case and pass appropriate orders and issue the writ or direction to consider the petitioner for the revision of pension as has been done in the case of other administrative officers vide Annexure P-2."*

5. In response to the petition, appellant/University filed its reply, wherein it was averred that the revision of pay scales of the Registrar and Finance Officer had not been decided so far.

6. When the matter came up before the learned Writ court, it held that the Finance Officer was one of the Administrative Officer of the University and since pay scales of all other officers of the University had been revised and, therefore, exclusion of the category of the writ petitioner amounted to discrimination and thereafter allowed the petition in the following terms:

> "13 Accordingly, the Writ petition is allowed. Annexure P-4 dated 18.4.2011 is quashed and set aside along with letter dated 4.10.2010. The Court would have ordered the respondents to consider the case of the petitioner for revision of pay scales on the basis of notification dated 31.12.2008, but taking into consideration that the petitioner is a senior citizen and in the interest of justice, the category of Finance Officer would be deemed to be included in the notification dated 30.6.2010 in the revised pay scale of Rs.37400-67000 with grade pay of Rs.8900 w.e.f. 1.1.2006, for all intents and purposes. The respondents are directed to revise the pension of the petitioner in the pay scale of Rs.37400-67000 with grade pay of Rs.8900 within a period of four weeks from today. The revised pension shall carry interest @ 9% per annum from the due date."

7. Aggrieved by the judgment, the appellant has approached this court with the short submission that the prerogative to grant a particular scale only vests with the employer and, therefore, there was no question of the writ court itself fixing the pay scales particularly when State Government was already seized of the matter.

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

8. At the outset, we may note that during the pendency of the appeal, State Government in fact has taken a decision on 16.4.2015 whereby claim of the writ petitioner/respondent has been rejected.

9. It is otherwise more than settled that the question relating to constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service pertain to the field of policy and within the exclusive discretion and jurisdiction of the State, though obviously subject to certain limitations or restrictions envisaged in the Constitution and, therefore, it is not for the statutory tribunals or the Courts at any rate to direct the Government to have a particular method of recruitment or eligibility criteria for further promotion as held by the Hon'ble Supreme Court in ***P.U.Joshi and others vs. Accountant General, Ahmedabad and others (2003) 2 SCC 632*** 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 and within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the Statutory Tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is*

well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

10. It would also be noticed that the learned Writ court proceeded on the premises that the category of the petitioner i.e. Finance Officer had been excluded, which is contrary to the record. It was the specific stand of the respondents that they were yet to take a decision with regard to the same and the matter had been referred to the State Government, (who took a decision during the pendency of the appeal on 16.4.2015). Thus, there was no occasion for the learned Writ court to have presumed that a decision had already been taken by the respondents to exclude the category of the petitioner.

11. The learned writ court has though observed that it was for the government to consider the case of the petitioner for revision of the pay scale on the basis of notification dated 31.12.2008, but then surprisingly it after taking into consideration the fact that the writ petitioner was a senior citizen, directed the category of the petitioner i.e. Finance Officer to be deemed to be included in the notification dated 30.6.2010 and proceeded to grant the pay scale which was impermissible in law.

12. There can be no quarrel with the proposition that granting of pay scales is the prerogative of the government and the further question as to whether there is parity of pay scales etc, is again in the exclusive domain of the executive government. It also cannot be disputed that the courts would not ordinarily interfere in the grant of pay scales or pay fixation or parity unless the decision is patently irrational, unjust. The grant of pay scales, nomenclature of posts and fitment are policy decision of Government and it should be decided by government and expert bodies. The courts will be loathe to interfere unless there is invidious discrimination between the similarly situated persons or there is patent arbitrariness. At best, the court can direct the authorities to consider the case, but cannot issue a writ of mandamus commanding the respondents-authorities to release a particular pay scale as has been done in the instant case.

13. Having said so, the judgment rendered by the learned writ court is obviously not sustainable and the same is accordingly set aside. However, the petitioner is at liberty to question the consideration order passed by the State Government dated 16.4.2015.

With these observations, appeal is allowed in the aforesaid terms leaving the parties to bear the costs.

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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. 70 of 2010 and LPA No. 71 of 2010
Judgment reserved on: 15.3.2016.
Date of decision: March 19, 2016

1. LPA No. 70 of 2010

Krishan Bhardwaj and others .....Appellants/Petitioners

Versus.

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

For the Appellants : Mr. Bharat Thakur, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent No.1.
Mr. Naresh Kaul, Advocate, for respondent No.2.
Mr. Sunil Mohan Goel, Advocate, for respondent No.3.

2. LPA No. 71 of 2010

Krishan Bhardwaj and others ...Appellants/Petitioners

Versus

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

For the Appellants : Mr. Bharat Thakur, Advocate.

For the respondents : Mr. Naresh Kaul, Advocate, for respondent No.1.
Mr. Jai Ram Sharma, Advocate, vice Mr. Bhuvnesh Sharma, Advocate, for respondent No.2.
Mr. Sunil Mohan Goel, Advocate, for respondent No.3.

Constitution of India, 1950- Article 226- An advertisement was issued for filling up the post of Commi-II by way of direct recruitment- appointment of respondent No.3 was assailed on the ground that he did not possess the requisite qualification- writ petition was dismissed by the Court- held, that applicant had taken part in the selection process and cannot question the method of selection- appointment was to be made on the basis of direct recruitment and not by way of promotion- different criteria of eligibility were provided for appointment in two cases- respondent No.3 was graduate and had undergone one year course of Cookery and possessed the requisite length of service- hence, no exception could have been taken qua his selection- judgment passed by writ Court cannot be faulted- appeal dismissed. (Para-7 to 13)

Case referred:
Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others (2016) 1 SCC 454

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Both these Letters Patent Appeals are directed against the common judgment rendered by learned writ Court in CWP(T) No. 2122 of 2008 and CWP(T) No.4783 of 2008 on

17.5.2010 whereby the claim of the petitioners questioning the appointment of respondent No.3 in CWP(T) No. 2122 of 2008 to the post of Commi-II and thereafter questioning the appointments of respondents No. 2 and 3 to the post of Commi-I in CWP(T) No. 4783 of 2008 came to be dismissed.

2. The appellants are the writ petitioners, who initially filed Original Application No. 568 of 1993 before the H.P.State Administrative Tribunal and upon its closure, the same was transferred to this Court and registered as CWP(T) No. 2122 of 2008, wherein the writ petitioners prayed for the following reliefs:

> *"A) That the appointment of respondent No.3 Shri Nand Lal be quashed and set aside in the interest of justice and fair play.*
>
> *B) That the respondent No.1 and 2 may very kindly be directed to promote the applicants, who have put up more than nine years of service, to the post of Commi-II.*
>
> *C) That the transfer orders of applicant No.3 from Holiday Home, Shimla to Ciraz Café, Mandi, be set-aside."*

3. Thereafter, the appellants filed Original Application No. 2388 of 1997, which too came to be transferred to this Court and registered as CWP(T) No.4783 of 2008 wherein the appellants prayed for the following reliefs:

> *"(i) That the promotion of respondents No.2 and 3 be kindly declared*
>
> *illegal and office order, Annexure A-1 dated 22.11.97 be quashed/set-aside.*
>
> *(ii) That the respondents be directed to produce the entire record pertaining to the case of the applicants for the perusal of this Hon'ble Tribunal.*
>
> *(iii) That the respondents be burdened with the cost of this application throughout.*
>
> *(iv) That for the convenience of this Hon'ble Tribunal, the Original Application be tagged with O.A.No. 568 of 1993 and be heard together."*

4. It was not disputed before the learned writ Court and has further not been disputed even before this Court that in case CWP(T) No. 2122 of 2008 is dismissed, then CWP(T) No. 4783 of 2008 would automatically stand dismissed and the decision of the former shall have a definite bearing on the latter.

5. On 5.11.1992 the respondents issued an advertisement for filling up the posts of Commi-II by way of direct recruitment. In terms of the Rules known as H.P.Tourism Development Corporation Limited (Staff) Recruitment and Promotion (Revised) Rules, 1985, this post was required to be filled up in the following manner:

"4.	*Commi-II* *(Rs.510-800).*	*50% by promotion.* *50% by direct recruitment.*	*75% from Commi-III with 3 years service as such on the basis of merit-cum-seniority.* *Matric/Hr. Secondary and having passed one year Cookery Course from a recognized Institute with experience of 5 years of working in hotels of repute."*

6. The appellants assailed the appointment of respondent No.3 by filing O.A. NO. 568 of 1993 (CWP(T) No. 2122 of 2008) on the ground that he did not possess the

requisite qualification and this plea did not find favour with the learned writ Court and consequently this led to the dismissal of the aforesaid petition which in turn led to the dismissal of the subsequent petition i.e. CWP(T) No. 4783 of 2008.

We have heard learned counsel for the parties and have gone through the records of the case carefully and meticulously.

7. At the outset, it may be observed that the appellants in order to succeed would first and foremost be required to cross the hurdle of estoppel, acquiescence and waiver. Admittedly, the appellants had taken part in the selection process with their eyes wide open and cannot, therefore, turn around and question the method of selection. This has been so held in a long line of decisions of the Hon'ble Supreme Court and we need only refer to the recent judgment of the Hon'ble Supreme Court in ***Madras Institute of Development Studies and another*** vs. ***K. Sivasubramaniyan and others (2016) 1 SCC 454***, wherein the Hon'ble Supreme Court held as under:

> "14. *The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.*
>
> *15.* *In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC p.591, para 15)*
>
> > *"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9)*
> >
> > > *'9. ..It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.' "*
>
> *16.* *In Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p.493, para 9)*
>
> > *"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful*

candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1986 Supp. SCC 285, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p.320, para 24)

"24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

8. Adverting to the facts of the case, it would be noticed that there was inherent fallacy in the case set up by the appellants inasmuch as they had questioned the appointment of respondent No.3 on an entirely wrong premise by considering the

appointment as a "promotion" little realising that the same was on the basis of direct recruitment. This fact is clearly evident from the following averment contained in para iv (A) of the Original Application and the same reads as under:

> *"...Here now it is pertinent to mention that at the time of scrutiny of the candidature of the candidates who had applied for the said posts, respondent No.2 called one candidate Shri Nand Lal, Asstt. Waiter for the said post who was in no way eligible according to the R&P Rules of the department wherein a candidate is required to possess the qualifications mentioned in proceedings sub para-iii of para-6. While selected candidate Sh. Nand Lal who neither belongs to the kitchen Branch nor he possesses any experience for the post mentioned above. Because Shri Nand Lal is working as an Asstt. Waiter with the respondents which is entirely different category than that of the post mentioned hereinabove (Commi-II and III). In these circumstances interviewing the respondent No.3 and not rejecting his candidature at the time of scrutiny of the candidatures. It clearly throws sufficient light that a special favour was done to respondent No.3 by respondent No.2 by appointing him (and promoting him) to Commi-II which is a post of Senior Cook who does not belong to that category in any way. Therefore, this action of respondents of appointing respondent No.3 as Commi-II is highly illegal, arbitrary and full of favouritism by respondent No.2 and the same be quashed and set-aside."*

9. Indisputably, the qualification of Commi-III with 3 years service was relevant only for the purpose of promotion, but insofar as the eligibility for being appointed as Commi-II by way of direct recruitment is concerned, the same was only Matric/Hr. Secondary with one year course from a recognized institute coupled with an experience of 5 years or working in hotel(s) of repute.

10. Even the appellants do not dispute that if this be taken as qualification, then respondent No.3 definitely possessed the same. The respondent No.3 was a graduate and had undergone one year course in Cookery and possessed the requisite length of service. This has been acknowledged by the appellants themselves in para-6 of their petition wherein it was averred as under:

> *"(2) That the respondent No.3 herein, Shri Nand Lal was initially appointed as Trainee Waiter in the year 1984 and was subsequently regularized as Asstt. Waiter in the year 1986 in the pay scale of Rs.300-430."*

11. Therefore, once the respondent No.3 possessed the requisite qualification then no exception can be taken qua his selection to the post of Commi-II. If that be so, then no exception can thereafter be taken to his further promotion to Commi-I on the basis of his eligibility acquired by rendering service as Commi-II.

12. Notably, the entire premise upon which the subsequent petition i.e. CWP(T) No. 4783 of 2008 assailing the promotion of respondents No. 2 and 3 to the post of Commi-I, proceeds is again that the post of Commi-II was a promotional post, whereas the post was required to be filled up by direct recruitment as has already been observed by us (Infra).

13. Having said so, no fault can be found with the judgment passed by learned writ Court and accordingly, both these appeals are 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 MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

State of Himachal Pradesh and others .....Petitioners.

Versus

Dr.Hitesh Gupta and others ....Respondents.

CWP No.350 of 2016.
Judgment reserved on: 16.03.2016.
Date of decision: March 19, 2016.

Constitution of India, 1950- Article 226- Original application was filed before the Tribunal pleading that applicants were General Duty Officers (GDOs) and were granted admission in PG Courses in the specialties of Anaesthesia, Obstetrics, Gynaecology, Radio-Diagnosis and Orthopaedics against the quota reserved for them- they were aggrieved by the imposition of third proviso to para 5.2.2 of the Notification which provided for a mandatory peripheral service of two years for Postgraduate GDO candidates opting for Senior Residency in their own specialty - it was contended that two-fold benefits were extended in-service GDOs having Postgraduate Degrees in specialties of Surgery and Medicine by relaxing two years peripheral service qua them and in addition to awarding of three years teaching experience in their own specialty, it would be denied to the applicants- the Tribunal did not quash para 5.2.2. of the policy but allowed the Original Application- held, that unless conditions laid down in policy are not quashed, the same would have de-facto operation and would have to be given effect- once the policy is in place, the same would operate and has to be followed in its letter and spirit- judgment passed by Tribunal set aside and the matter remanded to the Tribunal to decide the same afresh in accordance with law. (Para-2 to 11)

For the Petitioners : 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.Dilip Sharma, Senior Advocate with Mr.Manish Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The short question involved in this writ petition is as to whether the learned H.P. State Administrative Tribunal (for short 'Tribunal') could have without striking down the impugned provision in the addendum (Annexure A-2) for selection of Resident Doctors in Medical Colleges of Himachal Pradesh passed an order which infact has the consequences of striking down the provision itself.

2. The facts as necessary for the disposal of this petition are that the respondents herein filed an Original Application before the learned Tribunal claiming therein that they were in-service General Duty Officers (GDOs) and had been granted admission in PG Courses in the specialities of Anaesthesia, Obstetrics, Gynaecology, Radio-Diagnosis and Orthopaedics against the quota reserved for the Government Doctors. The respondents were infact aggrieved by the imposition of third proviso to para 5.2.2 of the Notification dated 25.07.2014 which provided for a mandatory peripheral service of two years on Postgraduate GDO candidates opting for Senior Residency in their own speciality and filed Original Application before the learned Tribunal claiming therein the following reliefs:-

"(i) That the impugned condition of mandatory peripheral service of two years imposed vide 3rd proviso to para 5.2.2 of notification dated 25.7.2014, Annexure A-3, only on Postgraduate GDO candidates opting for Senior Residency in their own specialty may kindly be struck down as violative of Articles 14 and 16 of the Constitution of India.

(ii) That the applicants may be held eligible for applying for the post(s) of Senior Resident in their own respective specialty pursuant to notification at Annexure A-5, after striking down the impugned condition of mandatory peripheral service prescribed in Annexure A-3, with all consequential benefits."

3. We, at this stage, are not concerned with the relative merits of the case, lest it prejudices either of the parties to the lis. As per the addendum dated 26.09.2012 (Annexure A-2) to the policy for selection of Resident Doctors in Medical Colleges in Himachal Pradesh (for short 'Policy'), the following method for selection was provided for :-

"5.2. **METHOD OF RECRUITMENT:**

5.2.2. The GDO category shall include the doctors appointed on regular or contract basis by the Government of Himachal Pradesh.

Provided that the only those GDO's whether appointed on regular or on contract basis, shall be eligible for selection as Sr. Resident who have served in the peripheral health institutions of the State of Himachal Pradesh for a period of at least two years after completion of their Post Graduation.

Provided further that this provision shall not apply to the specialities of **1.Anatomy 2.Physiology 3. Pharmacology 4. Pathology 5. Microbiology and 6. Biochemistry**."

4. However, the State Government thereafter issued a notification dated 08.07.2014 (Annexure A-3) and the above provision was modified as under:-

"**5.2 (Method of recruitment):**

5.2.2. The GDO category shall include the doctors appointed on regular or contract basis by the Government of Himachal Pradesh.

Provided that only those GDO's, whether appointed on regular or on contract basis, shall be eligible for selection as Sr. Residents who have served in the peripheral health institutions of the State of Himachal Pradesh for a period of at least two years after completion of their Post Graduation.

Provided further that this provision shall not apply to the specialities of 1.Anatomy 2.Physiology 3.Pharmacology 4.Pathology 5. Microbiology and 6. Biochemistry.

Provided further that two years mandatory peripheral service be exempted for Post Graduate doctors for doing Sr. Residency in Super-speciality Departments of Government Medical Colleges of the State and such GDOs will be awarded three years teaching experience in their own speciality."

5. The aforesaid amendment in para 5.2 of the policy came to be challenged by the respondents on the ground that the same seeks to accord two-fold benefit to in-service

GDOs having Postgraduate Degrees in specialities of Surgery and Medicine alone by relaxing two years peripheral service qua them and in addition to that awarding of "three years teaching experience in their own speciality", which by necessary implication would be denied to them. Thus, they would be discriminated vis-à-vis same class in-service GDOs having acquired PG Degrees in their disciplines.

6. In response to the Original Application, the petitioners herein placed reliance upon the judgment rendered by this Court in ***Dr.Babu Ram Thakur and others versus State of Himachal Pradesh and others (CWP No.4665 of 2012 decided on 22.08.2012)*** wherein the policy of the State Government regarding grant of relaxation of two years peripheral service for selection as Senior Residents in the State Government Medical Colleges was upheld to contend that the Original Application is without merit and, therefore, deserves to be dismissed.

7. The learned Tribunal distinguished the judgment in ***Dr.Babu Ram Thakur's*** case (supra) by holding that in that case there was conflict of interest between two distinct classes of in-service GDOs and direct recruits and, therefore, the same was distinguishable and not applicable to the facts of the case.

8. It would be noticed that the learned Tribunal without quashing the impugned provision i.e. para 5.2.2. of the policy allowed the Original Application in the following terms:-

> "9. As anywhere else in the country, there are two distinct wings of medical profession in the Government sector and both these wings should be sufficiently and suitably manned by medical professionals. However, the volume of the two is not in equal proportion as General Health Service require a large number of medical professionals, where number of such professionals in the Medical Education Service would always be on the lower side.
>
> 10. As already noticed, as far as the purpose behind modification of the policy for providing sufficient pool for running Super Specialities is concerned, there can be no two opinions about the same. However, in the long run the benefit bestowed upon in-service GDOs from the fields of Surgery and Medicine by taking their services in the Super Specialities, referred to hereinabove, would ultimately be beneficial to them for induction in the Medical Education Service at the entry level of Assistant Professor. To the contrary, in-service GDOs belonging to the categories of the applicants would be bereft of that benefit.
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> 11. Here, it is also pertinent to observe that in non-clinical fields, such as (1) Anatomy (2) Physiology (3) Pharmacology (4) Pathology (5) Microbiology and (6) Biochemistry, there is no requirement of two years peripheral service from the very beginning. It is because medical professionals belonging to these Specialities are not required for providing clinical services in the peripheral health institutions on a big scale. To that extent, no one has any dispute.
>
> 12. According to the applicants, though there are no Super Specialities in their respective fields, yet the fact remains that they can man the positions of Senior Residents in their respective fields, after which they also become eligible for entry in Medical Education Service as Assistant Professor. However, according to the respondents, once an in-service GDO with PG degree joins as a Senior Resident, his endeavour would always be to join

teaching cadre in Medical Colleges and his services would not be available in the peripheral health institutions in the State, but that is equally true about Senior Residents belonging to the fields of Surgery and Medicine joining Super Specialities. However, to offset the resultant shortage of in-service GDOs with PG degrees in the peripheral health institutions, the shortfall would always be met from in-service GDOs pursuing PG courses against their quota after completion of their courses in the Medical Colleges every year.

13. In view of the above, we are convinced that in order to ensure that a level playing field is provided to in-service GDOs with PG degrees irrespective of their specialities to achieve the right to equality postulated under Article 14 of the Constitution, it shall be expedient and in the interest of justice that the respondents consider exempting two years peripheral service in favour of in-service GDOs across the board. Ordered accordingly.

14. The original application stands disposed of in the above terms."

9. It cannot be disputed that so long as the conditions contained in the policy are not quashed, the same would have defacto operation and have, therefore, to be given effect to. It is more than settled that once the policy is in place, the same would operate and has to be followed in its letter and spirit with all its rigors and it cannot be whittled down or rendered nugatory by a judicial interpretation and will have a binding effect unless and until the same is struck down as being illegal, arbitrary or violative of Articles 14 and 16 of the Constitution of India or the like.

10. Therefore, what was required of the learned Tribunal was to have rendered a positive finding regarding the legality/illegality of the provisions i.e. para 5.2.2 of the policy and unless and until a positive finding regarding the impugned provision was not rendered, the petitioners herein could not have been directed to consider exempting of two years peripheral service in favour of in-service GDOs that too across the board.

11. In view of the aforesaid discussion, we have no other option but to set aside the impugned judgment passed by the learned Tribunal with a direction to decide the same afresh in accordance with law. Ordered accordingly. The parties are left to bear their own costs. Pending application, if any, also stands disposed of.

12. The parties through their counsel are directed to appear before the learned Tribunal on **22.03.2016.**

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

State of Himachal Pradesh .....Appellant.

Versus

Sohan Lal & ors. .....Respondents.

Cr. Appeal No. 273 of 2012.
Reserved on:March 18, 2016.
Decided on: March 19, 2016.

N.D.P.S. Act, 1985- Section 20 and 29- Accused were seen carrying bags on their backs by the police party- they became nervous and returned on seeing the police- they were apprehended and their search was conducted during which one plastic envelope from each of the accused containing 5 kg. of charas was recovered- it was found on investigation that 'K' was owner of the charas- accused were acquitted by the trial Court- held, in appeal against the acquittal that personal search of the accused were also conducted, therefore, it was necessary to obtain separate consent of the accused for the personal search- however, a joint consent was obtained which has vitiated the trial- Columns No. 9 to 11 of NCB Form are blank - no independent witness was associated during the search- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- call details have not been proved in accordance with Section 65 of Indian Evidence Act- in these circumstances, accused were rightly acquitted by the trial court– appeal dismissed. (Para-14 to 28)

Cases referred:

State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345
Gurbax Singh v. State of Haryana (2001) 3 SCC 28
Anvar P.V. vrs. P.K. Basheer and others, (2014) 10 SCC 473,

For the appellant: Mr. M.A.Khan, Addl. AG with Mr. Ramesh Thakur, Dy. AG.
For the respondents: Mr. G.R.Palsra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 23.1.2012, rendered by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, H.P., in NDPS case No. 05/2011, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offence punishable under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), have been acquitted.

2. The case of the prosecution, in a nut shell, is that on 19.9.2010, the police party was on routine patrol duty in official vehicle No. HP-34A-016. It was driven by Const. Karam Chand. At about 9:00 AM, when the patrol party was present near the bifurcation of Jaon-Sarahan road, two persons were seen coming from Jaon side towards Sarahan, carrying bags on their backs. On seeing the police party, they became nervous and turned back. On suspicion, they were apprehended. Since it was a lonely place and nearby there was no house or population, HHC Diwan Chand was sent to arrange for independent/local witnesses. However, no independent witness was available. In these circumstances, HC Lal Chand and Const. Ramesh Chand were associated as witnesses. The accused persons were informed verbally as well as by writing that the police had suspicion that they might be in possession of some contraband and for this reason, their personal search as well as that of the bags being carried by them was required to be taken. They were also apprised of their legal right to be searched before Magistrate or Gazetted Officer. The accused persons opted

to be searched by the police party. Thereafter, the police officials gave their search to the accused persons and in this regard search memo was prepared. The personal search of the accused No. 1 Sohan Lal was undertaken but no contraband was recovered. However, when the bag carried by the accused No. 1 was searched, one plastic envelope in which substance in the form of wicks and round shape was recovered. Some substance was also found to be wrapped in plastic paper. It weighed 5 kg. It was put in the same bag and sealed in a parcel with seal "H" (8 seals) and the parcel was marked as A-1. Similarly, when the personal search of accused No. 2 Anand Kumar was undertaken, no contraband was recovered except his personal belongings. The bag carried by him was checked and charas weighing 5 kg in round shape was found. It was sealed in a parcel with 8 seals of seal "H". It was marked as A-2. NCB form in triplicate were filled in and the recovered charas was taken into possession by preparing seizure memo. The rukka was sent to the Police Station through Constable Ramesh Chand and thereafter FIR was registered. Site plan was prepared. In the investigation, it was also revealed that the real owner of the recovered charas was one Khub Ram, accused No. 3. It also came during the investigation that accused No. 3 had abetted the co-accused to indulge in the trade/business of charas. Allegedly, he disclosed to have sent 6 kg. of charas from the house of some Nepali to the house of accused No. 1 so that the same could be taken by him to Delhi. He had telephonic conversion with the co-accused. The contraband was sent for FSL, Junga for chemical examination and report of the FSL is Ext. PX. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 10 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. G.R.Palsra, Advocate for the accused has supported the judgment of the learned trial Court dated 23.1.2012.

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

6. According to PW-2 HC Pushp Dev, he was posted as MHC PS Nirmand since May, 2010. On 19.9.2010, HC Pyare Lal deposited with him two packets sealed with 8 seals bearing impression "H" having five-five kilograms of charas each alongwith sample seal and NCB form in triplicate. He made entries of the same in register No. 19. He deposited the same in Malkhana of the Police Station. The extract of Malkhana register is Ext. PW-2/A. On 21.9.2010, he sent the packets alongwith NCB form in triplicate to FSL, Junga for chemical analysis through HHC Diwan Chand vide RC No. 111/2010 vide Ext. PW-2/B. On 12.10.2010, HHC Diwan Chand deposited with him the report of FSL alongwith the bulk charas which was sealed with seven seals each of FSL and eight seal impressions of "H". He made entry in register No. 19 vide Ext. PW-1/A and thereafter he deposited the bulk charas in Malkhana of the Police Station.

7. PW-3 Karam Singh testified that the house of accused Sohan Lal was not searched by the police in his presence. The police showed him pass book Ext. PW-3/A at Panchayatghar which was taken into possession vide recovery memo Ext. PW-3/B. The Panch of their village Nup Ram was also present at the Panchayat Ghar who signed the seizure memo Ext. PW-3/B in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he deposed that accused Sohan

Lal had not signed Ext. PW-3/B in his presence. The house of Sohan Lal is single storyed. The cowshed of accused Sohan Lal is separate. He denied the suggestion that the house of accused Sohan Lal was searched in his presence and during search, a pass book Ext. PW-3/A was found in room No. 3 from the trunk of accused Sohan Lal. In his cross-examination by the learned defence counsel he admitted that the road where Bagipull Sarahan bifurcates towards Jaon is a busy place where traffic/pedestrians keep on coming and going frequently.

8. PW-5 Beli Ram testified that accused Sohan Lal is related to him. He had not given any document to accused Sohan Lal to purchase the SIM. 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 has not stated to the police that on 4/5.7.2010, accused Sohan Lal visited his village and asked him to give him his photograph and ID card and at his request, he handed over to him the same. He denied that after some time accused Sohan Lal returned his ID card to him. He had not disclosed to the police that after some time, he came to know that accused Sohan Lal had purchased SIM No. 98052-93712 in his name and used the same. He had also not stated to the police that accused Sohan Lal had been using this SIM since July, 2010 and this SIM never remained with him. He has admitted that he is possessing SIM No. 98161-89547. He denied the suggestion that SIM No. 98052-93712 never remained with him and accused Sohan Lal used the same. He has denied portions A to A, B to B, C to C and D to D of his statement mark Y, wherein it is so recorded. In his cross-examination by the learned defence counsel, he admitted that SIM No. 98052-93712 was purchased by him for the use of his daughter Usha Kumari. She is about 16 years old and studying in 9th class. The aforesaid SIM was being used by his daughter Usha Kumari since the time it was purchased by him in his name till today. Affidavit Ext. PW-5/A was prepared by HC Pyare Lal at Nirmand and he himself presented the same before the Executive Magistrate, Nirmand for attestation. The Executive Magistrate and HC Pyare Lal had not read over and explained the contents of the same to him. He is illiterate and could only sign.

9. PW-6 Const. Ramesh Chand testified that at about 9:00 AM on 19.9.2010, two persons were seen coming from Jaon side who were carrying bags on their back. They got perplexed and tried to run back. They were apprehended. The place being an isolated one, no person was found on the spot. HHC Diwan Chand was sent to search for independent witnesses who returned after some time and told that no one was available. The I.O. associated him and Lal Chand as witnesses and apprised the accused that they have legal right to be searched by the Magistrate or the Gazetted Officer upon which accused persons gave their consent to be searched before the police present. To this effect, consent memo Ext. PW-6/A was prepared which was signed by him and HC Lal Chand alongwith the accused persons. The bags carried by the accused were searched. These contained charas 5 kg each. The sealing proceedings were completed on the spot. NCB forms in triplicate were filed in. FIR Ext. PW-2/G was registered on the basis of rukka Ext. PW-2/F. The case property was produced while recording the statement of PW-6 Const. Ramesh Chand. In his cross-examination, he deposed that HHC Diwan Chand was sent on the Sarahan road to search for witnesses.

10. PW-7 HHC Diwan Chand also deposed the manner in which the accused were apprehended, search, seizure and sealing proceedings were completed on the spot. He deposed that he was sent to search for independent/local witnesses but no one was available. Rukka Ext. PW-2/F was handed over to Const. Ramesh Chand. The accused were apprised of grounds of arrest vide memo Ext. PW-6/E. In his cross-examination, he

admitted that personal search of both the accused was carried out before taking search of their bags.

11. PW-8 Devinder Verma has proved call details Ext. PW-8/B of mobile No. 98052-93712.

12. PW-9 HC Pyare Lal also deposed the manner in which the accused were apprehended, search, seizure and sealing proceedings were completed on the spot. He deposed that HHC Diwan Chand was sent in search of independent witnesses who returned after some time and told that no one was available. He told both the accused persons that they have a legal right to be searched by the Magistrate or the Gazetted Officer. Accused persons gave their consent through consent memo Ext. PW-6/A that they wanted to be searched by him. The accused were arrested by him. On interrogation on the spot, both the accused persons revealed that the recovered charas i.e. 10 kg belonged to accused Khub Ram which was handed over to them by him in the house of Sohan Lal on 17.9.2010 to be carried for sale to Delhi. They were to be paid Rs. 10,000/- by accused Khub Ram. Accused Khub Ram had conversation with accused Sohan Lal through mobile. The mobile No. of accused Sohan Lal is 98052-93712 and mobile No. of accused Khub Ram was 94182 68946. The house of accused Sohan Lal was searched and one PNB pass book Ext. PW-3/A was recovered. The SIM used by accused Sohan Lal was found to have been in the name of Beli Ram son of Thakur Dass, r/o Kaloti. He interrogated Beli Ram about SIM used by accused Sohan Lal who disclosed through affidavit Ext. PW-5/A that Sohan Lal was his relative and SIM No. 98052-93712 was given by him to Sohan Lal. In his cross-examination, he admitted that no contact of accused Anand Kumar and Khub Ram was established nor any personal contact was also established between them during investigation. He also admitted that telephone No. 94182-68946 was not owned and possessed by accused Khub Ram. He did not know that the number belonged to one Rajni daughter of Bhagwan Dass.

13. PW-10 Const. Birbal Dass testified that accused Sohan Lal and Anand Kumar were interrogated by the police and they disclosed in his presence that police had apprehended them with 5 kg charas each and they further disclosed that the charas recovered by the police from them did not belong to them but it was of accused Khub Ram. They further disclosed that on 17.9.2010, the charas was sent through somebody to the house of accused Sohan Lal. Accused Khub Ram had also telephonically instructed accused Sohan Lal and Anand Kumar that this contraband should be taken to Delhi by pass road where he would meet them and accused Khub Ram promised to give Rs. 20,000/- to accused Sohan Lal. In his cross-examination, he admitted that the disclosure statement was made in the Police Station, Nirmand. The statement was made during day time. There were so many independent persons in the Police Station. The disclosure statement was not reduced into writing in his presence.

14. It was not necessary for the police to carry out the personal search of the accused when the charas was recovered from the bags carried by them. However, despite that, accused persons were searched and thus there is breach of mandatory provisions of Section 50 of the ND & PS Act. The consent memo is Ext. PW-6/A. It was the duty of the I.O. to inform the accused persons that they have legal right to be searched either before the Executive Magistrate or the Gazetted Officer. In memo Ext. PW-6/A, the accused were not apprised that they had a legal right to be searched either before Executive Magistrate or the Gazetted Officer. Ext. PW-6/A is plural. It is settled law by now that it is necessary to obtain separate consent of each accused. It cannot be plural. However, the fact of the matter is that in Ext. PW-6/A, the consent of both the accused was obtained jointly. It has vitiated the trial.

15. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held as follows:

> "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."

16. The accused were apprehended at 9:00 AM carrying two bags. The charas was recovered from the bags. It was deposited with MHC Pushp Dev, Police Station Nirmand on 19.9.2010 alongwith NCB form in triplicate. He sent the same to FSL, Junga for chemical analysis through HHC Diwan Chand. The NCB form is Ext. PW-9/A. Columns No. 9 to 11 of the same are required to be filled in by the SHO concerned. Columns No. 9 to 11 are blank. Though, Section 55 of the ND & PS Act is not mandatory but still the provision is required to be followed in letter and spirit. The purpose of re-sealing is to ensure that the contraband was infact seized and sealed in accordance with law. The only explanation given by the prosecution is that the SHO was on leave. However, the Court can take judicial notice of the fact that in the absence of SHO, the second in command is authorized to discharge the duties of SHO.

17. Their Lordships of Hon'ble Supreme Court in the case of ***Gurbax Singh v. State of Haryana*** reported in ***(2001) 3 SCC 28***, have held while appreciating the provisions of Section 52, 55 and 57 of the Act that though the provisions of Section 52 and 57 are directory and violation would not ipso facto violate the trial or conviction. However, investigating officer can not totally ignore these provisions because such failure would have a bearing on appreciation of the evidence regarding arrest of the case. Their lordships have held as under:

> "9. The learned counsel for the appellant next contended that from the evidence it is apparent that the I.O. has not followed the procedure prescribed under Sections 52, 55 and 57 of the N.D.P.S. Act. May be that the I.O. had no knowledge about the operation of the N.D.P.S. Act on the date of the incident as he recorded the FIR under Section 9 of the Opium Act. In our view, there is much substance in this submission. It is true that provisions of Sections 52 and 57 are directory. Violation of these provisions would not ipso facto violate the trial or conviction. However, I.O. cannot totally ignore these provisions and such failure will have a bearing on appreciation of evidence regarding arrest of the accused or seizure of the article. In the present case, I.O. has admitted that the seal which was affixed on the

muddamal article was handed over to the witness PW-1 and was kept with him for 10 days. He has also admitted that the muddamal parcels were not sealed by the Officer-in-charge of the police station as required under Section 55 of the N.D.P.S. Act. The prosecution has not led any evidence whether the Chemical Analyser received the sample with proper intact seals. It creates a doubt whether the same sample was sent to the Chemical Analyser. Further, it is apparent that the I.O. has not followed the procedure prescribed under Section 57 of the N.D.P.S. Act of making full report of all particulars of arrest and seizure to his immediate superior officer. The conduct of panch witness is unusual as he offered himself to be a witness for search and seizure despite being not asked by the I.O. particularly when he did not know that the substance was poppy husk, but came to know about it only after being informed by the police. Further, it is the say of the Panch witness that Muddamal seal used by the PSI was wooden seal. As against this, it is the say of PW-2 SI/IO that it was a brass seal. On the basis of the aforesaid evidence and faulty investigation by the prosecution, in our view, it would not be safe to convict the appellant for a serious offence of possessing poppy-husk."

18. The place where the accused were apprehended, as per the statement of PW-3 Karam Singh was busy place where traffic/pedestrians keep on moving frequently. However, the fact of the matter is that no independent witnesses were joined during search, seizure and sealing proceedings. It was not an isolated or secluded place. No. serious efforts were made to join independent witnesses except that PW-6 Const. Ramesh Chand deposed that HHC Diwan Chand was sent to search independent witnesses who returned after some time and informed that no one was available. Similarly, HHC Diwan Chand while appearing as PW-7 deposed that the place was isolated and no person was available.

19. The case property was produced while recording the statement of PW-6 Const. Ramesh Chand. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

"22.70. Register No. XIX- This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.

The register may be destroyed three years after the date of the last entry."

The register is to be maintained in Form 22.70. It reads as under.

"FORM NO. 22.70.

POLICE STATION_____ ____DISTRICT

Register No. XIX.-Store-Room Register (Part-I)

Column 1.- Serial No.

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.

3. Date of deposit and name of depositor.

4. Description of property.

5. Reference to report asking for order regarding disposal of property.

6. How disposed of and date.

7. Signature of recipient (including person by whom dispatched).

8. Remarks.

(To be prepared on a quarter sheet of native paper).”

20. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is re-deposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is re-deposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case.

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

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

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

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

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

“27.18. Safe custody of property.-

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

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

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

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

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

higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

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

25. PW-9 HC Pyare Lal, in his cross-examination, has admitted that no contact of accused Anand Kumar and Khub Ram was established nor any personal contact was established between them during investigation. PW-8 Devinder Verma has proved the call details of Mobile No. 98052-93712 vide Ext. PW-8/A. PW-5 Beli Ram was declared hostile. He has categorically deposed that he has not given any document to accused Sohan Lal to purchase the SIM. In his cross-examination by the learned Public Prosecutor, he has denied the relevant portions of his statement recorded vide Mark "Y". In his cross-examination by the learned defence counsel, he admitted that SIM No. 98052-93712 was purchased by him for the use of his daughter Usha Kumari. She is about 16 years of age and studying in 9th standard. Affidavit Ext. PW-5/A was prepared by HC Pyare Lal at Nirmand and he himself presented the same before the Executive Magistrate, Nirmand for attestation. The Executive Magistrate and HC Pyare Lal had not read over and explained the contents of the same to him. He is illiterate and could only sign. He also denied the suggestion during cross-examination by the learned Public Prosecutor that SIM No. 98052-93712 never remained with him and accused Sohan Lal used the same.

26. Ext. PW-8/B call details, has also not been proved as per Section 65 of the Indian Evidence Act, 1872. No certificate has been issued by the competent authority to prove the authenticity of the call details made vide Ext. PW-8/B. In his cross-examination, PW-8 Devinder Verma has admitted that it could not be ascertained as to who was talking on the telephones at the relevant time and as to what conversation took place between them.

27. Their lordships of the Hon'ble Supreme Court in the case of ***Anvar P.V. vrs. P.K. Basheer and others,*** reported in ***(2014) 10 SCC 473***, have held that production of copy of statement pertaining to electronic record in evidence not being the original electronic record, such statement has to be accompanied by a certificate as specified in S. 65-B(4) and such certificate must accompany electronic record like CD, VCD, pen drive etc. Their lordships have further held that under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the conditions are satisfied. It has been held as follows:

> "15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (a) There must be a certificate which identifies the electronic record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;

(c) The certificate must furnish the particulars of the device involved in the production of that record;

(d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

(e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

17. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

28. The prosecution has failed to prove case against the accused persons under Sections 20 & 29 of the ND & PS Act. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 23.1.2012.

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

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

LPAs No. 204 to 206 of 2015
Decided on: 21.03.2016

LPAs No. 204 & 205 of 2015

Shri Ashok Pal Sen ...Appellant(s).

Versus

Smt. Raj Kumari and others ...Respondents.

.....

LPA No. 206 of 2015

Sh. Martand Mahindra ...Appellant.

Versus

Sh. Dinesh Kumar and others ...Respondents.

Code of Civil Procedure, 1908- Order 1 Rule 10- Court held that suit can be treated as an inter-pleader suit while deciding the application under Order 1 Rule 10 of CPC- Ld. Counsel for the parties made a request that order be set aside with the direction to the Single Judge to decide the application under Order 1 Rule 10 of CPC on merits- in view of this statement, the orders are set aside- applications are restored to their original numbers- Learned Single Judge is directed to decide the application under Order 1 Rule 10 of CPC afresh after hearing the parties. (Para-7 and 8)

LPAs No. 204 & 205 of 2015

For the appellant:	Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisth, Advocate.
For the respondents:	Ms. Seema K. Guleria, Advocate, for respondents No. 1 and 2. Mr. R.R. Rahi, Advocate, for respondent No. 3. Mr. G.R. Palsra, Advocate, for respondents No. 4, 9 to 11 and 15. Mr. Surinder Saklani, Advocate, for respondents No. 5 to 8. Ms. Bhavna Dutta, Advocate, for respondents No. 12 to 14.

.....

LPA No. 206 of 2015

For the appellant:	Ms. Seema K. Guleria, Advocate.
For the respondents:	Ms. Bhavna Dutta, Advocate, for respondents No. 1 to 3. Mr. G.R. Palsra, Advocate, for respondents No. 4, 7 and 12 to 14. Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisth, Advocate, for respondent No. 5. Mr. R.R. Rahi, Advocate, for respondent No. 6. Mr. Surinder Saklani, Advocate, for respondents No. 8 to 11.

The following judgment of the Court was delivered:

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

These Letters Patent Appeals are outcome of orders, dated 18th November, 2015, made by the learned Single Judge in OMPs No. 24 and 217 of 2015 in Civil Suit No. 4 of 2007, titled as Raja Ashok Pal Sen versus Raj Kumari Indra Maohindra and others, whereby applications under Order 1 Rule 10 of the Code of Civil Procedure (for short "CPC") were determined and the applicants came to be impleaded as defendants in the Civil Suit (for short "the impugned orders").

2. Suit for declaration was on the docket of this Court before the learned Single Judge. During the pendency of the suit, applications were moved by the applicants for arraying them as defendants in the suit, in terms of the mandate of Order 1 Rule 10 CPC.

3. The applications were resisted by the non-applicants, treated under Order 22 Rule 10 CPC and granted. Applicants have been arrayed as defendants.

4. In terms of the impugned orders, suit can be treated as inter-pleader suit.

5. The question is – whether a suit for declaration, where the parties have questioned their respective rights, can be treated as inter-pleader suit?

6. We have perused the record read with the impugned orders and are of the considered view that the learned Single Judge has erred in treating the lis as inter-pleader suit.

7. At this stage, learned counsel for the parties made a request that the impugned orders be set aside with a direction to the learned Single Judge to decide the applications under Order 1 Rule 10 CPC on merits.

8. In view of the above, the impugned orders are set aside. Applications under Order 1 Rule 10 CPC are restored to their original number. Learned Single Judge is directed to decide the applications under Order 1 Rule 10 CPC, i.e. OMPs No. 24 and 217 of 2015, afresh after hearing the parties.

9. Parties to appear before the learned Single Judge on **31st March, 2016.**

10. The appeals are disposed of accordingly alongwith all pending applications.

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

HP State Financial Corporation .....Appellant

Versus

Krishan Dayal and others ...Respondents.

LPA No. 249 of 2010
Date of decision: 21st March, 2016.

Constitution of India, 1950- Article 226- A notice was issued by the collector to the petitioner- petitioner again committed defaults and a fresh notice was issued- writ Court relied upon the judgment of Hon'ble Supreme Court in **Unique Butyle Tube Industries (P) Ltd. Vs. U.P. Financial Corporation and others (2003) 2 SCC 455** which goes against the petitioner- learned Counsel for the petitioner stated that civil suit filed by the appellants was dismissed and he may be permitted to file reply- in these circumstances, LPA is allowed and judgment is set aside with liberty to file reply to the show-cause notice and take all the grounds, which are available to him in the reply to the said show-cause notice. (Para-3 to 7)

Case referred:
Unique Butyle Tube Industries (P) Ltd. Vs. U.P. Financial Corporation and others (2003) 2 SCC 455

For the appellant: Mr.Ajay Sharma, Advocate.

For the respondents: Mr. Tara Singh Chauhan, Advocate, for respondent No.1.
Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma Anup Rattan, and M.A. Khan, Additional Advocate Generals 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 19.4.2010, made by the learned Single Judge of this Court in ***CWP No. 848/2007*** titled ***Sh. Krishan***

Dayal versus Himachal Pradesh State Financial Corporation and others, whereby the writ petition filed by the petitioner came to be allowed and Annexure P2 questioned in the writ petition was quashed and set aside, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. Petitioner, by the medium of writ petition, had sought quashment of Annexure P2, on the grounds taken in the writ petition.

3. It appears that Annexure P2 is show-cause notice issued by the Collector, on the grounds made out in Annexure RB-2 with the reply.

4. Annexure RB-2 does disclose that notice was issued to the writ petitioner and thereafter he has committed faults. Again, notice was issued. Be it as it is.

5. The pleadings and the documents do disclose that the writ petitioner was heard. The learned Writ Court has relied upon the judgment delivered by the Supreme Court in ***Unique Butyle Tube Industries (P) Ltd. Vs. U.P. Financial Corporation and others (2003) 2 SCC 455,*** which is not in favour of the writ petitioner but virtually it goes against the petitioner.

6. At this stage, the learned counsel for the petitioner/respondent No. 1 herein stated at the Bar that the Civil Suit filed by the appellant was dismissed and he may be permitted to reply the show-cause notice. Show-cause notice is contained in Annexure P2. Even otherwise, the writ petitioner has to file reply to the show-cause notice.

7. In the given circumstances, the LPA is allowed and the impugned judgment is set aside. Writ petitioner-respondent No. 1 herein is at liberty to file reply to the show-cause notice and take out all those grounds, which are available to him in the reply to the said show- cause notice.

8. Having said so, the LPA is disposed of alongwith pending applications, if any.

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

Cr. Appeal No. 179/2012 with
Cr. Appeal No. 378/2012
Reserved on: March 18, 2016
Decided on: March 21, 2016

1. Cr. Appeal No. 179/2012

Rishi Pal ..... Appellant
Versus
State of Himachal Pradesh .....Respondent

2. Cr. Appeal No. 378/2012

State of Himachal Pradesh ..... Appellant
Versus
Rishi Pal .....Respondent

N.D.P.S. Act, 1985- Section 15- Secret information was received that accused had kept poppy husk in his possession for sale to the public - search of the house of the accused was conducted during which 2.200 kg. of poppy husk was found in one bag and 5.3 kg of poppy

husk was found in another bag- search of the store was also conducted during which 10 bags were recovered which contained 200 kg. of poppy husk- total 207.5 kg. of poppy husk was recovered from the possession of the accused- accused was tried and convicted by the trial Court- independent witnesses did not support the prosecution version- PW-15 has admitted in his cross-examination that no document or article was found suggesting that accused was residing in that house- no agreement pertaining to tenancy of store was brought on record- no rent receipt was produced- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts a doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- appeal allowed and the judgment passed by the trial Court set aside. (Para-10 and 11)

For the appellant :Mr. Anoop Chitkara, Advocate, for the appellant in Cr. Appeal No. 179/2012 and for the respondent in Cr. Appeal No. 378/2012

For the respondent : Mr. Ramesh Thakur, Deputy Advocate General, for the State in both the appeals.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The instant appeals are instituted against Judgment dated 28.4.2012 rendered by learned Special Judge (Additional Sessions Judge), Sirmaur at Nahan, HP in Sessions Trial No. 4-N/7 of 2011, whereby Rishi Pal (appellant in Cr. Appeal No. 179/2012 and respondent in Cr. Appeal No. 378/2012) (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for commission of offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for four years, and to pay a fine of Rs.50,000/-, and in default of payment of fine, to further undergo rigorous imprisonment, for one year, for being in conscious possession of 7.5 kg of Poppy husk. Accused has preferred Cr. Appeal No. 179/2012 against his conviction as mentioned above. State has preferred Cr. Appeal No. 378/2012 seeking conviction of the accused for being in conscious possession of 200 kg poppy husk.

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

3. Prosecution case, in a nutshell, is that on 6.3.2011, Bhisham Singh Thakur, Inspector/ SHO Police Station, Paonta Sahib alongwith SI Dharam Pal and other police officials at about 4.30 PM was present near Bata Pul in Government vehicle bearing No. HP-17B-1222 in connection with routine patrol and traffic checking. A secret information was received that the accused in his residential house and rented shop/store at village Patlion, had kept poppy husk in his possession for sale to the people. The information was reduced into writing as per terms of Section 42 (2) of the Act and was sent to the Superintendent of Police, Sirmaur at Nahan through HHC Maan Singh. Independent witnesses namely Pritpal Singh and Parmeshwar Dass were associated and rushed to the house of the accused and one party consisting of PSI Naresh Kumar was deputed to take guard of rented store, which

was at a distance from the house of accused. Accused was present in his residential house and the search was carried out after his written consent and from the prayer room (Pooja room), on the left side of Godrej Almirah one plastic bag containing poppy husk in grinded shape was recovered. It weighed 2.200 kg. Second bag on which 'special chakki atta' was printed, was found containing 5.300 kg poppy straw/husk. Both the bags were sealed with seal 'X' on the spot and NCB form in triplicate was filled in and taken into possession vide seizure memo prepared on the spot. During the search of the house of accused, in Godrej Almirah, two bags of cloth were found and in one bag, Rs.1,31,750/- and in the second bag, Rs.1,60,000/- total Rs.2,91,750/- were recovered. Accused could not account for and it was presumed that said money was illegally acquired by selling of poppy husk. Same was sealed in a parcel and sealed with 'X' impression. Thereafter, police party rushed to the rented store of accused alongwith witnesses and accused was asked to produce the key but he could not produce it and lock of the store was broken and on search of the store, 10 bags i.e. 5 yellow and 5 white in colour on which 'Petpre Form Shree' was printed were found and on checking poppy husk was found in the same. It weighed 200 kg. Two samples of 1 kg each from all the bags were taken separately and 20 samples and 10 bags were sealed with seal impression 'X' and taken into possession vide seizure memo prepared on the spot. NCB form in triplicate was also filled up. Accused could not produce licence for the possession of poppy husk weighing 207.5 kg and thereafter written report for registration of case was sent to Police Station Paonta Sahib, on the basis of which case was registered. Case property was deposited with MHC Police Station Paonta Sahib. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

4. Prosecution has examined as many as 15 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. Accused was convicted for conscious possession of 7.5 kg poppy husk as noticed herein above but was acquitted for possession of 200 kg poppy husk. Hence, these two appeals i.e. one by the accused and the other by the State.

5. Mr. Anoop Chitkara, Advocate, has vehemently argued that the prosecution has failed to prove case against the accused.

6. Mr. Ramesh Thakur, Deputy Advocate General, has vehemently argued that the prosecution has proved case against accused.

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

8. PW-1 Pritpal Singh testified that accused was resident of his Panchayat. He was called by SHO Police Station Paonta Sahib. His signatures were obtained by Bhisham Singh Thakur Inspector, SHO on certain papers. SHO apprised him that accused was involved in some criminal offence. Poppy husk was recovered. He was not associated by the police on 6.3.2011 nor house of accused situate at village Patlion was searched in his presence. No poppy husk was recovered in his presence. He denied that currency notes in different denominations from Godrej Almirah totaling Rs.2,91,750/- were recovered. Even police has not searched the store/shop of which accused was tenant. No poppy husk from the rented accommodation was recovered from the possession of the accused. He was declared hostile and cross-examined by the learned Public Prosecutor. He has denied in cross-examination by the learned Public Prosecutor that in their presence, Addl. SHO Dharam Pal, SI, Police Station Paonta Sahib had conducted search of the house of accused at village Patlion. He also denied that during the course of search from prayer room of accused by the side of Godrej Almirah, one plastic bag was recovered and he further denied on checking the same, poppy husk weighing 2.200 kg was recovered. He further denied that

the second bag was recovered containing 5.300 kg poppy husk. He also denied that sealing proceedings were completed at the spot. He has admitted his signatures on Ext. P1 and P2. Volunteered that his signatures were obtained in Police Station, Paonta Sahib. He signed the documents without going through the contents though he admitted that he appended his signatures after pondering over the matter. He also denied that on 6.3.2011, police searched store/shop of the accused which was on left side of Nahan-Paonta road. He denied that the police demanded keys of the shop. He denied that the lock was broken by the police and they recovered 10 bags containing poppy husk. He denied that NCB form in triplicate was filled and seal after use was handed over to him. He denied that the bags of sample were taken into possession by the police vide seizure memo Ext. PW-1/B. However, he identified his signatures on Ext. PW-1/B. In his cross-examination by the learned defence counsel, he admitted that in the half of the building, there is Gurukul School and in the rest half, accused resides with his family.

9. PW-2 Parmeshwar Dass deposed that he occasionally purchases grocery from the shop of accused. He was called by the SHO Police Station. A Sub Inspector obtained his signatures on certain papers. Police apprised him of some objectionable articles having been recovered from accused. He was not associated by the police on 6.3.2011 nor the house of accused situate at village Patlion was searched in his presence. No poppy husk was recovered in his presence from the house or store of accused. No currency notes were recovered in his presence. Police has not taken search of store/shop of accused in which he was a tenant. No poppy husk was recovered from the rented house of accused. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that in their presence ASHO Dharam Pal has conducted search of the house of accused in village Patlion. He denied that during the course of search from prayer room of accused, by the side of Godrej Almirah one plastic bag containing 2.200 kg poppy husk was recovered. He denied that second bag was also recovered containing 5.300 kg poppy husk. He denied that both the bags were sealed with seal impression 'X' on the spot and NCB form in triplicate was completed. He also denied that sample of seal impression 'X' was taken separately. He admitted his signatures on Ext. P1 and P2. Volunteered that his signatures were obtained at Police Station Paonta Sahib on 7.3.2011. He also admitted his signatures on recovery memo Ext. PW-1/A. Volunteered that his signatures on Ext. PW-1/A were taken in the Police Station. He also denied that police on 6.3.2011 conducted search of store/shop of accused which was on left side of Nahan-Paonta road. He denied that police demanded keys from accused and he failed to produce it. He denied that police broke the lock and on search, 10 bags containing poppy husk weighing 200 kg were found. He denied that sampling and sealing proceedings were completed at the spot. He denied that NCB form in triplicate was filled in and seal after use was handed over to Pritpal. He identified his signatures on Ext. PW-1/B. He also admitted his signatures on Exts. P3 to P12. Volunteered that his signatures were obtained on 7.3.2011 in Police Station. He further denied that during the course of search of house of accused, currency notes of different denominations were recovered i.e. Rs.1,60,000- from one bag and Rs.1,31,750/- from other bag, total Rs.2,91,750/-. He denied that recovery memo to this effect Ext. PW-1/C was prepared. In his cross-examination by the learned defence counsel, he admitted that in the building, Gurukul School was being run at the relevant time. School was housed in a portion of the house and accused was residing with his family. House of father of accused was at a distance of 200 metres from the house of accused. There were many houses just close to the house of father of accused.

10. PW-3 Kirat Singh testified that in March 2011, he had let out shop to accused on monthly rent of Rs.1200/- Accused used to pay the rent in advance. Accused remained in the shop for 1-1/2 months. No agreement of tenancy was scribed. He was

associated by the police during investigation. Certificate Ext. PW-3/A was given by him to the police. He was called by the police on 6.3.2011. In the cross-examination by the learned defence counsel, he testified that he has not entered into any written agreement with accused which shows that shop was rented. Shop was owned by his son Jiwan Singh. He has not produced any revenue record to the police showing ownership of the shop. His signatures on Ext. PW-3/A were obtained in the Police Station. He admitted that police was planning to arrest him in the case as the shop was in his possession.

11. PW-4 Dugal Singh deposed that in his presence, police weighed some bags. Ext. PW-4/A was scribed by him.

12. PW-6 Constable Ayub Khan, deposed that on 8.3.2011, Incharge Malkhana Police Station Paonta Sahib handed over to him, two bags sealed with seal impression 'X' allegedly containing poppy husk and 10 parcels allegedly containing samples of poppy husk pertaining to the case vide RC No. 222/11 dated 8.3.2011. He handed over the same to FSL Junga.

13. PW-7 Constable Kamal Khan testified that he was present with Inspector Bhisham Singh Thakur SI, ASI Parkash Chand, ASI Kedar Singh etc. near Bata Pul in connection with detection of excise cases and traffic checking. SHO Bhisham Thakur received a secret information that accused Rishi dealt with sale and purchase of poppy husk. SHO Bhisham Singh Thakur prepared information under Section 42 (2) of the Act and sent the same the Superintendent of Police, Sirmaur at Nahan through HHC Maan Singh. Thereafter two persons namely Pritpal Singh and Parmeshwar Singh were called and raiding party was formed. Thereafter, they alongwith two independent witnesses proceeded to the house of accused. PSI Naresh Sharma and HC Dharam Singh went to the store of accused which was taken on rent. Accused was found at his residence. They gave their personal search to the accused and thereafter house of accused was searched. During the search, in prayer room, two bags were found placed near Godrej Almirah. Bags were checked and poppy husk was found. Search, sealing and sampling proceedings were completed at the spot. Currency notes were also recovered. Shop of accused was found locked. Accused was asked to give keys of lock. He refused. Lock was broken and search was conducted. 10 plastic bags were recovered from the shop, and 200 kgs of poppy husk was found in the bags. In his cross-examination, he admitted that father of accused was present in his house. He did not know about the presence of mother of accused. He admitted that brothers of accused had separate houses and parents have separate house. They have common courtyard. He has seen Gurukul School. He admitted that Gurukul school was housed in the building owned by the accused. Almirah from which currency notes were recovered was open. Volunteered that it was locked.

14. PW-8 ASI Paramjeet Singh deposed that information under Section 42 (2) of the Act was received by Punita Bhardwaj, Superintendent of Police, Sirmaur at Nahan at her residence through HHC Maan Singh.

15. PW-9 Constable Dharam Singh deposed that he was posted as Assistant of Malkhana incharge at Police Station, Paonta Sahib. He has brought Malkhana Register No. 19. On 6.3.2011, Bhisham Singh Thakur, SHO Police Station, Paonta Sahib had deposited at 10.15 PM 10 bags of poppy husk sealed with seal impression 'X' at three places each as well as 20 parcels of sample sealed with seal impression 'X'. Besides this, two other sealed bags containing poppy husk 2.200 kg and 5.300 kg were also deposited. He made entry of the aforesaid items and documents in Register No. 19. Case property was sent to the FSL Junga.

16. PW-10 Constable Dharam Singh No. 519, Police Station Paonta Sahib, testified that Inspector SHO Bhisham Singh Thakur deputed him and PSI Naresh Sharma to protect the rented shop/store of the accused, which was situated at a distance of about ½ kms, from the house of the accused. The shop/store was locked and accused was asked to produce the key of lock, he did not give the key. Lock of store was broken and search was conducted. Contraband was recovered. It weighed 200 kg. Search, sealing and sampling proceedings were completed at the spot. In his cross-examination, he has admitted that no recovery memo was prepared at the store. Volunteered that the recovery memo was prepared at the flour mill.

17. PW-11 ASI Parkash Chand deposed that accused was found present when they reached his house. PSI Naresh Sharma and Dharam Singh were sent to guard the store. Every member of the raiding party gave their search to the accused vide memo Ext. PW-11/A. Accused was asked to give the search of his residential house before any gazetted officer or Magistrate. He consented to give search to the police present on the spot. Memo Ext. PW-11/B was prepared to this effect. Search of the prayer room of accused was conducted by the raiding party in the presence of accused. Two plastic bags white in colour were found placed near Godrej Almirah. Bags were checked. Poppy husk was found in the same. It weighed 2.200 kg and 5.300 kg. Thereafter they proceeded to the place where rented store/shop was situate. Landlord of the store was present. Accused was asked to give the key of the lock of store room. He refused to give the keys. Lock was broken. Search was conducted. Ten plastic bags were found. On opening the same, poppy husk was found in the bags. It weighed 200 kg. Bags were taken into possession vide Ext. PW-1/B after drawing two samples of one kg from each bag. Search, seizure and sampling proceedings were completed at the spot.

18. PW-12 SI Dharam Pal, deposed that Inspector Bhisham Singh Thakur prepared information under Section 42 (2) of the Act. It was sent to the Superintendent of Police, Sirmaur at Nahan through HHC Maan Singh. Two independent witnesses were associated. PSI Naresh Sharma and HC Dharam Singh were sent to guard the store of the accused. Accused was asked to give search of his residential house by any gazetted officer or magistrate. Contraband was recovered from the house. Similarly, cash amounting to Rs.2,91,750/- was recovered and taken into possession. Store was searched. 200 kg poppy husk was recovered. In his cross-examination, he has admitted that there was one house, however brothers of accused resided in separate portion. It contains 7 rooms and has only ground floor and a common courtyard.

19. PW-15 Bhisham Singh Thakur testified that he had prepared information under Section 42 (2) of the Act and handed over the same to HHC Man Singh for giving the same to Superintendent of Police, Sirmaur. Report is Ext. PW-8/A. House of accused was searched and contraband was recovered. Store was also searched. Contraband was recovered. Landlord of store was Kirat Singh. In his cross-examination, he has admitted that he has not associated any person residing in the front houses or by the side of the house searched by them. Volunteered that he associated Pradhan and Up Pradhan. House contained four room. They searched all the four rooms. He has also found ration card in the Almirah but he has not taken the same into possession. During entire search of the house, no document or article was found which could show that accused was residing in the house. He has not obtained the revenue record of the house from the Patwari to establish as to whom the house belonged nor he collected any record regarding the ownership and possession of the house including from Panchayat. Currency notes recovered from the house belonged to father of the accused, who was owner in possession of the house. Store was not

having anything except 10 bags of poppy husk. He has not further investigated about the ownership of the store except that he took certificate Ext. PW-3/A in this regard.

20. Case of the prosecution has not been supported by independent witnesses PW-1 Pritpal Singh and PW-2 Parmeshwar Dass. According to PW-1, Pritpal Singh, he was neither associated by the Police on 6.3.2011 nor the house of the accused situate at village Patlion was searched in his presence. No poppy husk was recovered in their presence from the house of the accused. He denied that the currency notes in different denominations were recovered in his presence. Police has not conducted search of the rented store/shop, in which accused was a tenant. He further denied that any poppy husk was recovered from the rented accommodation. Similarly, PW-2, Parmeshwar Dass, deposed that he was called by SHO to Police Station Paonta Sahib and was apprised that some objectionable articles were recovered from the house. He was not associated on 6.3.2011 nor house of accused at village Patlion was searched in his presence. No poppy husk was recovered from the house. No currency notes were recovered in his presence. Police had not taken search of the store/shop of accused in which he was tenant and no poppy husk was recovered from the rented house of the accused.

21. Case of the prosecution is that poppy husk weighing 7.5 kg was recovered from the house of accused. PW-15 Bhisham Singh Thakur in his cross-examination has admitted that he has not associated any person residing in the front side of the house, they searched. Volunteered that he has associated Pradhan and Up Pradhan. He has not taken any search warrant for the search of house of accused. House had four rooms. They searched all the four rooms. He found a ration card in the almirah. However, same was not taken into possession. He has not written or mentioned about ration card in any document or daily diary. During the entire search of the house, no document or article was found suggesting that accused was residing in the house. He has not obtained any revenue record of the house from the Patwari as to whom house belonged to nor any record regarding ownership of accused was obtained from Panchayat. It was necessary for him to obtain revenue record to prove that house was owned and possessed by accused. He could get assistance from the local Panchayat also. The alleged ration card recovered by him was not placed on record. It has come in the statement of PW-15 Bhisham Singh Thakur that currency notes recovered from the house belonged to the father of accused, who was owner-in-possession of the house.

22. Case of the prosecution is that 200 kgs of poppy husk was recovered from the store rented to the accused by PW-3 Kirat Singh. PW-3 Kirat Singh deposed that he has rented out shop to the accused in March, 2001 for Rs.1200/- per month. He used to pay rent in advance. Accused remained for 1 -1/2 months. No agreement was prepared to this effect. Ext. PW-3/A was given by him. In his cross-examination he admitted that shop was owned by Jiwan Singh, his son. He admitted that the police was planning to arrest him in the case as shop was in his possession. He further admitted that contents of Ext. PW-3/A were not in his handwriting. His signatures were obtained on Ext. PW-3/A in the Police Station. PW-15, Bhisham Singh Thakur, in his cross-examination, he has admitted that Ext. PW-3/A was not given by Kirat Singh. Ext. PW-3/A was not in the handwriting of Kirat Singh. He did not know whose writing it was. He has not investigated the matter qua the ownership of the store except Ext. PW-3/A in this regard.

23. Prosecution has failed to prove that the shop was rented out to the accused. There is no rent note. PW-3 Kirat Singh admitted that police was planning to arrest him in this case. Thus, possibility of giving such certificate by PW-3 Kirat Singh in order to save him can not be ruled out. PW-3 Kirat Singh while appearing in witness box deposed that he has rented out shop to the accused for Rs.1200/- per month. However, in Ext. PW-3/A, it is

stated that rent was Rs.900 per month. There is variance in the statement of PW-3 Kirat Singh and contents of Ext. PW-3/A. Prosecution has failed to prove that store was in occupation and possession of the accused in the capacity of tenant. Recovery of 7.5 kg poppy husk from the house of accused is doubtful. PW-15 Bhisham Singh Thakur has not proved any revenue record nor any record from Panchayat to establish that the house from which 7.5 kg Poppy husk was recovered belonged to accused. Independent witnesses PW-1 Pritpal Singh and PW-1 Parmeshwar Dass have not supported the case of the prosecution. According to them, nothing was recovered in their presence from the house or store/shop of the accused. PW-12 Dharam Pal has admitted that Partap, brother of accused, his father and some ladies were present in the house at the time of search. Similarly, PW-7 Kamal Khan also deposed that father of accused was present in the house. Though he did not know about the presence of mother of accused. He also admitted that it was a compact house owned and possessed by brothers and parents of accused. However, PW-12 Dharam Pal admitted that house contained 7 rooms and were situate in ground floor having a common courtyard.

24. Case property was produced in the Court. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

25. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused.

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

> (2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.
>
> Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.
>
> The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.

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

> 27.18. Safe custody of property.-

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

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

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

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

28. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and

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

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

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

31. Accordingly, Cr. Appeal No. 179/2012 is allowed. Judgment dated 28.4.2012 rendered by learned Special Judge (Additional Sessions Judge), Sirmaur at Nahan, HP in Sessions Trial No. 4-N/7 of 2011, is set aside. Accused is acquitted of the offence under Section 15 of the Act, giving him benefit of doubt. He is ordered to be released immediately, if not required by the police in any other case. Fine amount, if any, paid by him shall be refunded to him. Registry is directed to prepare and issue release warrants of the accused to the concerned Superintendent of Jail, forthwith.

32. Cr. Appeal No. 378/2012 fails and is accordingly, dismissed. All pending applications, in both the appeals, also stand disposed of.

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

State of Himachal Pradesh .....Appellant.

Versus

Jagdish Chander Gupta & ors. .....Respondents.

Cr. Appeal No. 190 of 2011.
Reserved on: March 19, 2016.
Decided on: March 21, 2016.

Indian Penal Code, 1860- Section 336 and 304 A- Director General Border Roads had undertaken construction work of bridge - accused was the contractor- the bridge collapsed during the process of the construction- 9 labourers were buried alive under the debris- it was found in investigation that bridge had collapsed due to failure of the shuttering – accused was tried and acquitted by the trial Court- held, that labourers had brought the cracking noises to the notice of the officers of D.G.B.R., however, the work was not stopped- no efforts were made for getting the drawings approved from the competent authority- prosecution was required to prove that accused had acted negligently which resulted the death of labourers- drawing were required to be approved by Director General Border Roads for which the officers were responsible- case was not proved against the accused- trial Court had rightly acquitted the accused. (Para-25 to 28)

For the appellant: Mr. Parmod Thakur, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.

For the respondents: Mr. Sumeet Raj Sharma, Advocate for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 30.8.2010, rendered by the learned Judicial Magistrate Ist Class, Court No. V, Shimla, H.P., in Criminal Case No. 20-2 of 03/98, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offence punishable under Sections 336 and 304 A IPC have been acquitted.

2. The case of the prosecution, in a nut shell, is that in the year 1997, Director General Border Roads had undertaken construction work of bridge known as Malgi Bridge on Dhami Kingal road and the accused Jagdish Chander Gupta was the contractor. On 11.12.1997, when about 60-65 labourers were laying concrete over the under construction bridge, it suddenly collapsed. Nine labourers were buried alive under the debris and lost their lives. The mishap was reported to the police by Smt. Dhani Devi, Pradhan, Gram Panchayat Rebag. Thereafter, ASI Kishore Chand PP Sunni and other police officials reached on the spot. The statement of Mina Ram under Section 154 Cr.P.C. was recorded, on the basis of which FIR No. 210 dated 12.12.1997 was recorded at PS Dhalli, Shimla. The investigation was assigned to ASI Kishore Chand. Spot map was prepared. The I.O. also took samples of steel bars, cement, grit, sand, mixture of cement, one iron plate vide seizure memos. Post mortem of the dead bodies was got conducted. Drawings of the under construction bridge and attendance register of the labourers were seized. It was found during investigation that the work of bridge was assigned by DGBR to Contractor Jagdish Chander Gupta. The expert report from the then Executive Engineer, HP PWD, Kumarsain was obtained, wherein he opined that the drawings of the bridge were not got approved from the competent authority and it was revealed from the drawings that there was no provision for tying both the trusses, as the drawings did not show such details of tie beams. As per the opinion of the Executive Engineer, the bridge collapsed mainly due to failure of the shuttering. The expert opinion regarding the steel bars was also obtained from the Engineering College, Sector 120, Chandigarh. The steel bars used for the construction were found of suitable strength. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 22 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them,

the construction work was under the supervision of the Engineers of DGBR. The construction work could not proceed further unless it was checked. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Parmod Thakur, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Sumeet Raj Sharma, Advocate for the accused has supported the judgment of the learned trial Court dated 30.8.2010.

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

6. PW-1 Mina Ram deposed that he was working in D.G.B.R. since 1988. On 11.12.1997, the bridge was under construction. He was also working on the spot. He did not know the name of the contractor. On the spot S/Sh. O.C. Jain and Siddappa were supervising the work. About 60-65 labourers were working on the bridge. When on 11.12.1997 concrete was laid at 12:30 PM, the bridge collapsed. Three persons died on the spot. He was declared hostile and cross-examined by the learned Assistant Public Prosecutor. In his cross-examination, he admitted that the D.G.B.R. had awarded work to accused Jagdish Chander Gupta. He has admitted that on 10.12.1997, they have told the contractor and officers of the D.G.B.R. that they have heard cracking noises beneath the bridge. Neither the accused nor the officers of the D.G.B.R. took remedial steps. He further deposed that on 8th and 11th December, 1997, cracking noises were heard below the bridge. In his cross-examination by the learned defence counsel he deposed that on 10th the cracking noise was heard. The same were also heard on 11th when the bridge collapsed. He has informed the officers S/Sh. O.C. Jain and Siddappa about the noises.

7. PW-2 Ved Parkash deposed that he was working in D.G.B.R. since 1983. They were putting concrete on 8th to 10th December, 1997 and heard cracking noises below the bridge. He did not know as to who informed about these noises to S/Sh. O.C. Jain and Siddappa.

8. PW-3 Nokh Ram deposed that he was working in D.G.B.R. for the last 14 years. The work was awarded to Sh. J.C. Gupta. He proved Ext. P-1 and PW-3/A. On the spot, accused Vikas Gupta was supervising the work. In his cross-examination, he admitted that the work undertaken by the contractor was being checked by the officers of the D.G.B.R.. He further deposed that the work could only be carried out at their instructions.

9. PW-4 Hem Raj has proved Ext. PW-4/A. He deposed that the police had taken into possession iron plate which was used while constructing the bridge in his presence.

10. PW-5 Sewa Ram deposed that the police has taken into possession sand, grit and cement vide Ext. PW-5/A.

11. PW-6 Kewal Raj deposed that on 11.12.1997 at about 2:00 PM, he heard noises from the side of bridge. He also noticed smoke. He reached the spot with other people. He noticed that the bridge had collapsed. Few labourers of contractor engaged by D.G.B.R. died. The attendance register was taken into possession vide memo Ext. PW-3/A. The police has taken into possession one iron plate vide Ext. PW-4/A. He along with Hem Raj signed the memos.

12. PW-7 Pradeep Kumar deposed that he was engaged as supervisor on the bridge in the year 1997. Drawings were taken into possession vide memo Ext. PW-7/A. He signed the documents at P.P. Sunni. He did not know as to who has prepared the drawings.

13. PW-8 Bhoop Ram deposed that he visited the spot. The police had reached the spot and took into possession grit, cement and sand vide memo Ext. PW-8/A.

14. PW-9 Mohan Lal was declared hostile. He has identified his signatures on Ext. PW-7/A.

15. PW-10 Sahaj Ram deposed that he was working on the bridge in the year 1997. On 11.12.1997, when they were working on the bridge, he heard noise below the bridge and the bridge collapsed. He has not heard the cracking noises before and after the collapse of the bridge. Neither he nor his colleagues have brought to the notice of the officers S/Sh. O.C. Jain and Siddappa about noises. Volunteered that he has not heard any noise before the collapse of the bridge. He did not know how the accident has taken place. According to him, it was an act of God. He has not seen accused Vikas Gupta or Jagdish Chander Gupta on the spot. He was declared hostile and cross-examined by the learned Assistant Public Prosecutor. In his cross-examination by the learned Asstt. Public Prosecutor, he denied the suggestion that bridge has collapsed due to the negligence of contractor or the officers, namely, S/Sh. O.C. Jain and Siddappa.

16. PW-11 Bhajan Lal deposed that he was working in D.G.B.R. since 1967. The work was being supervised by S/Sh. O.C. Jain and Siddappa. These officers were present on the spot on 10.12.1997. The noise started emanating from the bridge. They told them about the noises coming from the bridge. They told him that it is due to support and there is no threat to them. On 11.12.1997, no noise was heard. The bridge collapsed. He was also declared hostile and cross-examined by the learned Assistant Public Prosecutor. He denied the suggestion that on 11.12.1997, the cracking noises were heard from the bridge. He also denied the suggestion that at 12:30 PM, cracking became shriller and despite that S/Sh. O.C. Jain and Siddappa had not got the work stopped. He denied that the accident has taken place due to the negligence of accused and supervisory staff of the D.G.B.R.

17. PW-12 Devi Singh deposed that on 10th, cracking noises were coming from below the bridge. They had apprised the D.G.B.R. officers, namely, S/Sh. O.C. Jain and Siddappa and the bridge collapsed at about 11-12:00 PM. He did not know how the bridge collapsed. He was declared hostile and cross-examined by the learned Assistant Public Prosecutor.

18. PW-14 G.K.Kapoor deposed that he was working as Executive Engineer in PWD since 1996. His opinion was sought as to how the bridge collapsed. He prepared the report and submitted it to the police. The report is Ext. PW-14/A.

19. PW-15 Shyam Lal proved Ext. PW-15/A.

20. PW-16 Dr. Rajnish has conducted the post mortem examination on the dead bodies of the labourers. According to him, the labourers died due to damage to their brain and spinal chord, as per the medical reports.

21. PW-18 Const. Jaswant Singh deposed that on 2.8.1998, MHC PP Sunni has handed over the iron bar and plates to be carried to Principal, College Chamdigarh. He deposited the same at Chandigarh.

22. PW-19 Prem Singh deposed that on 11.12.1997, the bridge collapsed. He did not know how the accident took place. He was declared hostile and cross-examined by the learned Assistant Public Prosecutor.

23. PW-20 ASI Kishore Chand was the I.O. He received the information from Smt. Dhani Devi, Pradhan, Gram Panchayat Rebag. He reached the spot and recorded the

statement of Mina Ram under Section 154 Cr.P.C. He prepared the spot map. He also took into possession iron bar and other construction material. In his cross-examination he admitted that he came to know during the investigation that work of the bridge was being carried out under the supervision of D.G.B.R. They used to visit the spot.

24. PW-22 S.I. Surender Singh, has proved drawings PW-7/B and PW-7/G-2. These were got examined from the Executive Engineer, HP PWD, Kumarsain. His report is Ext. PW-14/A.

25. It has come in the evidence that labourers have brought the cracking noises to the notice of the officers of D.G.B.R. and despite that the work was not stopped. The labourers started hearing the noises from 9th/10th December, 1997 onwards. The remedial steps ought to have been taken by the supervisory staff. According to report Ext. PW-14/A which is proved by PW-14 G.K.Kapoor, it is stated that from the drawings of staging truss, it appeared that no tangible efforts were put forth for getting these drawings approved from the competent authority before putting them in use. These drawings were required to be got approved from the competent authority in order to adjudge the adequacy of its connected members to see whether they were safe for carrying out the super imposed load liable to be carried out by the truss. According to him, provision for tieing both the trusses was not made as the drawings did not show such details of the tie-beams. He finally concluded that the collapse of the bridge was mainly due to failure of the shuttering.

26. PW-1 Mina Ram in his cross-examination has admitted that on 10th, cracking noises were heard and those were brought to the notice of the officers, namely, S/Sh. O.C. Jain and Siddappa of the D.G.B.R. PW-3 Nokh Ram has also deposed that the work was being supervised by the officers of the D.G.B.R. PW-10 Sahaj Ram, in his examination in chief, deposed that they were hearing noises on 11.12.1997 and before that he has not heard any cracking noise. He was also declared hostile. In his cross-examination, he denied that the bridge has collapsed due to mischief of the accused or the officers of the D.G.B.R. PW-11 Bhajan Dass deposed that no noises were heard on 11.12.1997 when the bridge collapsed. PW-12 Devi Singh deposed that the noises were heard on 10th below the bridge and those were brought to the notice of the officers of D.G.B.R. They told him that there is no threat to their lives and they should keep on working. PW-19 Prem Singh has not supported the case of the prosecution. He was also declared hostile.

27. In order to prove an offence under Section 304-A IPC, the prosecution was required to firstly prove that it was the accused who did some act which was rash or negligent; secondly it entailed death of any person and the death was the direct result of the rashness or negligence and lastly that the rash and negligent act did not amount to culpable homicide. The prosecution is required to prove that the act was much more than simple negligence. Similarly, in order to prove an offence under Section 336 IPC, the prosecution was required to prove that some act was done and the act was rash and negligent and resultantly such act endangered the life and personal safety of the others. The rash or negligent act must be proved.

28. The drawings were required to be approved by the D.G.B.R. In case, there was any defect in the drawings, the officers/officials of the D.G.B.R. were responsible. The iron bar was also sent for checking its quality and strength to Punjab Engineering College. The copy of the same is Mark “C”. According to Mark “C”, the average strength of 16 mm dia rods was 13.25 as against desired value of 8.3 ft. Both 10 mm dia and 16 mm dia rods samples supplied for testing were of suitable strength. The police has though taken into

possession the sand, concrete and cement but the same was not sent to the recognized laboratory.

29. Thus, the prosecution has failed to prove the case against the accused persons. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 30.8.2010.

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

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

State of Himachal Pradesh ...Appellant
Versus
Suresh Kumar ...Respondent

Cr. Appeal No. 700/2008
Reserved on: March 19, 2016
Decided on: March 21, 2016

Indian Penal Code, 1860- Section 376- Prosecutrix had gone to jungle where she was raped by the accused- accused also threatened to kill her in case of disclosure of incident to any person- whenever prosecutrix used to go to jungle, accused used to rape her with the assurance of marrying her- accused refused to marry her on which matter was reported to the police- FIR was registered- accused was tried and acquitted by the trial Court- held, in appeal that testimony of the mother does not inspire confidence and according to her prosecutrix disclosed the incident only when she was 4 months pregnant- mother of the prosecutrix could have noticed pregnancy- earlier mother of the prosecutrix had demanded Rs. 10,000/- from the accused for compromise- prosecutrix had refused to depose against the accused and reported the matter to the police only at the instance of her mother- statement of prosecutrix could not be recorded as she died during the trial - no DNA test of the foetus was conducted to determine the paternity- in these circumstances, prosecution had not proved its case beyond reasonable doubt against the accused- accused was rightly acquitted by the trial Court- appeal dismissed. (Para-15 to 7)

For the Appellant: Mr. J.S. Guleria, Assistant Advocate General.
For the Respondent: Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted by the State against judgment dated 30.6.2008 rendered by learned Sessions Judge, Chamba Division, Chamba, Himachal Pradesh in Sessions Trial No. 63/2007, whereby respondent-accused, (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 376 IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 5.6.2007, prosecutrix alongwith her parents had gone to the Police Station Chuwari and lodged a report disclosing therein that she studied upto 4th standard and now she was doing household work. She is the youngest in her family. She had gone to the jungle. Accused Suresh Kumar chased her and asked her to get marry with him and when she refused, accused committed rape upon her. She raised alarm but her cries were not heard by anybody as none was nearby. Accused threatened her that in case she disclosed the matter she would be defamed in the village and nobody would marry her. She did not disclose the fact to anyone. Whenever she used to go to jungle, accused used to come and commit sexual intercourse with the assurance to marry her. 4-5 months ago, when she was alone in the house, accused came again and committed rape upon her. She approached accused and requested to marry her, however, accused kept on delaying the matter on one pretext or the other. FIR under Section 376 IPC was registered on 6.6.2007. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. His case was that of denial simpliciter. Accused was acquitted. Hence, this appeal.

4. Mr. J.S. Guleria, Assistant Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Naresh Kaul, Advocate, has supported the judgment of acquittal dated 30.6.2008.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Chuni Lal is the father of the prosecutrix. He testified that he had two sons and two daughters. Prosecutrix was the youngest. On 4.6.2007, Kamla Devi told him that accused had committed forcible sexual intercourse with the prosecutrix when she used to graze her cattle. He promised to marry her. Thereafter, he contacted the father of the accused and told him about the incident. However, accused was made to flee from the house and did not meet them. His daughter became pregnant. Accused was committing forcible sexual intercourse with his daughter for 5-6 months prior to 4.6.2007. The date of birth of the prosecutrix was 1.3.1992. He enquired from his daughter about the incident and she told him that accused used to commit sexual intercourse forcibly under the pretext of marrying her. However, thereafter, accused fled away from the house. He asked his daughter as to why she did not narrate the incident to anyone and she told that accused assured to marry her and that is why she did not narrate the incident to him. Daughter also told him that accused had committed forcible sexual intercourse. Matter was reported to the police on 5.6.2007. FIR Ext. PW-1/A was registered. In his cross-examination, he deposed that his wife told him name of accused was Chamaru Ram. Chamaru Ram had committed rape on his daughter. He did not report the matter to the Pradhan of the Panchayat. Volunteered that he had disclosed the matter to Netar Singh, Pradhan of the Gram Panchayat, who told him to report the matter to the police.

8. PW-2 Dr. N.K. Surya has conducted post mortem. According to him, prosecutrix was pregnant. In his cross-examination, he admitted that X-ray in this case was not conducted.

9. PW-7 Chamel Singh deposed that on 15.6.2007, MHC Hakam Singh handed over to him vaginal swab of prosecutrix, one parcel said to be containing underwear, one

envelope said to be containing pubic hair, two letters written by Dr. Harmit Kaur and Dr. Samir. He took them to FSL Junga vice RC No. 40/2007 and deposited them on 16.6.2007.

10. PW-8 Hem Raj has proved certificate Ext. PW-8/A

11. PW-9 Harbans Lal deposed that date of birth of prosecutrix was 1.3.1992 as per original record of the family. He proved Ext. PW-9/A.

12. PW-11 Hans Raj deposed that investigation was handed over to him on 5.6.2007. He recorded the statement of Kamla Devi and Chuni Lal under Section 161 CrPC. He got the prosecutrix medically examined and obtained MLC. He prepared site plan Ext. PW-11/A. Accused was arrested on 6.6.2007. Accused Suresh Kumar was also known as Chamaru Ram. He was got medically examined. Accused gave demarcation of the place where he used to rape the prosecutrix. Ext PW-11/C, site plan was prepared by him at the instance of accused. He obtained birth certificate of prosecutrix from CMO and also the Parivar register. In his cross-examination, he admitted that he has not recorded in the investigation that Suresh Kumar was also known as Chamaru Ram. He admitted that no evidence of rape was found in the house of the prosecutrix. He also admitted that no evidence of rape was found in the jungle also. He has not got the DNA test of prosecutrix conducted. Prosecutrix had died. Prosecutrix had not given any specific date of rape. Statement of Kamla Devi was recorded on 5.6.2007.

13. PW-12 Kamla Devi is the mother of the prosecutrix. She deposed that her daughter told her in the month of '*Jeth'* that when she had gone to Jungle for grazing cattle, accused had committed forcible sexual intercourse with her. She cried but no one heard her cries. There was no inhabitation. She asked her daughter why she has not told the incident earlier. She told her that due to shame she could not narrate the incident to her and that the accused had advanced threats to her also. Accused had assured to marry her daughter. Accused again committed rape with her daughter when she was alone in the house. She narrated this incident when she was 4-5 months pregnant. She informed her husband. She was cross-examined. She did not disclose the incident to Panchayat. She contacted father of accused but he flatly refused to compromise the matter. She disclosed the incident to her husband. They demanded Rs.10,000/- from accused. She also admitted specifically that prosecutrix refused to depose against the accused. When they insisted, she reported the matter to the police. They were not on speaking terms with the accused. Statement of prosecutrix in this case could not be recorded as she died during trial.

14. PW-13 Dr. Harmit Kaur has issued MLC Ext. PW-13/B. She admitted that the ossification test in medical science is the best test to determine the age of a person. In her cross-examination, she admitted that she has not conducted or advised DNA test. She admitted that without DNA test, doctors can not opine about paternity of the foetus.

15. Statement of PW-12 Kamla Devi does not inspire confidence. According to her, her daughter has told her about the incident only when she was 4 months' pregnant. In case prosecutrix was pregnant, she should have told the incident to her mother. PW-12 Kamla Devi being the mother of prosecutrix was bound to notice the pregnancy. According to PW-13, Dr. Harmit Kaur, she was found pregnant for a period of six months i.e. 24 weeks. Pregnancy could not go unnoticed by the mother of the prosecutrix. PW-12 Kamla Devi demanded Rs.10,000/- from accused for compromise. It has come in the statement of PW-12 Kamla Devi as noticed above, that the prosecutrix has refused to depose against accused and when they insisted, she reported the matter to the police. PW-1 Chuni Lal has initially deposed that the matter was not brought to the notice of Pradhan and then volunteered that it was brought to the notice of Pradhan. But, Pradhan, despite a material witness, has not

been examined. PW-11 ASI Hans Raj admitted in his cross-examination that there was no evidence of rape in the house with the prosecutrix and there was no evidence of rape in the jungle also. No DNA test of the prosecutrix was conducted. Even PW-13 Dr. Harmit Kaur has neither conducted nor advised DNA test to determine the paternity of the foetus.

16. According to the prosecutrix, when she was raped for the first time, in the jungle, she cried however, nobody heard her cries. Had she raised alarm in the jungle, she was bound to disclose the incident to her mother immediately. A girl aged 15 and ½ years, is mature. According to PW-1 Chuni Lal, Chamaru Ram had committed rape upon his daughter. PW-11 Hans Raj in his cross-examination has admitted that he has not recorded in the investigation that Suresh Kumar was also known as Chamaru Ram. PW-1 Chuni Lal, in his cross-examination has deposed that when his daughter narrated the incident to mother, his daughter Salochna was also present but she has also not been examined.

17. Accordingly, the prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

18. In view of the discussion and analysis made hereinabove, 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 RAJIV SHARMA, J.

Baldev Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No. 457 of 2011.
Reserved on: March 21, 2016.
Decided on: March 22, 2016.

Prevention of Corruption Act, 1988- Sections 7 and 13(2)- A complaint was made by the complainant that accused had demanded Rs.15,000/- for assisting the release of complainant on bail- Rs. 10,000/- were paid and Rs. 5,000/-were to be paid subsequently- a trap was laid and accused was caught with money- accused was tried and convicted by the trial Court- held, in appeal that complainant had admitted in cross examination that money was demanded within the hearing range in the High Court complex- accused had opposed the bail application of the complainant- there are material contradictions in the testimonies of the witnesses- in these circumstances, prosecution had failed to prove its case beyond reasonable doubt against the accused- accused acquitted. (Para-13 to 20)

Cases referred:
N. Sunkanna vrs. State of Andhra Pradesh, (2016) 1 SCC 713
Krishan Chander vs. State of Delhi, (2016) 3 SCC 108

For the appellant: Mr. Satyen Vaidya, Sr. Advocate, with Mr. Vivek Sharma, Advocate, for the appellant.
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 28.11.2011, rendered by the learned Special Judge (Forests), Shimla, H.P., in Corruption Case No. 4-S/7 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Sections 7 and 13(2) of the Prevention of Corruption Act, 1988 was convicted and sentenced to suffer imprisonment for one year and to pay fine of Rs. 10,000/- and in default of payment of fine to further undergo simple imprisonment for six months.

2. The case of the prosecution, in a nut shell, is that on 8.10.2009, Sanjay Sharma (PW-7) made a complaint to Vigilance to the effect that Baldev Thakur, SHO Bhawarna had demanded Rs. 15,000/- for assisting him in his bail. He paid him Rs. 10,000/- on 24.9.2009 and remaining amount was to be paid after the matter was over in the High Court on 8.10.2009. He did not want to give him the money. The SHO recorded the FIR and obtained from the complainant, 10 currency notes of 500 denomination bearing No. 9BA 991271 to 991280 and the same were treated with phenolphthalein powder and given to him. A demonstration was given about the reaction of sodium carbonate and the phenolphthalein and when mixed, mixture turned pink. The currency note numbers were also recorded in a memo. The trap party came to the High Court on confirmation of bail by the High Court on 8.10.2009 when complainant Sanjay Sharma gave Rs. 5000/- on demand being made by Baldev Thakur, SHO Bhawarna near High Court parking. When he was caught by vigilance officials from his shoulder, he threw the money into the bushes. The hands of the accused were washed firstly with plain water and thereafter sodium carbonate mixture was added and the mixture turned pink. The mixture was put in a nip and sealed. Accused Baldev Thakur was asked to pick up the currency notes which were lying in the bushes and seized. The hands were again got washed as aforesaid procedure and mixture turned pink. The hand wash was put in a nip and sealed. The I.O. prepared the site plan and recorded the statements of the witnesses. The hand wash nips were sent to the FSL, Junga and on analysis, the nips contained traces of sodium carbonate and phenolphthalein. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 8 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied to have demanded any money from the complainant and when case was registered against him, he was asked to produce the vehicle which he was not doing. He had opposed his bail application in the High court even on 8.10.2009. No money was given to him on 8.10.2009 and complainant tried to thrust money into his pocket to which he resisted and he threw away the money. His hand wash was obtained but its colour was not shown to him. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Satyen Vaidya, Sr. 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 28.11.2011.

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

6. PW-1 Dheeraj Lagwal deposed that on 8.10.2009, he alongwith Karan and Sanjay Sharma had come to Shimla and went to the office of Vigilance, where Sanjay Sharma lodged complaint. Sanjay Sharma told the police that accused Baldev Thakur SHO had demanded money from him. Naratta Ram Inspector gave demonstration. They were 4-5 officials in civil dress. Sanjay produced 10 currency notes of Rs. 500/- denomination and they were treated with one power. Demonstration memorandum Ext. PW-1/A was prepared. He identified his signatures on the memorandum. These were treated with powder. Memorandum was prepared vide Ext. PW-1/B. The currency notes, so treated were handed over to Sanjay, who put those notes in his left pocket of the pants. He was directed to hand over the same when demanded by SHO Baldev. He alongwith Sanjay Sharma and Karan Pathania came in their vehicle to High Court. There was one official of the vigilance in civil dress. He remained with him inside the Court and also outside. The case was listed for hearing in the Court No. V. At about 11:15 AM, the court had passed the bail order in favour of Sanjay. Accused Baldev Thakur, SHO Bhawarna was present in the Court. He met Sanjay Sharma, complainant outside the Court and told him that the work had been done. Accused had demanded money and Sanjay had told him that he had kept money in the vehicle and he should meet him in the High Court Parking. Sanjay and accused proceeded on the road near High Court parking and at some distance Sanjay Sharma handed over money to Baldev who put the money in his pant pocket. He was following Sanjay and behind him, two vigilance officials were present. As soon as money was put in the right pocket of the pants by accused Baldev Thakur, he gave signal by putting his hand on head and immediately, two officials who were following him caught hold of Baldev Thakur, SHO Bhawarna from his shoulders. Accused Baldev took out the money from his pocket and threw the same into the bushes near the parking. Within 2-3 minutes Naratta Ram came there. Accused told Naratta Ram that he had thrown away money down into the bushes. Naratta Ram requisitioned one plate and jug from the parking canteen alongwith water. The hands of accused were got washed and water did not change. Sealing proceedings were completed on the spot. Accused Baldev got recovered currency notes from the bushes and the notes were handed over to I.O. Naratta Ram. The notes were seized vide memo Ext. PW-1/D. These were put in envelope and sealed with seal impression A-4. Out of the envelope, ten currency notes of Rs. 500/- denomination were found. The currency notes were the same which were recovered. The proof of the currency notes was tallied with the pre-raid memo Ext. PW-1/D. The number tallied. In his cross-examination, he categorically testified that they had reached Shimla in the evening and at 7:00 AM, they had lodged the report. Money was demanded within his hearing range in the High Court complex. He apprised the police that money was demanded in his presence in the High Court complex. The police had told him to give agreed signal by placing his hand on his head. Sanjay gave him signal and thereafter he gave signal to the police. He was present in the Court No. V when the bail was allowed. He admitted that the bail was opposed by the accused and he filed reply Ext. DB. On 8.10.2009 the wife of accused was already on bail.

7. PW-2 Charan Singh deposed that complainant Sanjay Sharma reached the office at about 7:30 AM alongwith Karan Pathania and Dheeraj Lagwal. In his presence complainant Sanjay Sharma told Naratta Ram that Baldev Thakur, SHO Bhawarna demanded Rs. 5,000/-. Naratta Ram obtained from complainant Rs. 5000/- in the denomination of Rs. 500/- each. The same were treated with phenolphthalein powder. The numbers of the notes were taken down separately. Dheeraj Lagwal was appointed as shadow witness with the direction that when the bribe was demanded, he would give signal to the party. At a distance of 50-60 feet from High Court parking, the shadow witness gave signal. Immediately thereafter, he caught Baldev Thakur from his left shoulder and Ashok Kumar caught him from his right shoulder. The accused threw away the money. Insp. Naratta Ram deputed one Constable Chander Shekhar to bring one plate and jug from the

canteen. The canteen was at a distance of 50-80 feet. Chander Shekhar brought jug and plate and hands of accused were got washed with clean water. That was put in a glass. In another glass, mixture of sodium bicarbonate was mixed. Naratta Ram asked the accused to pick up the currency notes. Thereafter, his hands were got washed. The mixture was put in a nip and sealed with seal "T". The currency notes were taken into possession. In his cross-examination, he admitted that their office is situated in thickly populated area in Khalini. Sanjay, Karan Pathania and Dheeraj had come together in the Police Station. The FIR was lodged after Naratta Ram had reached there. The complainant had only informed that only Rs. 5000/- was demanded and no other demand was made. The complainant had not disclosed that he had made any payment to the accused. The demonstration was given by Naratta Ram. They had not seen either demanding the money or receiving the same.

8. PW-3 MHC Dayawati deposed that she was posted as MHC in Police Station SV & ACB, Shimla since 2008. On 8.10.2009, Insp. Naratta Ram deposited with her demonstration nip including specimen impression of seal "D" and one nip hand wash after recovery alongwith specimen seal impression seal "T", hand wash nip after recovery sealed with seal "T", one pants in a packet sealed with seal "T", one envelope alleged to be containing currency notes sealed with seal "T", one pants wash nip sealed with seal "T". She made entry in the malkhana register. On 16.10.2009, through Const. Om Prakash, the same were sent to FSL, Junga vide RC No. 43/09 dated 16.10.2009.

9. PW-4 Const. Om Prakash has taken the case property to FSL, Junga.

10. PW-7 Sanjay Sharma testified that he alongwith Dheeraj Lagwal and Karan Pathania had come from Dharamshala and reached at Shimla at about 7:00 AM. They went to Khalini Vigilance Police Station. At about 8:00 AM, SHO Amar Singh and two other officials reached there. He told Amar Singh that at PS Bhawarna, a case was registered against him and I.O. Baldev Thakur had demanded Rs. 15,000/- for facilitating his bail. The bail was listed before the High Court on 8.10.2009. He had paid Rs. 10,000/- to Baldev Thakur, SHO Bhawarna at his residence and remaining Rs. 5000/- were to be paid after confirmation of bail by the High Court. The FIR was recorded vide Ext. PW-5/A. He went in the Court room in the High Court and one vigilance official was with him. Dheeraj Lagwal and Karan Pathania were also in the Court. Baldev was also present in the Court. The High Court confirmed his bail at about 11:00 AM. When he and Baldev Thakur came out of the Court room, Baldev Thakur told him that he had kept money in the vehicle parked in the High Court parking and there he will make the payment. Accused Baldev Thakur, SHO Bhawarna proceeded further and behind him Karan and Dheeraj and two officials were there. After the lapse of ten minutes, accused met him near the parking. Dheeraj Lagwal was at a distance of 10-12 feet away from him. At a distance of 50 feet from the parking on the main road, he took out money from his rear pocket of the pants and the same was taken by accused Baldev by his left hand. He was told that as soon as money was paid, he should give signal by scratching the head. He gave signal to Dheeraj Lagwal and Dheeraj gave the agreed signal to police and two persons came there. In his cross-examination, he deposed that his wife was in police department. She was also an accused in the case. He had drawn Rs. 15,000/- from the SBI bank Jai Singhpur. He did not know the exact date when he has drawn the money from the bank. He admitted that he had told that he had gone to Police Station Bhawarna before Baldev Thakur, SHO Bhawarna on 19.9.2009 and 20.9.2009 and SHO had required him to produce Alto vehicle No. HP-37 B-1139. He had refused to produce the vehicle since he was paying installments and vehicle was financed by him. SHO had told him that in case he did not produce the vehicle, he would get his bail cancelled. He could not say whether his bail was opposed by Baldev Thakur, SHO Bhawarna in the High Court by filing reply. In the High Court accused Baldev had not said that bail may be

granted. In the High Court complex, money was demanded by accused in the presence of Dheeraj Lagwal and Karan Pathania. Dheeraj has not heard their talk. Dheeraj was asked to give signal and not to hear the conversation.

11. PW-8 Insp. Naratta Ram testified that he prepared raising party comprising of Insp. Subhash, HC Yashwant, HC Ashok, Const. Davinder and Const. Charan Singh. In his presence, Sanjay produced Rs. 5000/- currency notes. The notes were handed over to Sanjay with direction that money be handed over only on demand. The demonstration was given. Currency notes were recovered and put in a packet and sealed with seal "T". In his cross-examination, he categorically admitted that Police Station SV & ACB is situated in thickly populated area and he had not joined any independent witness from the locality as there was no time. They reached High Court at 10:00 AM. He also admitted that the accused had opposed the bail in the High Court.

12. PW-1 Dheeraj Lagwal in his cross-examination has categorically stated that they had reached Shimla in the evening and at 7:00 AM they lodged the report. However, PW-7 Sanjay Sharma, complainant deposed that they had reached Shimla alongwith PW-1 Dheeraj Lagwal and Karan Pathania on 8.10.2009 at 7:00 AM. PW-1 Dheeraj Lagwal is a shadow witness and PW-7 Sanjay Sharma is the complainant.

13. The case of the prosecution is that the accused had demanded money from the complainant PW-7 Sanjay Sharma for helping him in getting bail. PW-1 Dheeraj Lagwal, in his cross-examination has categorically admitted that the bail was opposed by accused in the High Court and he had filed reply Ext. DB. PW-8 Insp. Naratta Ram has also admitted in his cross-examination that the accused has opposed the bail in the High Court. PW-7 Sanjay Sharma, complainant, in his cross-examination has admitted that he had told that he had gone to the Police Station Bhawarna before Baldev Thakur accused on 19.9.2009 and 20.9.2009 and SHO had required him to produce the Alto vehicle No. HP-37B-1139. SHO had told him that in case he did not produce the vehicle, he would get his bail cancelled. PW-7 Sanjay Sharma has deposed that he had drawn Rs. 15,000/- from the bank SBI Jai Singhpur, however, there is no proof of the same. When according to PW-1 Dheeraj Lagwal and PW-8 Insp. Naratta Ram, the accused had opposed the bail in the High Court, there was no occasion for him to demand money from the complainant.

14. The prosecution is required to prove that the accused has demanded money from the complainant. In his cross-examination, PW-1 Dheeraj Lagwal, deposed that money was demanded within the hearing range in the High Court complex. However, PW-7, in his cross-examination, has deposed that Dheeraj had not heard their talk. Dheeraj was asked to give signal and not to hear conversation. Thus, the accused has not demanded any money in the presence of Dheeraj. Karan Pathania who had come with the accused has not been examined. He was a material witness.

15. The accused has opposed the bail of the complainant (accused in bail petition) and also filed the reply Ext. DB. The accused/complainant was asked by the SHO Baldev Singh to produce the Car. The SHO has specifically told him that if the Car was not produced, the bail would be cancelled. The accused Sanjay Sharma had lodged the report in the morning on 8.10.2009. The Court has already noticed that he alongwith Dheeraj Lagwal and Karan Pathania reached Shimla at 8:00 AM in the morning and thereafter they went to Police Station SV and ACB, Khalini. However, PW-1 Dheeraj Lagwal deposed that they have reached Shimla in the evening at 7:00 PM. There are material contradictions in the statements of PW-1 Dheeraj Lagwal and PW-7 Sanjay Sharma about their arrival at Shimla. It casts doubt in the prosecution case.

16. PW-2 Const. Charan Singh deposed that Insp. Naratta Ram deputed Const. Chander Shekhar to bring one plate and one jug from the canteen. The canteen was at a distance of 50-80 feet. However, Const. Chander Shekhar has not been produced as a witness.

17. Sh. Neeraj K. Sharma, Dy. Advocate General for the State has vehemently argued that the statement of PW-7 Sanjay Sharma complainant has been corroborated by PW-1 Dheeraj Lagwal that the money was demanded. However, the fact of the matter is that statement of PW-1 Dheeraj Lagwal and PW-7 Sanjay Sharma, complainant do not inspire confidence.

18. Their lordships of the Hon'ble Supreme Court in the case of ***N. Sunkanna vrs. State of Andhra Pradesh,*** reported in ***(2016) 1 SCC 713*** have held that unless there is proof of demand of illegal gratification, proof of acceptance will not follow. It has been held as follows:

> "5. The prosecution examined the other fair price shop dealers in Kurnool as PWs 3, 4 and 6 to prove that the accused was receiving monthly mamools from them. PWs 4 and 6 did not state so and they were declared hostile. PW-3 though in the examination-in-chief stated so, in the cross-examination turned round and stated that the accused never asked any monthly mamool and he did not pay Rs.50/- at any time. The prosecution has not examined any other witness present at the time when the money was demanded by the accused and also when the money was allegedly handed-over to the accused by the complainant. The complainant himself had disowned his complaint and has turned hostile and there is no other evidence to prove that the accused had made any demand. In short there is no proof of the demand allegedly made by the accused. The only other material available is the recovery of the tainted currency notes from the possession of the accused. The possession is also admitted by the accused. It is settled law that mere possession and recovery of the currency notes from the accused without proof of demand will not bring home the offence under Section 7, since demand of illegal gratification is sine-qua-non to constitute the said offence. The above also will be conclusive insofar as the offence under Section 13(1)(d) is concerned as in the absence of any proof of demand for illegal gratification the use of corrupt or illegal means or abuse of position as a public servant to obtain any valuable thing or pecuniary advantage cannot be held to be established. It is only on proof of acceptance of illegal gratification that presumption can be drawn under Section 20 of the Act that such gratification was received for doing or forbearing to do any official act. Unless there is proof of demand of illegal gratification proof of acceptance will not follow. Reference may be made to the two decisions of three-Judge Bench of this Court in B. Jayaraj vs. State of Andhra Pradesh [(2014) 13 SCC 55] and P. Satyanarayna Murthy vs. The District Inspector of Police and another [(2015 (9) SCALE 724]."

19. Their lordships of the Hon'ble Supreme Court in a recent judgment in the case of ***Krishan Chander vs. State of Delhi,*** reported in ***(2016) 3 SCC 108,*** have held that the *sine qua non* for conviction under Sections 7 and 13(1)(d) read with Section 13(2) of Prevention of Corruption Act, is proof of demand and acceptance. It has been held as follows:

> "14. It was further contended by him that the demand of illegal gratification by the accused is a sine qua non for constitution of an offence

under Sections 7 and 13(1)(d) read with Section 13(2) of the PC Act. A mere production of the tainted money recovered from the appellant along with positive result of phenolphthalein test, sans the proof of demand of bribe is not enough to establish the guilt of the charge made against appellant. In support of the above legal submission, he placed reliance upon the judgments of this Court in the cases of B. Jayaraj v. State of Andhra Pradesh[1], A. Subair v. State of Kerala[2] and State of Kerala & Anr. v. C.P. Rao[3], wherein this Court, after interpreting Sections 7 and 13(1)(d) of the PC Act, has held that the demand of bribe money made by the accused in a corruption case is a sine qua non to punish him for the above said offences. The learned senior counsel has also placed reliance upon the three Judge Bench decision of this Court in the case of P. Satyanarayana Murthy v. The Dist. Inspector of Police, State of Andhra Pradesh & Anr.[4], in which I was one of the companion Judges, wherein this Court, after referring to the aforesaid two Judge Bench judgments on the question of necessity of demand of bribe money by the accused, has reiterated the view stated supra."

20. Thus, the prosecution has failed to prove the case against the accused.

21. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 28.11.2011, rendered by the learned Special Judge(Forests), Shimla, H.P., in Corruption Case No. 4-S/7 of 2010, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him.

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

Smt. Damyanti Jairath .....Petitioner

Versus

State of H.P. and another ....Respondents.

Ext. Pet. No. 18 of 2015.
Judgment reserved on 16.3.2016.
Date of decision: 22nd March, 2016,

Code of Civil Procedure, 1908- Order 21- Respondents have taken same objections in the Execution Petition which were taken in their reply and were turned down by the Writ Court- same grounds were taken in LPA which were turned down by LPA Bench- respondents directed to pass fresh order within six weeks, keeping in view the directions passed by the Writ Court and upheld by the Division Bench in LPA. (Para-2 to 7)

For the petitioner: Mr. Onkar Jairath, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals, with Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this Execution Petition, the petitioner has sought implementation and execution of the judgment made by the learned Single Judge of this Court in CWP-T No. 2709 of 2008, dated 28.7.2010 in case titled ***Damyanti Jairath versus State of H.P. and others***. It is apt to reproduce relevant portion of para 1 and operative portion of the said judgment herein.

> *"……There is no merit in the contention of Mr. R.P. Singh that staff nurses and designated staff nurses are two separate categories holding separate cadre. A conscious decision has been taken by the State Government as per Annexure A-2 to designate only those ANMs, who had put in 20 years or more service as such under the Department of Health and Family Welfare, Himachal Pradesh and are two years trained ANM. Once the ANMs have been designated as staff nurses, they cannot be treated differently even though their initial qualification may be different. The duties discharged by the staff nurses and designated staff nurses are same. Once the petitioner has been designated as per order dated 26.11.1998 as Staff Nurse, she is entitled to the same pay scale, which is payable to other regularly appointed Staff Nurses as per notification annexed alongwith covering letter dated 9.4.1991….."*
>
> *"Consequently, the petition is allowed. Respondents are directed to consider the case of the petitioner for the release of the pay scale of Rs.1640-2925 with effect from 1.4.1986 as per Annexure S-1 annexed with covering letter dated 9.4.1991 with interest @ 6% per annum. No costs."*

2. The State had questioned the said judgment by the medium of LPA No. 165 of 2011 dated 21.11.2013 titled State of Himachal Pradesh and others versus Smt. Damyanti Jairath, which was dismissed by the Division Bench of this Court. It is apt to reproduce para 2 of the judgment passed in the LPA herein.

> *"2.The main ground urged before us is that there is only change in the designation of the staff nurse and there were no financial benefits attached. The learned Single Judge has considered this point in extenso in para-1 of the judgment and has rejected the consideration of the same, what has been urged before us. We find that the judgment passed by the learned Single Judge is only direction to consider. There can be no grievance as far as the direction for consideration is concerned. We are unable to find out any illegality in the order passed, subject matter of this appeal. Appeal dismissed."*

3. It is averred in the Execution Petition that the respondents have complied with the directions passed by this Court but has passed the consideration order on the foundation, which was already raised as ground in the reply and turned down by the Writ Court. The same grounds were urged before the Division Bench in LPA which were also turned down by the LPA Bench, by holding that the Writ Court has rightly determined the issue.

4. The respondents herein had taken the same grounds in the reply; stand thrashed out by the learned Writ Court. It is apt to reproduce para 3 of the supplementary affidavit dated 23.4.2009, filed by the respondents to the Original Application herein.

> *"3.That the Designated Staff Nurse were not at all equal to the 'A' Grade Staff Nurses, as 'A' grade Staff Nurses were highly qualified and professionally trained for three and half years with their registration with*

the Nursing Council as 'A' grade Nurse, whereas, the old Auxiliary Nurse Midwives Designated as Staff Nurse did not possess this professional qualification. It is to submit further that both these categories i.e. Staff Nurse and Designated Staff Nurse were/are two separate categories holding separate cadre not analog and similar to each other ion the matter of eligibility criteria including professional qualification, duration of training course, nature of duties and pay scales etc., and they both as such, cannot be equated and brought at part with each other."

5. The consideration order has been made only on same basis which cannot stand in the eyes of law. It is apt to reproduce relevant paras of the consideration order herein.

"And whereas, after having received the specific advice from the Govt. in the matter as per the observations made by the Hon'ble High Court in LPA No. 165 of 2011, the complete matter was thoroughly examined in detail on the basis of the old correspondence and instructions as also the record on files and after detail perusal of the records, it has been gathered that Smt. Damyanti Jairath was working with the Appellant State and the Department as Auxiliary Nurse Midwife (ANM). In the year 1983, the posts of Auxiliary Nurse Midwife were re-designated as to that of the Female Health Worker (FHW) under the Multipurpose Health Workers Scheme. As per the then existing provisions, Selection Grade of Rs.680-1120 (i.e.the next higher stage in the pre-revised scale) was allowed to some of the Female Health Workers (ANMs) including Smt. Damyanti Jairath w.e.f. 1.4.1986 as per their seniority, vide office order dated 29.4.1988....."

"........And whereas, after a detailed and thorough consideration of the matter in terms of the specific observations made by the Hon'ble Court on 21.11.2013 in LPA No. 165/11, it appears that the claim of Smt. Damyanti Jairath for releasing of higher inadmissible pay scale of Rs.1640-2925 w.e.f. 1.4.1986, is not justified in the light of the given facts and circumstances of the case as also the old record and Notifications of the Govt. as well as issued from time to time with regard to the grant and revision of pay scales. Moreover, if the claim so advanced is considered, it would also lead to multiplicity of litigation besides there being a wrong precedence as also the huge burden on the State exchequer....."

6. Thus, the consideration order cannot stand and is virtually repetition of the reply filed by the respondents in the writ petition.

7. Having said so, the respondents are directed to pass fresh consideration order, keeping in view the directions made by the Writ Court and upheld by the Division Bench in LPA. The consideration order be passed within six weeks from today and compliance report be filed before the Registrar (Judicial).

8. Accordingly, the Execution Petition is disposed of alongwith pending applications, if any.

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

Kultar Singh and others ...Petitioners.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 6705 of 2013
Reserved on : 15.03.2016
Decided on: 22.03.2016

Constitution of India, 1950- Article 226- Petitioner filed a Writ commanding the respondents not to charge the taxes applicable for the use of National Highway-21A, which is incomplete and not roadworthy, to refund the excess taxes charged and complete the construction of National Highway-21A within a stipulated period – held, that it is not known in which capacity the writ petition was filed –permission was required to be sought under Order 1 Rule 8 of CPC for filing the writ petition in representative capacity which was not taken- writ is also not in the nature of Public Interest Litigation as it was not fulfilling the requirement of the Rules framed by the Court- notification empowering levying, charging and paying the Special Road Tax has not been questioned- tax was paid from 1.4.2005- no objection was raised till 6.8.2013- filing the present writ petition shows that Writ Petition has been filed for avoiding the payment of taxes- Writ Petition dismissed. (Para-8 to 14)

For the petitioners: Mr. H.S. Rana, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 3.
Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Ajay Chauhan, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The writ petitioners have sought writ of mandamus commanding the respondents not to charge the taxes applicable for the use of National Highway-21A, which is incomplete and not roadworthy, to refund the excess taxes charged and to complete the construction of National Highway-21A within a stipulated period, on the grounds taken in the memo of the writ petition.

2. Respondents have filed the replies.

3. Respondents No. 1 and 3, in their short reply filed on 8th November, 2013, have stated that Pinjore-Baddi-Nalagarh-Swarghat NH-21A falls within the territorial limits of Himachal Pradesh from Km 17/400 to 66/275 (near Baddi to Swarghat), the work of strengthening the road was completed on 9th February, 2011 and it is roadworthy. However, some pot holes were developed due to rainy season, which were repaired. The road from Manapura to Nalagarh is in good condition and from Nalagarh to Bagleher, the work was awarded to M/s Trilok Chand Gupta & Co. Kankhal, Haridar (Uttarakhand).

4. Thereafter, respondents No. 1 and 2 have filed detailed reply on 31st January, 2014 and in para 9 of the reply on merits, it is stated that though, Chikni Bridge was constructed, but stretch of it was washed away due to unprecedented flash floods and its reconstruction was under process, it was to be completed by March, 2014.

5. Respondent No. 3, in its reply on merits, has stated in para 5 how taxes are being charged. It is apt to reproduce para 5 of the reply herein:

> *"5. That in reply to this para it is submitted that Govt. of Himachal Pradesh has issued notification dated **9-1-2006** and fixed the rates of Special Road Tax which has to be charged for National Highways, State Highway etc. **(Annexure R II).** The Regional Transport Officer cum Taxation Authority under Himachal Pradesh Motor Vehicle Taxation Act 1972 has charged the special Road Tax as per these rates which are notified by Government."*

6. It has also been stated in the reply that the taxes charged are permissible as per the law applicable. It is profitable to reproduce para 12 of the reply on merits filed by respondent No. 3 herein:

> *"12. That Regional Transport Officers are rightly charging the Special Road Tax as per rates so fixed by State Govt. to avoid any kind of Audit Objections and charging the Special Road Tax as per rates of National Highway. Already annexed as **(Annexure R II).**"*

7. Mr. Romesh Verma, learned Additional Advocate General, stated at the Bar that the said road is operationalized. His statement is taken on record.

8. The question is – whether the writ petitioners are within their rights to file the writ petition and seek a writ of mandamus commanding the respondents not to charge the taxes?

9. It is not known in which capacity the writ petitioners have filed the writ petition. Had they filed the writ petition in representative capacity, they were required to seek permission under Order VIII Rule 1 of the Code of Civil Procedure (for short "CPC"), which they have not done. The writ petition is also not in the nature of public interest litigation because it is not fulfilling the requirements as per the Rules framed by this Court read with the mandate of the Apex Court judgments.

10. The writ petition has been loosely drafted, leads nowhere. It is also apt to record herein that the writ petitioners have not questioned the mandate of notification dated 9th January, 2006 (Annexure R-II), the mention of which has been made in paras 5 and 12 of the reply (supra) read with the mandate of sub-Section (1) of Section 3(A) of the Himachal Pradesh Motor Vehicles Taxation Act, 1972 (for short "the Act").

11. The said notification, dated 9th January, 2006 (Annexure R-II) provides how to levy, charge and pay the Special Road Tax to the State Government for the roads in hills. Without questioning the said notification, the writ petitioners cannot seek writ of mandamus.

12. In terms of the mandate of the said notification, the Special Road Tax was payable from 1st April, 2005. The writ petitioners have not raised any finger right from the date of issuance of the notification, i.e. from 9th January, 2006, till filing of the writ petition in hand, i.e. 6th August, 2013, is suggestive of the fact that the writ petition is aimed at to avoid paying the taxes, which the writ petitioners are legally bound to pay.

13. It would also be profitable to record herein that the road in question has been declared as National Highway on 6th January, 1999, in terms of Annexure P-3. Once the road has been declared as a National Highway, the taxes are payable as are applicable to a National Highway.

14. It was for the writ petitioners to question the said notification, which they have failed to do so till filing of the writ petition. Rather, they have acted upon the same and paid the taxes. Once, the road has been declared as National Highway, the consequential actions have to follow.

15. In view of the above, we find no merit in the writ petition and the same is dismissed alongwith all pending applications.

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

Manoj Kumar .....Petitioner

Versus

M/s Sintex Industries Pvt. Limited. .....Respondent.

CWP No.4675 of 2015.
Decided on: 22nd March, 2016.

Industrial Disputes Act, 1947 - Section 25- Petitioner claimed himself to be an employee of the respondent who was appointed in the July, 2001 as Machine Operator- he continued to discharge his duties to the satisfaction of his superiors - he proceeded on leave and when returned to join his duty, his services were terminated in violation of the Section 25-F of the Act- respondent denied the relationship of employer and employee - it was claimed that petitioner was employed through contractor as per provision of Contract Labour (Regulation and Abolition) Act, 1970 and H.P. Contract Labour (Regulations and Abolition) Rules, 1974- petitioner had not deliberately impleaded the contractor as party – Industrial Tribunal held that petitioner was never on the roll of the company and was employee of the Contractor- petition was filed against the award announced by the Tribunal- held, that overwhelming evidence produced by the respondent show that petitioner was employed by the Contractor and not by the company- wages were being paid by the Contractor and even if the Contractor was not a registered contractor, the penal action can be taken against the contractor but that will not give right to the workman to claim the employment under the principal employer- Award passed by the Industrial Tribunal can be interfered by the High Court only if the same is illegal or irrational and suffers from procedural impropriety- petition dismissed. (Para- 12 to 24)

Cases referred:

M. Venugopal Reddy Vs. Hindustan Aeronautics Limited, Bangalore and another, 1999 KLAB. L.C. 1369

Dina Nath and others Vs. National Fertilisers Limited and others, AIR 1992 SC 457

Their Workmen, Bihar Collery Kamgar Union Vs. Bharat Coking Coal Limited and another, 2014 LLR 842

Balwant Rai Saluja and another Vs. AIR India Limited and others, (2014) 9 SCC 407

Bhuvnesh Kumar Dwivedi Vs. Hindalco Industries Limited, (2014) 11 SCC 85

Sudarshan Rajpoot Vs. Uttar Pradesh State Road Transport Corporation, (2015) 2 SCC 317

For the petitioner: Mr. Dinesh Bhanot, Advocate.
For the respondent: Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. *(Oral)*

Aggrieved by the award dated 8.9.2015, passed by learned Presiding Judge, Industrial Tribunal-cum-Labour Court, in Reference No.52 of 2007, the petitioner-workman has approached this Court by filing present writ petition with a prayer to quash and set aside the same.

2. The complaint is that the evidence available on record has neither been considered nor appreciated in its right perspective and the Tribunal below has passed the impugned award on surmises and conjectures. The impugned award is stated to be against the provisions of Industrial Disputes Act, and the legal principles settled in various judicial pronouncements.

3. The facts, in a nutshell, are that the petitioner claims himself to be the employee of respondent establishment, allegedly appointed in July, 2001, as a Machine Operator. He continued discharging his duties to the satisfaction of his superiors. It is on 18.12.2004, he proceeded on leave and when returned to join his duty on 18.1.2005, the respondent-establishment did not accept his joining report and rather terminated him from service w.e.f. January, 2005, in violation of the Provisions contained under Section 25-F of the Act. It has also been claimed that since he had worked for a period over 240 days in each and every calendar year, therefore, the termination of his services is in violation of the Act.

4. The respondent-establishment has contested the claim of the petitioner. In reply, preliminary objections qua maintainability of the claim petition, relationship of employer and employee between the parties, non-joinder of necessary party, i.e. M/s Apex Management Consultant, the contractor and also that the petitioner remained gainfully employed, have been raised. On merits, the relationship of employer and employee between the petitioner and the respondent-establishment has been denied. It is submitted that the petitioner was employed through a contractor as per the provisions of Contract Labour (Regulation and Abolition) Act, 1970 and H.P. Contract Labour (Regulations and Abolition) Rules, 1974, hereinafter referred to as "the Contract Labour Act" in short. The petitioner intentionally and deliberately has not impleaded the contractor as party in the Reference Petition.

5. As per the further case of the respondent-establishment, the petitioner was engaged through contractor to perform manual work only and as such, he never worked as Machine Operator. Since he was not the employee of the respondent management, therefore, it is claimed that there is no question of violation of Section 25-F of the Act.

6. Rejoinder was not filed.

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

1. Whether the termination of the services of Shri Manoj Kumar petitioner by the Management of M/s Sintex Industries Limited,

Baddi, is in violation of the provisions of Industrial Disputes Act, 1947? OPP.

2. Whether Manoj Kumar was employed through contractor as a helper as per the provisions of Contract Labour (Regulation and Abolition) Act, 1970 and HP contract Labour (Abolition and Regulations) Rules, 1974? If so, its effect OPR.

3. Whether the petitioner is gainfully employed? OPR.

4. Whether the petition is bad for non-joinder of necessary party? OPR.

5. Relief.

8. Learned Tribunal below has taken on record the evidence produced by the parties on both sides and on appreciation of the same, has arrived at a conclusion that the petitioner-workman was never on the roll of the respondent-company and rather was employee of the Contractor M/s Apex Management Consultant, Baddi, and as such, was rightly informed by the respondent-company that he has been engaged by the Contractor. Therefore, there is no question of termination of the services of the petitioner by the respondent-company in violation of Section 25-F of the Act.

9. Aggrieved by the award passed by learned Tribunal below, this petition has been filed for quashing the same on the grounds, as discussed hereinabove.

10. Mr. Bhanot, learned counsel has forcefully contended that the petitioner was an employee of respondent-establishment and that learned Tribunal below has failed to appreciate the evidence available on record in its right perspective. This, according to Mr. Bhanot, vitiates the entire proceedings and as such, the impugned award being perverse is not legally sustainable.

11. On the other hand, Shri Rahul Mahajan, learned counsel representing the respondent-establishment, has urged that here is no iota of evidence to show that the petitioner was appointed as Machine Operator by the respondent-establishment. His own statement while in the witness box as PW-1 is stated to be not at all suggestive of that he was the employee of the respondent-establishment. Therefore, according to Mr. Mahajan, the impugned award having been passed on the basis of evidence available on record is legally and factually sustainable and that the same calls for no interference by this Court.

12. On behalf of the petitioner, reliance has been placed on Ext. PA, the ESI Card. A perusal of this document reveals that the petitioner was registered with Employees State Insurance Corporation (ESI) as its member and his address is C/O Sintex Industries Limited, Industrial Area, Baddi, the respondent establishment herein. On the strength of this document, it has been urged that he was the employee of respondent-establishment for all intents and purposes. I am afraid that any such interpretation can be given to this document for the reason that under Sections 40 to 44 of the Employees State Insurance Act, 1948, in the case of contract labour also, it is the responsibility of principal employer to ensure that the labour is duly registered with the Corporation and the contribution required in terms of the Act is deposited by the employer, of course subject to realization thereof from the contractor. Support in this regard can be drawn from a judgment of High Court of Kaarnatka in ***M. Venugopal Reddy*** *Vs.* ***Hindustan Aeronautics Limited, Bangalore and another, 1999 KLAB. L.C. 1369***. This judgment reads as follows:

"**Section 8-A(1)** of the Act reads as under:--

"8-A. Recovery of Money by Employers and Contractors:---

(1) **The amount of contribution** (that is tos ay the employer's contribution as well as the employee's contribution in pursuance of any Scheme and the employer's contribution in pursuance of the Insurance Scheme) and any charges for meeting the cost of administering the Fund **paid or payable by an employer in respect of an employee employed by or through a contractor may be recovered by such employer from the contractor**, either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.

A reading of the above provision makes it clear that the contributions of employees employed by or through a contractor is required to be recovered by the employer from the contractor. The definition of 'employee' under Section 2(f) of the act reads thus:--

"employee" means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment and who gets his wages directly or indirectly from the employer and includes any person—

(i) employed by or through a contractor or in connection with the work of the establishment,

(ii) x x x

As per clause (i), 'employee' includes any person employed by or through a contractor. In view of this definition, the Regional Provident Fund Commissioner of Karnatka has rightly observed in Annexure R2 dated 24.4.1990 this aspect that the law as it stands at present does not make any distinction between the employees employed directly by the employer or through the contractors and it is the principal employer responsible for implementation of the provisions of the Act and the Schemes. In the absence of any specific provision in the Act that the contractor has to obtain separate numbers in respect of the employees engaged by him to discharge the work of principal employer and in view of the specific duty cast upon the employer to file returns and to deduct the contributions of the employees from the employer the condition imposed on the petitioner in the impugned communication at Annexure A to furnish his own ESI and PF Code numbers is unwarranted and such a condition is without any authority of law.

8. Even the Employees State Insurance Corporation Act also do not prescribe that a contractor has to possess his

> own account in respect of the employees engaged by him for the work of the principal employer. On the other hand, Section 40 of the ESI Act prescribes that the principal employer shall pay the contributions in the first instance and thereafter, under Section 41 of the said Act he shall recover the same from the immediate employer. Under this Act also, Section 44 casts a duty on the employers to furnish returns and maintain registers in certain cases. In Section 2(9) of this Act, the definition of 'employee' is, any person employed for wages in or in connection with the work of a factory or establishment to which the Act applies and who is employed byt or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer. Therefore, the principal employer has to discharge the duty prescribed under Section 40 and 41 of the Act and he cannot compel a contractor to have his own account in respect of the employees engaged by him to discharge the work of principal employer. Such a duty or obligation is not cast upon a contractor under the ESI Act also. Consequently, the condition imposed in Annexure-A on the petitioner to furnish his own separate account of ESI cannot be sustained as the same is not prescribed under the Act."

13. If coming to the case in hand, here the contribution towards registration of the petitioner, as member of the Corporation, has been realized from the Contractor i.e., M/s Apex Management Consultant. A reference in this regard can be made to Ext.RW3/C. Therefore, it can not be said on the basis of Card Ext. PA that the petitioner was employed by the respondent-establishment. Otherwise also, if coming to the overwhelming evidence produced by the respondent-establishment, Ext. RA-1 is the adult worker register, Ext. RA-2 is the copy of provident fund return for the year 2004-05 and Ext. RA-3 is ESI return of contribution, in respect of the employees of the respondent-establishment. The name of petitioner-workmen nowhere figures in these documents. In the record pertaining to salary for the period from January 2004 to December, 2005 Ext.RA-5 in respect of the employees of the respondent establishment, again the name of the petitioner does not figure anywhere. These documents are proved on record from the testimony of RW-1 Ashish Kumar, Personnel Manager of respondent establishment. No doubt, he has been cross-examined at length on behalf of the petitioner; however, in sundry, as nothing material lending support to the case of petitioner-workman could be elicited there from.

14. If coming to the evidence as has come on record by way of the testimony of RW-2 Abhey Kumar Saxena, Factory Manager, he has categorically stated that the petitioner was employed as helper through contractor. Also that contribution under the EPF Act and Miscellaneous Provisions Act, is being made by the Contractor. Wages were also being paid to the petitioner by the Contractor. He has further clarified that he petitioner was working in the industrial premises of the respondent through Contractor.

15. Respondent-establishment has also examined Shri Lalit, Personnel Officer of the Contractor firm, i.e. M/s Apex Management Consultant. This witness has produced the copy of muster roll Ext.RW3/A, and the register of payment Ext.RW3/B, pertaining to the period from January, 2002 to March, 2005. The name of the petitioner workman figures in both these documents. Meaning thereby that the petitioner was the employee of the

contractor i.e. M/s Apex Management Consultant during the relevant period. The argument that this record has been manufactured, as addressed on behalf of the petitioner, does not find any substance nor the authenticity and genuineness thereof can be disputed, particularly when the petitioner himself has failed to produce in evidence the appointment letter to show that he was appointed by the respondent-establishment.

16. An effort has been made to belie the evidence produced by the respondent while submitting that as per the testimony of RW-3 Lalit in his cross-examination, M/s Apex Management Limited was registered as Contractor only in 2003 and as such how the said Contractor could have employed the petitioner in the respondent-establishment in the year 2001, however, unsuccessfully for the reason that it was merely a suggestion given to RW-3 and no other and further evidence has been produced to show that in the year 2001 M/s Apex Management Consultant was not a registered Contractor. Otherwise also, the Apex Court in ***Dina Nath and others*** *Vs.* ***National Fertilisers Limited and others***, ***AIR 1992 SC 457***, has held that if a contractor is not registered one, penal action under Sections 23 and 25 of the Contract Act can be initiated against the principal employer or contractor, as the case may be, and the petitioner-workman can not claim himself to be the employee of principal employer on that score. This judgment reads as follows:

> " It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the Government after considering the matter, as required to be considered under Section 10 of the Act. The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. We are thus of the firm view that in proceedings under Article 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. We would not like to express any view on the decision of the Karnataka High Court or of the Gujarat High Court (supra) since these decisions are under challenge in this court, but we would place on record that we do not agree with the afore-quoted observations of the Madras High Court about the effect of non-registration of the principal employer or the non-licensing of the labour contractor nor with the view of Bombay High Court in the aforesaid case. We are of the view that the decisions of the Kerala High Court and Delhi High Court are correct and we approve the same."

17. Similar is the view of the matter taken by Jharkhand High Court in ***Their Workmen, Bihar Collery Kamgar Union*** *Vs.* ***Bharat Coking Coal Limited and another, 2014 LLR 842***. This judgment reads as follows:

> "12. Learned counsel for the respondent-management submitted that in the case of Dena Nath & Ors. [(1992) 1 SCC 695], Hon'ble Supreme Court held that the effect of non-compliance of the provisions of CLRA Act of 1970, i.e. non-registration of the establishment under Section 7 of the Act and non-possession of licence under Section 12 of the Act would not result in regularization

of the concerned workmen, rather it would result in penal consequences – that is, prosecution under Section 23/24 of the CLRA Act, 1970 and therefore, the finding of the Tribunal that the contract labour system is sham or camouflage was an erroneous finding and referring to the findings of the Tribunal that the arrangement of the management is camouflage, learned Single Judge held that the said finding is in clear teeth of the decision rendered by Hon'ble Supreme Court in the case of Dena Nath & Ors. v. National Fertilizer Ltd. [(1992) 1 SCC 695] and para 22 thereof reads as under:- 7

> "22. It is not for the High Court to inquire into the question and decide whether the employment of contract labour in any process, operation or in any other work in any establishment should be abolished or not. It is a matter for the decision of the government after considering the matter, as required to be considered under Section 10 of the Act. The only consequences provided in the Act where either the principal employer or the labour contractor violates the provision of Sections 9 (sic 7) and 12 respectively is the penal provision, as envisaged under the Act for which reference may be made to Sections 23 and 25 of the Act. We are thus of the firm view that in proceedings under Article 226 of the Constitution merely because contractor or the employer had violated any provision of the Act or the rules, the Court could not issue any mandamus for deeming the contract labour as having become the employees of the principal employer. We would not like to express any view on the decision of the Karnataka High Court or of the Gujarat High Court (supra) since these decisions are under challenge in this Court, but we would place on record that we do not agree with the afore-quoted observations of the Madras High Court about the effect of non-registration of the principal employer or the non-licensing of the labour contractor nor with the view of Bombay High Court in the aforesaid case. We are of the view that the decisions of the Kerala High Court and Delhi High Court are correct and we approve the same."

18. Therefore, even if it is presumed that M/s Apex Management Consultant was not a registered Contractor in the year 2001, it does not extend a right in favour of the petitioner-workman to claim that he was the employee of respondent-establishment or he has been removed from the service in violation of Section 25-F of the Act.

19. If coming to the relationship of employee and employer, Hon'ble the Apex Court in ***Balwant Rai Saluja and another*** *Vs.* ***AIR India Limited and others***, ***(2014) 9 SCC 407,*** has discussed the entire case law and culled out the situations when it can be said that there exists the relationship of employer and employee. This judgment reads as follows:

> "53. This Court would first refer to the relevant pronouncements by various English Courts in order to analyze their approach regarding employer-employee relationship.

54. In Ready Mix Concrete (South East) Ltd v. Minister of Pensions and National Insurance, [1968] 2 QB 497, McKenna J. laid down three conditions for the existence of a contract of service. As provided at p.515 in the Ready Mix Concrete case, the conditions are as follows:

> "..... "(i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master; (ii) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master; (iii) the other provisions of the contract are consistent with its being a contract of service."

55. In Ready Mix Concrete case (supra), McKenna J. further elaborated upon the above-quoted conditions. As regards the first, he stated that there must be wages or remuneration; else there is no consideration and therefore no contract of any kind. As regards the second condition, he stated that control would include the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. Furthermore, to establish a master-servant relationship, such control must be existent in a sufficient degree.

56 McKenna J. further referred to Lord Thankerton's "four indicia" of a contract of service said in Short v. Page 43 J. and W. Henderson Ltd. (1946) 62 TLR 427. The J. and W. Henderson case (supra) at p.429, observes as follows:

> "(a) The master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the method of doing the work; and (d) the master's right of suspension or dismissal."

57. A recent decision by the Queen's Bench, in JGE v. The Trustees of Portsmouth Roman Catholic Diocesan Trust, [2012] EWCA Civ 938, Lord Justice Ward, while discussing the hallmarks of the employer-employee relationship, observed that an employee works under the supervision and direction of his employer, whereas an independent contractor is his own master bound by his contract but not by his employer's orders. Lord Justice Ward followed the observations made by McKenna J. in the Ready Mix Concrete case (supra) as mentioned above. The JGE case (supra), further noted that 'control' was an important factor in determining an employer-employee relationship. It was held, after referring to numerous judicial decisions, that there was no single test to determine such a relationship. Therefore what would be needed to be done is to marshal various tests, which Page 44 should cumulatively point either towards an employer-employee relationship or away from one.

58. Short v. J. and W. Henderson Ltd., as cited in the Ready Mix Concrete case (supra) and in the JGE case (supra), was also referred to in the fourJudge Bench decision of this Court in Dhrangadhra Chemical Works Ltd. v. State of Saurashtra, AIR 1957

SC 274. In the Dhrangadhra Chemical Works case (supra), it was observed that (AIR 268 pra 14)

> "14……. the prima facie test for the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work……."

59. In Ram Singh v. Union Territory, Chandigarh, (2004) 1 SCC 126, as regards the concept of control in an employer-employee relationship, observed as follows: (SCC p 131 para 15)

> "15. In determining the relationship of employer and employee, no doubt, "control" is one of the important tests but is not to be taken as the sole test. In determining the relationship of employer and employee, all other relevant facts and circumstances are required to be considered Page 45 including the terms and conditions of the contract. It is necessary to take a multiple pragmatic approach weighing up all the factors for and against an employment instead of going by the sole "test of control". An integrated approach is needed. "Integration" test is one of the relevant tests. It is applied by examining whether the person was fully integrated into the employer's concern or remained apart from and independent of it. The other factors which may be relevant are — who has the power to select and dismiss, to pay remuneration, deduct insurance contributions, organize the work, supply tools and materials and what are the "mutual obligations" between them. (See Industrial Law, 3rd Edn., by I.T. Smith and J.C. Wood, at pp. 8 to 10.)"

60. In Bengal Nagpur Cotton Mills case (supra), this Court observed that: (SCC p.638 paras 9-10)

> "9. In this case, the industrial adjudicator has granted relief to the first respondent in view of its finding that he should be deemed to be a direct employee of the appellant. The question for consideration is whether the said finding was justified.
>
> 10. It is now well settled that if the industrial adjudicator finds that the contract between the principal employer and the contractor to be a sham, nominal or merely a Page 46 camouflage to deny employment benefits to the employee and that there was in fact a direct employment, it can grant relief to the employee by holding that the workman is the direct employee of the principal employer. Two of the well-recognized tests to find out whether the contract labourers are the direct employees of the principal employer are: (i) whether the principal employer pays the salary instead of the contractor; and (ii) whether the principal employer controls and supervises the work of the employee. In this case, the Industrial Court answered both questions in the affirmative and as a consequence held that the first respondent is a direct employee of the appellant."

61. Further, the above case made reference to the case of the International Airport Authority of India case (supra) wherein the expression "control and supervision" in the context of contract labour was explained by this Court. The relevant part of the International Airport Authority of India case (supra), as quoted in Bengal Nagpur Cotton Mills case (supra) is as follows: (Bengal Nagpur Cotton Mills case, SCC pp.638-39, para 12)

> "12. "38 ... if the contract is for supply of labour, necessarily, the labour supplied by the contractor will work under the directions, supervision and control of the principal employer but that would not make the worker a Page 47 direct employee of the principal employer, if the salary is paid by a contractor, if the right to regulate the employment is with the contractor, and the ultimate supervision and control lies with the contractor.
>
> 39. The principal employer only controls and directs the work to be done by a contract labour, when such labour is assigned/allotted/sent to him. But it is the contractor as employer, who chooses whether the worker is to be assigned/ allotted to the principal employer or used otherwise. In short, worker being the employee of the contractor, the ultimate supervision and control lies with the contractor as he decides where the employee will work and how long he will work and subject to what conditions. Only when the contractor assigns/sends the worker to work under the principal employer, the worker works under the supervision and control of the principal employer but that is secondary control. The primary control is with the contractor. (international Airport Authority of India cases, SCC p. 388, paras 38-39)"

62. A recent decision concerned with the employer-employee relationship was that of the NALCO case (supra). In this case, the appellant had established two schools for the benefit of the wards of its employees. The Writ Petitions were filed by the employees of each school for a declaration that they be treated as the employees of Page 48 the appellant-company on grounds of, inter alia, real control and supervision by the latter. This Court, while answering the issue canvassed was of the opinion that the proper approach would be to ascertain whether there was complete control and supervision by the appellant-therein. In this regard, reference was made to the case of Dhrangadhra Chemical Works case (supra) wherein this Court had observed that: (Nalco case, SCC pp.768-69, para 22)

> "22. '14. The principle which emerges from these authorities is that the prima facie test for the determination of the relationship between master and

> servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work, or to borrow the words of Lord Uthwatt at p.23 in Mersey Docks and Harbour Board v. Coggins & Griffith (Liverpool) Ltd., (1952) SCR 696 "The proper test is whether or not the hirer had authority to control the manner of execution of the act in question".(Dharangadhra Chemical Works case, AIR p.268, para 14) (Emphasis supplied).

" 63. The NALCO case further made reference to the case of Workmen of Nilgiri Coop. Mkt. Society Ltd. v. State of T.N., (2004) 3 SCC 514, wherein this Court had observed as follows: (Nalco case, SCC p.771, para 27)

> "27. "37. The control test and the organization test, therefore, are not the only factors which can be said to be decisive. With a view to elicit the answer, the Court is required to consider several factors which would have a bearing on the result: (a) who is the appointing authority; (b) who is the paymaster; (c) who can dismiss; (d) how long alternative service lasts; (e) the extent of control and supervision; (f) the nature of the job e.g. whether it is professional or skilled work; (g) nature of establishment; (h) the right to reject.
>
> 38. With a view to find out reasonable solution in a problematic case of this nature, what is needed is an integrated approach meaning thereby integration of the relevant tests wherefor it may be necessary to examine as to whether the workman concerned was fully integrated into the employer's concern meaning thereby independent of the concern although attached therewith to some extent." (Workmen of Nilgiri Coop. Mktg. Society case, SCC p.529, paras 37-38)."

64. It was concluded by this Court in the NALCO case (supra) that there may have been some element of control with NALCO because its officials were nominated to the Managing Committee of the said schools. However, it was observed that the above-said fact was only to ensure that the schools run smoothly and properly. In this regard, the Court observed as follows: (SCC p.772, para 30)

> "30. ... However, this kind of "remote control" would not make NALCO the employer of these workers. This only shows that since NALCO is shouldering and meeting financial deficits, it wants to ensure that the money is spent for the rightful purposes."

65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee

> relationship would include, inter alia, (i) who appoints the workers; (ii) who pays the salary/remuneration; (iii) who has the authority to dismiss; (iv) who can take disciplinary action; (v) whether there is continuity of service; and (vi) extent of control and supervision, i.e. whether there exists complete control and supervision. As regards, extent of control and supervision, we have already taken note of the observations in Bengal Nagpur Cotton Mills case (supra), the International Airport Authority of India case (supra) and the NALCO case." (emphasis supplied).

20. In view of the ratio of this judgment, the petitioner cannot be said to be the employee of the respondent-establishment, as he even has failed to place on record his appointment letter also. As regards the payment of salary/remuneration, the evidence available on record reveals that he was being paid by the Contractor M/s Apex Management Consultant and was working as Helper in the factory premises of the respondent-establishment under the control and supervision of the said Contractor. Therefore, the respondent-establishment had no authority to dismiss him from the employment nor was in a position to take disciplinary action against him.

21. As regards the continuity, again there is no evidence which can be termed as cogent and reliable.

22. On the other hand, the correspondence made by the Contractor M/s Apex Management Consultant, Mark Z-2 to Z-8, make it crystal clear that it is the Contractor, who called upon the petitioner time and again to come and resume his duties. Therefore, it lies ill that there were relations of employer and employee between the petitioner and respondent-establishment and that he remained working as Machine Operator under the control and supervision of respondent. He rather was working as helper on contract basis under the control and supervision of the contractor.

23. The award passed by the Industrial Tribunal can only be interfered with by the High Court in the exercise of its extraordinary writ jurisdiction in case the same is illegal or irrational and suffers from procedural impropriety. This Court can draw support in this regard, again from the judgment of Hon'ble the Apex Court in ***Bhuvnesh Kumar Dwivedi*** *Vs.* ***Hindalco Industries Limited***, ***(2014) 11 SCC 85***". The Apex Court after taking note of the settled legal principles, has concluded in this judgment as follows:

> "22. 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."

24. The present is not a case where it can be said by any stretch of imagination that the impugned award suffers from some procedural impropriety and is irrational or illegal. Therefore, on this score also, no case in favour of the petitioner is made out.

25. On the other hand, on behalf of the petitioner reliance has been placed on a judgment of the Apex Court in ***Sudarshan Rajpoot*** Vs. ***Uttar Pradesh State Road Transport Corporation, (2015) 2 SCC 317***, to show that there was relationship of employer and employee between him and the respondent-establishment. With due regard to the law laid down in the judgment supra, the same is not applicable in the given facts and circumstances of this case.

26. In view of what has been said hereinabove, there is no merit in this writ petition and the same is accordingly dismissed.

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

Nidhi Sharma ...Petitioner

Versus

Himachal Pradesh Public Service Commission ....Respondent.

CWP No. 337 of 2016
Date of Decision : 22.3.2016

Constitution of India, 1950- Article 226- Petitioner submitted an application which was rejected on the ground that certificate of age proof was not submitted- a representation was filed which was rejected – held, that it was specifically provided in the advertisement that defective applications would not be entertained and were to be rejected out-rightly without providing opportunity for correction- non-submission of the certificate is a disputed question of fact which cannot be determined in the writ petition- matriculation certificate is mandatorily required - the conditions prescribed in the advertisement have to be strictly complied with – application was rightly rejected- petition dismissed. (Para-2 to 7)

Case referred:
Gunjan Kapoor vs. State of Himachal Pradesh and others 1999 (1) Shim. L.C. 246

For the Petitioner : Mr. Sunil Mohan Goel, Advocate.
For the respondent : Mr. D. K. Khanna, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

The moot question involved in this petition is as to whether the Public Service Commission is bound to accept an incomplete application form and thereafter issue admit card and permit the applicant to compete in the examination.

2. The petitioner was an aspirant for the post of Civil Judge (Junior Division) and in terms of the advertisement dated 15.12.2015 is stated to have personally submitted the application form alongwith all requisite documents in the office of the respondent. However, the application form was rejected by the respondent on the ground that the certificate of age proof had not been submitted therewith. The petitioner submitted representation on 1.2.2016, which has been

rejected vide letter dated 5.2.2016, constraining her to file the present writ petition claiming therein the following substantive reliefs:

> "(i) *That this Hon'ble Court may kindly be pleased to issue writ of mandamus directing the respondent commission to consider the application form of the petitioner and permit her to compete in the written examination to be held on 28.2.2016.*
>
> *(ii) That this Hon'ble Court may further be pleased to issue writ of certiorari by quashing the impugned rejection dated 5.2.2016 (Annexure P-6) and further permit the petitioner to sit in the examination of Civil Judge (Junior Division) to be held on 28.2.2016."*

3. The respondent in reply to the petition has averred that the petitioner had though submitted the application alongwith some documents in their office but after scrutiny it was found that the petitioner as per the advertisement had not attached the age proof certificate with the down-loaded application form and her form was accordingly rejected.

We have heard learned counsel for the parties and have also gone through the records carefully.

4. The parties are ad idem that in terms of the advertisement, the aspiring candidates were required to submit their application forms alongwith certain certificates including the matriculation certificate or its equivalent showing therein the date of birth of the candidate. There is also no dispute that in terms of the advertisement an application submitted in the proforma, which was not prescribed, improperly filled up, defective applications or applications with inadequate fees or applications received after 05.01.2016 could not be entertained and were to be rejected out-rightly without providing opportunity for correction.

5. The only contention put-forth by the petitioner is that she had submitted her application, complete in all respects, by submitting the same personally in the office of the respondent and, therefore, the action of the respondent in rejecting the form and not issuing admit card is prima-facie arbitrary, wrong and illegal. That apart, once the petitioner had already filled in her date of birth as 01.01.1992 in the application form, then the respondent could not have insisted for her matriculation certificate or any other document in support of her age.

6. The contention of the petitioner cannot be accepted for the simple reason that firstly the submission/non-submission of certificates in question is a disputed question of fact which cannot be determined in the instant proceedings and even otherwise there is nothing on the record to prima-facie indicate much less establish and prove that the certificate in fact had been submitted. Secondly, the submission of matriculation certificate or its equivalent showing the date of birth is not an empty formality, but is a mandatory condition prescribed in the advertisement itself. Since the petitioner had not furnished the documents as required in the advertisement, her candidature was rightly rejected.

7. In addition to the aforesaid, the petitioner cannot even dispute that the conditions prescribed in the advertisement have to be strictly complied with and this has been the consistent view of this Court. (See: ***CWP No.1427 of 2015 titled Yatin Sachdeva*** vs. ***State of H.P. and others, decided on 27.2.2015, Gunjan Kapoor*** vs. ***State of Himachal Pradesh and others 1999 (1) Shim. L.C. 246, CWP No. 779 of 2001, titled Rahul Dubey*** vs. ***H.P.Public Service Commission and another decided on 10.9.2001, CWP No. 7965 of 2014 titled Indu Bhardwaj*** vs. ***H.P.Public Service Commission and***

others, decided on 19.12.2014 and CWP No. 6170 of 2014 titled Harish Kumar vs**. *State of Himachal Pradesh and others, decided on 17.9.2014****).*

8. Therefore, in view of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

Ram Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Cr. Appeal No. 115 of 2014
Judgment reserved on: 29.02.2016
Date of Decision: March 22 , 2016

Indian Penal Code, 1860- Section 506- **Protection of Children from Sexual Offences Act, 2012**- Section 6- Prosecutrix aged 8 years was residing with her Aunt- accused had been subjecting her to sexual intercourse and last such assault took place on 24.05.2013- prosecutrix narrated the incident to her teacher who informed the Head Mistress- FIR was registered against the accused- accused was tried and convicted by the trial Court- Date of Birth of prosecutrix is recorded as 02.07.2004 in school record- her medical age was found to be between 9-10 years- testimony of the prosecutrix was duly corroborated by medical evidence- Prosecutrix has withstood the test of scrutiny- she has no reason to depose falsely against the accused - her testimony is free from blemish, improvements and contradictions and it inspires confidence- her testimony was also corroborated by the Teacher to whom the incident was narrated- the ocular version and documentary evidence clearly establish complicity of the convict in the crime- there are no major contradictions - held, that in these circumstances, trial Court had rightly convicted the accused- appeal dismissed.

(Para- 7 to 45)

Cases referred:

Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re, (2014) 4 SCC 786
Rajkumar v. State of Madhya Pradesh, (2014) 5 SCC 353
Shyam Narain v. State (NCT of Delhi), (2013) 7 SCC 77
Narender Kumar v. State (NCT of Delhi), (2012) 7 SCC 171
Munna v. State of Madhya Pradesh, (2014) 10 SCC 254
Madan Gopal Makkad v. Naval Dubey and another, (1992) 3 SCC 204
Mukesh v. State of Chhattisgarh, (2014) 10 SC 327
State of Haryana v. Basti Ram, (2013) 4 SCC 200
O.M. Baby (Dead) by Legal Representative v. State of Keral, (2012) 11 SCC 362
State of U.P. v. Chhotey Lal, (2011) 2 SCC 550
Radhakrishna Nagesh v. State of Andhra Pradesh, (2013) 11 SCC 688
Mohd. Iqbal v. State of Jharkhand, (2013) 14 SCC 481
Rameshwar v. The State of Rajasthan, AIR 1952 SC 54

State of Punjab versus Jagir Singh (1974) 3 SCC 277
State of Rajasthan versus N. K. THE ACCUSED (2000) 5 SCC 30
State of Maharashtra versus Chandraprakash Kewalchand Jain, (1990) 1 SCC 550
State of Punjab versus Gurmit Singh and others, (1996) 2 SCC 384
Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72
State of M.P. v. Dharkole alias Govind Singh and others, (2004) 13 SCC 308
Dattu Ramrao Sakhare v. State of Maharashtra (1997 (5) SCC 341)
Golla Yelugu Govindu vs. State of Andhra Pradesh (2008) 16 SCC 769
Radhu v. State of Madhya Pradesh, (2007) 12 SCC 57
State of Himachal Pradesh vs. Suresh Kumar (2009) 16 SCC 697
Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, (1983) 3 SCC 217
State of H.P. v. Asha Ram, (2005) 13 SCC 766

For the Appellant: Mr. Umesh Kanwar, Advocate, for the appellant.
For the Respondent: Mr. V.S. Chauhan, Addl. AG., with Mr.Kush Sharma, Dy. AG., and Mr. J.s. Guleria, Asstt. AG., for the respondent-State.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 374 Cr.P.C., convict Ram Singh has assailed the judgment dated 07.11.2013/12.11.2013, passed by learned Judge Special Court, Una, H.P., in Sessions Case No. 7-VII-2013, titled as *State of Himachal Pradesh Versus Shri Ram Singh,* whereby he stands convicted for having committed offences punishable under the provisions of Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act) and Section 506-II of the Indian Penal Code and sentenced to undergo rigorous imprisonment for ten years and pay fine in the sum of Rs.5,000/-, for commission of offence punishable under the provisions of Section 6 of the POCSO Act and in default thereof, further to undergo simple imprisonment for a period of three months and also sentenced to serve rigorous imprisonment for one year and pay fine in the sum of Rs.2000/- for the commission of offence punishable under the provisions of Section 506-II IPC and in default thereof, further to undergo simple imprisonment for a period of one month.

2. It is the case of prosecution that prosecutrix was permanently residing with her aunt for her father, after murdering her mother, had left her alone to fend by herself. Prosecutrix aged 8 years, was studying in a local school. Accused, who is her cousin, had been subjecting her to sexual intercourse and last such assault took place on 24.05.2013, when after gagging her mouth, not only he subjected her to sexual intercourse, but also threatened her not to disclose the incident to anyone. However, on 30.05.2013, prosecutrix narrated the incident to her teacher Beera Sharma (PW.7), who in turn informed Head Mistress Anupama Rani (PW.9), which led to the lodging of a formal complaint with the police. FIR No.149 of 2013, dated 31.05.2013 (Ex.PW.20/A) was registered at Police Station, Sadar, Una, H.P., against the accused, for committing offences punishable under the provisions of Sections 376 of IPC and Section 4 of the POCSO Act. SI Trilok Singh (PW.21), conducted the investigation. Prosecutrix was got medically examined both from the point of crime as also determination of age. Also record qua age and link evidence was taken on record. Report of the Chemical Analyst (Ex.PW.1/C), pertaining to the articles recovered by the police was taken on record. With the completion of investigation, which *prima facie*

revealed complicity of the accused in the alleged crime, *Challan* was presented in the Court for trial.

3. The accused was charged for having committed offences punishable under the provisions of Section 6 of the POCSO Act and Sections 376 and 506 of IPC, to which he did not plead guilty and claimed trial.

4. In order to establish its case, in all, prosecution examined as many as twenty one witnesses and statement of the accused under Section 313 of the Code of Criminal Procedure was also recorded, in which he took the following defence:-

> "The witnesses have deposed falsely. PW4 is my cousin and being a brother I wanted to control her activities as she was in the habit of leaving the house without permission during night time and used to come late. She was scolded off and she has roped me in this false case."

However no evidence in defence was led by him.

5. Appreciating the testimonies of the prosecution witnesses, Trial Court convicted accused Ram Singh for having committed offences punishable under the provisions of Section 6 of the POCSO Act and Sections and Section 506-II of IPC and sentenced as aforesaid. Hence the present appeal by the convict.

6. We have heard Mr. Umesh Kanwar, learned counsel, on behalf of the convict-appellant as also M/s V.S. Chauhan, learned Addl. AG., Kush Sharma, learned Dy. AG and J.S. Guleria, learned Asstt. AG., on behalf of the State. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find the findings returned by the trial Court to be based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice. Prosecution has been able to prove its case, beyond reasonable doubt against the convicts.

7. We shall first discuss the question of age of the prosecutrix. Prosecutrix (PW.4) was examined in Court on 23.08.2013, on which date, she declared her age to be of 8 years. She deposed that for the last six years she had been residing with her aunt i.e. mother of the accused. For the last two years, accused had been subjecting her to sexual intercourse and last such incident took place on 24.05.2013. She disclosed the incident both to her aunt, who did not take any action but then to her teacher, which led to the recording of her statement (Ex.PW.4/A) dated 31.05.2013. At the time of her medical examination vide MLC (Ex.PW.1/B), prosecutrix recorded her age to be 8 years. Jai Kumar (PW.12) has produced on record the original record of the school where the prosecutrix was studying. In the school record, her date of birth is recorded as 02.07.2004. Certificates (Ex.PW.12/A and Ex.PW.12/B) are on record to such effect. The medical age of the prosecutrix, as is evident from the testimonies of Dr. P.K. Soni (PW.2), Dr. Anu Priya (PW.3) and Rakesh Kumar (PW.11), who have also proved on record documents (Ex.PW.2/1 to Ex.PW2/6, Ex.PW.2/A, Ex.PW.3/A-1 to Ex.PW.3/A-4, Ex.PW.3/A, Ex.PW.3/B, Ex.PW.11/A, Ex.PW.11/A-1 to Ex.PW.11/A-2), is between 9-10 years. Thus, prosecution has been able to establish, beyond reasonable doubt, that on the date of crime, prosecutrix was a minor.

8. At this juncture we deem it appropriate to deal with the statement of law on the point.

9. In *Indian Woman Says Gang-Raped on Orders of Village Court Published in Business and Financial News Dated 23.10.2014, In Re,* (2014) 4 SCC 786, the Apex Court has highlighted the need for having an effective State police machinery for curbing the menace of rape, for such crime is not only in contravention of the domestic laws, but is also in direct breach of obligations under International Law, treaties whereof stand ratified by the State, which is under an obligation to protect its women from any kind of discrimination.

10. 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).

11. In *Shyam Narain v. State (NCT of Delhi)*, (2013) 7 SCC 77, the Apex Court held as under:

> "27. Respect for reputation of women in the society shows the basic civility of a civilised society. No member of society can afford to conceive the idea that he can create a hollow in the honour of a woman. Such thinking is not only lamentable but also deplorable. It would not be an exaggeration to say that the thought of sullying the physical frame of a woman is the demolition of the accepted civilized norm, i.e., "physical morality". In such a sphere, impetuosity has no room. The youthful excitement has no place. It should be paramount in everyone's mind that, on one hand, the society as a whole cannot preach from the pulpit about social, economic and political equality of the sexes and, on the other, some pervert members of the same society dehumanize the woman by attacking her body and ruining her chastity. It is an assault on the individuality and inherent dignity of a woman with the mindset that she should be elegantly servile to men. Rape is a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a woman and the soul of the society and such a crime is aggravated by the manner in which it has been committed. We have emphasised on the manner because, in the present case, the victim is an eight year old girl who possibly would be deprived of the dreams of "Spring of Life" and might be psychologically compelled to remain in the "Torment of Winter". When she suffers, the collective at large also suffers. Such a singular crime creates an atmosphere of fear which is historically abhorred by the society. It demands just punishment from the court and to such a demand, the courts of law are bound to respond within legal parameters. It is a demand for justice and the award of punishment has to be in consonance with the legislative command and the discretion vested in the court."

12. 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."

13. 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.

14. The Apex Court in *Madan Gopal Makkad v. Naval Dubey and another,* (1992) 3 SCC 204, has held as under:

> “34. A medical witness called in as an expert to assist the court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and enlighten the court on the technical aspect of the case by explaining the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the court.
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> 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:
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> > "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:
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> > "... [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."
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> 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:
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> > "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:
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> "... [E]ven slight penetration is sufficient and emission is unnecessary."
>
> 40. In Halsbury's Statutes of England and Wales, (Fourth Edition), Volume 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse within the meaning of S. 44 of the Sexual Offences Act, 1956. Vide (1) *R. v. Hughes*, (1841) 9 C&P 752, (2) *R. v. Lines and R. v. Nicholls*, (1844) 1 Car & Kir 393.
>
> 41. See also Harris's Criminal Law, (Twenty-second Edition) at page 465.
>
> 42. In American Jurisprudence, it is stated that slight penetration is sufficient to complete the crime of rape. Code 263 of Penal Code of Califomia reads thus:
>
> "RAPE; essentials Penetration sufficient. The essential guilt of rape consists in the outrage to the person and feelings of the victim of the rape. Any sexual penetration, however slight, is sufficient to complete the crime."
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> 43. The First Explanation to S. 375 of Indian Penal Code which defines 'Rape' reads thus:
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> "EXPLANATION.PENETRATION is sufficient to constitute the sexual intercourse necessary to the offence of rape."
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> 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." ”

15. 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).

16. 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.

17. 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).

18. 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.

19. In *Radhakrishna Nagesh v. State of Andhra Pradesh,* (2013) 11 SCC 688, the apex Court held as under:

> "33. It will be useful to refer to the judgment of this Court in the case of O.M. Baby v. State of Kerala, (2012) 11 SCC 362, where the Court held as follows:-
>
> > "17. ..... '16. A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.'
> >
> > 18. We would further like to observe that while appreciating the evidence of the prosecutrix, the court must keep in mind that in the context of the values prevailing in the country, particularly in rural India, it would be unusual for a woman to come up with a false story of being a victim of sexual assault so as to implicate an innocent person. Such a view has been expressed by the judgment of this Court in the case *of State of Punjab v. Gurmit Singh*, (1996) 2 SCC 384 and has found reiteration in a recent judgment in *Rajinder @ Raju v. State of H.P.*, (2009) 16 SCC 69, para 19 whereof may be usefully extracted:
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> > > '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.' ""

20. In *Rameshwar v. The State of Rajasthan,* AIR 1952 SC 54, the Supreme Court has held that previous statement of the raped girl to her mother, immediately after the occurrence, is not only admissible and relevant as to her conduct, but also constitutes corroboration of her statement under the provisions of section 157 of the Evidence Act. In order to come to the aforesaid conclusions, illustration (j) to section 8 of the Evidence Act was relied upon. In that case, the victim, named Purni, was 7/8 years old. She was not administered oath, but was held to be competent witness and, therefore, duly examined and believed.

21. In *State of Punjab versus Jagir Singh* (1974) 3 SCC 277 the apex Court held that:-

> "A criminal trial is not like a fairy tale wherein one is free to give fight to one's imagination and fantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the Courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures." (Emphasis supplied)

22. The Apex Court in *State of Rajasthan versus N. K.* THE ACCUSED (2000) 5 SCC 30 has held that:-

> "... ...It is true that the golden thread which runs throughout the cobweb of criminal jurisprudence as administered in India is that nine guilty may escape but one innocent should not suffer. But at the same time no guilty should escape unpunished once the guilt has been proved to hilt. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none exists. A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for finding in favour of acquittal. An

> unmerited acquittal encourages wolves in the society being on prowl for easy prey, more so when the victims of crime are helpless females. It is the spurt in the number of unmerited acquittals recorded by criminal Courts which gives rise to the demand for death sentence to the rapists. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women."
>
> (Emphasis supplied)

23. It is also a settled position of law that victim of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. If for some reason Court is hesitant to place implicit reliance on the testimony of the victim it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the victim must necessarily depend on the facts and circumstances of each case. If the totality of the circumstances appearing on the record of the case disclose that victim does not have a strong motive to falsely involve the person charged, Court should ordinarily have no hesitation in accepting her evidence. [*State of Maharashtra versus Chandraprakash Kewalchand Jain,* (1990) 1 SCC 550 and *O. M. Baby (dead) by Legal Representative vs. State of Kerala*, 2012 (11) SCC 362].

24. The Apex Court in *State of Punjab versus Gurmit Singh and others,* (1996) 2 SCC 384 has held that:-

> "… …The Courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion ?
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> ---- --- ---
>
> "21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Court, therefore, shoulder

a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case." ... ...

(Emphasis supplied)

The Court again reiterated its view in Siriya @ Shri Lal vs. State of Madhya Pradesh, (2008) 8 SCC 72.

25. In *State of M.P. v. Dharkole alias Govind Singh and others,* (2004) 13 SCC 308 the Apex Court has held that:-

"9. ... Eye witnesses' account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the 'credit' of the witnesses; their performance in the witness-box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

"10. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt. Though this standard is a higher standard, there is, however, no absolute standard. What degree of probability amounts to 'proof' is an exercise particular to each case?

"The simple multiplication rule does not apply if the separate pieces of evidence are dependent. Two events are dependent when they tend to occur together, and the evidence of such events may also be said to be dependent. In a criminal case, different pieces of evidence directed to establishing that the defendant did the prohibited act with the specified state of mind are generally dependent. A junior may feel doubt whether to credit an alleged confession, and doubt whether to infer guilt from the fact that the defendant fled from justice. But since it is generally guilty rather than innocent people who make confessions and guilty rather than innocent people who run away, the two doubts are not to be multiplied together. The one piece of evidence may confirm the other."

"11. Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and commonsense. It must grow out of the evidence in the case."

[Emphasis supplied]

26. In *Dattu Ramrao Sakhare v. State of Maharashtra* (1997 (5) SCC 341) it held that:

> '5. .....A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored'. The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and said Judge may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the Court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness."

27. In *Radhu v. State of Madhya Pradesh,* (2007) 12 SCC 57, the Apex Court has held that "... Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age" and "There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case".

28. Law with regard to testimony of a child witness is now well established. In *Golla Yelugu Govindu* vs. *State of Andhra Pradesh* (2008) 16 SCC 769, while reiterating its earlier view the Apex Court held that:-

> "11. 6.Indian Evidence Act, 1872 (in short the 'Evidence Act') does not prescribe any particular age as a determinative factor to treat a witness to be a competent one. On the contrary, Section 118 of the Evidence Act envisages that all persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to these questions, because of tender years, extreme old age, disease whether of mind, or any other cause of the same kind. A child of tender age can be allowed to testify if he has intellectual capacity to understand questions and give rational answers thereto. This position was concisely stated by Brewer J. in Wheeler v. United States [159 U.S. 523 (1895)]. The evidence of a child witness is not required to be rejected per se, but the Court as a rule of prudence considers such evidence with close scrutiny and only on being convinced about the quality thereof and reliability can record conviction, based thereon. [See Suryanarayana v. State of Karnataka (2001) 9 SCC 129].

29. In *State of Himachal Pradesh vs. Suresh Kumar* (2009) 16 SCC 697, the Apex Court was dealing with a case where victim was ravished by the accused on 15.3.2000

which incident was narrated by the victim to her sister later during the day. She also narrated the incident to her parents the following day and later on to the Doctors. Court accepted the statement of the sister, parents and the doctors while holding the accused guilty. Importantly, Apex Court reversed the finding recorded by the High Court wherein it was held that statement of the victim being minor was not worthy of credence.

30. The apex Court in *Radhakrishna Nagesh Versus State of Andhra Pradesh,* (2013) 11 SCC 688 had an occasion to deal with a case of a child victim. After considering its earlier decisions, the Court held that Court must examine the evidence of the prosecution in its entirely and then see its cumulative effect to determine whether offence of rape stands committed or not.

31. The apex Court in *Bharwada Bhoginbhai Hirjibhai v. State of Gujarat,* (1983) 3 SCC 217 has held as under:

> "9. In the Indian setting, refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? To do so is to justify the charge of male chauvinism in a male dominated society. We must analyze the argument in support of the need for corroboration and subject it to relentless and remorseless cross-examination. And we must do so with a logical, and not an opinionated, eye in the light of probabilities with our feet firmly planted on the soil of India and with our eyes focussed on the Indian horizon. We must not be swept off the feet by the approach made in the western world which has its own social milieu, its own social mores, its own permissive values, and its own code of life. Corroboration may be considered essential to establish a sexual offence in the backdrop of the social ecology of the western world. It is wholly unnecessary to import the said concept on a turnkey basis and to transplant it on the Indian soil regardless of the altogether different atmosphere, attitudes, mores, responses of the Indian society, and its profile. The identities of the two worlds are different. The solution of problems cannot therefore be identical. It is conceivable in the western society that a female may level false accusation as regards sexual molestation against a male for several reasons such as :-
>
> > (1) The female may be a 'gold digger' and may well have an economic motive- to extract money by holding out the gun of prosecution or public exposure.
> >
> > (2) She may be suffering from psychological neurosis and may see an escape from the neurotic prison by phantasizing or imagining a situation where she is desired, wanted, and chased by males.
> >
> > (3) She may want to wreak vengeance on the male for real or imaginary wrongs. She may have a grudge against a particular male, or males in general, and may have the design to square the account.
> >
> > (4) She may have been induced to do so in consideration of economic rewards, by a person interested in placing the accused in a compromising or embarrassing position, on account of personal or political vendetta.

(5) She may do so to gain notoriety or publicity or to appease her own ego or to satisfy her feeling of self-importance in the context of her inferiority complex.

(6) She may do so on account of jealousy.

(7) She may do so to win sympathy of others.

(8) She may do so upon being repulsed.

10. By and large these factors are not relevant to India, and the Indian conditions. Without the fear of making too wide a statement, or of overstating the case, it can be said that rarely will a girl or a woman in India make false allegations of sexual assault on account of any such factor as has been just enlisted. The statement is generally true in the context of the urban as also rural society. It is also by and large true in the context of the sophisticated not so sophisticated, and unsophisticated society. Only very rarely can one conceivably come across an exception or two and that too possibly from amongst the urban elites. Because :- (1) A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred, (2) She would be conscious of the danger of being ostracized by the Society or being looked down by the society including by her own family members, relatives, friends, and neighbours, (3) She would have to brave the whole world. (4) She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. (5) If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a respectable or an acceptable family. (6) It would almost inevitably and almost invariably result in mental torture and suffering to herself. (7) The fear of being taunted by others will always haunt her. (8) She would feel extremely embarrassed in relating the incident to others being overpowered by a feeling of shame on account of the upbringing in a tradition bound society where by and large sex is taboo. (9) The natural inclination would be to avoid giving publicity to the incident lest the family name and family honour is brought into controversy. (10) The parents of an unmarried girl as also the husband and members of the husbands' family of a married woman, would also more often than not, want to avoid publicity on account of the fear of social stigma on the family name and family honour. (11) The fear of the victim herself being considered to be promiscuous or in some way responsible for the incident regardless of her innocent. (12) The reluctance to face interrogation by the investigating agency, to face the Court, to face the cross-examination by counsel for the culprit, and the-risk of being disbelieved, act as a deterrent.

11. In view of these factors the victims and their relatives are not too keen to bring the culprit to books. And when in the face of these factors the crime is brought to light there is a built-in assurance that the charge is genuine rather than fabricated. On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self-inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye-witness account of an independent witness may often be forthcoming in

> physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the rules devised by the Court's in the western world (obeisance to which has perhaps become a habit presumably on account of the colonial hangover). We are therefore of the opinion that if the evidence of the victim does not suffer from any basic infirmity, and the 'probabilities- factor' does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming, subject to the following qualification : Corroboration may be insisted upon when a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self preservation. Or when the 'probabilities-factor' is found to be out of tune."

[Also: *State of H.P. v. Asha Ram,* (2005) 13 SCC 766]

32. We shall now discuss the evidence in view of the aforesaid settled proposition of law.

33. Initially prosecutrix was examined by Dr. Sudhi Kaushal (PW.18), who issued MLC (Ex.PW.18/B). The doctor recorded the factum of alleged sexual assault. On the directions of the Judicial Magistrate 1st Class, Una, a Board of doctors was constituted and Dr. Sita Thakur (PW.1) and Dr.Indu Bhardwaj (PW.6) upon medical examination issued MLCs (Ex.PW.1/B and Ex.PW.6/B). As per opinion of the doctor possibility of sexual assault could not be ruled out. Hymen was torn and injury could be possible by penetration of vagina.

34. Prosecutrix (PW.4) is a child witness. Her statement stands appreciated by the Court below as also by this Court with caution. Having minutely examined the same, we are of the considered view that witness has withstood the test of scrutiny, her statement being absolutely inspiring in confidence. She has no reason to falsely depose against the accused, who in any case, has not led any evidence or examined any witness to probablize his defence.

35. In no uncertain terms and unambiguously, prosecutrix has deposed that after the death of her mother, her father left her. She has explained the circumstances under which she continued to live with her aunt, who has two children daughter namely Parvati, who has since married and son the present accused. Her father had killed her mother and left for Nepal. Thereafter prosecutrix had been staying with her aunt and studying in Government Primary School, Rakkar. Accused had been subjecting her to penetrative sexual assault for the last two years. Also accused had been putting his fingers inside her vagina. He had also threatened her not to disclose the incident to anyone. Last such assault took place on 24.05.2013 when she was alone in the house. At that time, accused had gagged her mouth and tied her hands. Following day she disclosed the incident to her Tai (aunt), who inquired the accused but he simply stated not to have done anything. Later on she disclosed the incident to her teacher Beera Sharma (PW.7), who in turn informed the Head Mistress, when police was called in the school and her complaint (Ex.PW.4/A) recorded. Also she was medically examined.

36. On the question of prosecutrix being subjected to sexual assault, we find her testimony to be absolutely free from blemish, improvements and contradictions. It inspires

confidence and is true narration of facts. She did not disclose the incident to anyone out of fear and threats given by the accused. It is only when Beera Sharma (PW.7) found her to be sleeping outside the shop, did she, in confidence disclose the incident. Noticeably her aunt had refused to take any action and she had none else to fall back upon. Also her cousin Parvati was not there at home.

37. Version of the prosecutrix stands completely corroborated by Beera Sharma, who has further stated that with the prosecutrix narrating the incident, Head Teacher was informed and matter reported to the police. Now when we peruse the testimony of Anupama Rani (PW.9), we find the same to have been corroborated.

38. Record reveals that the matter was also brought to the notice of the School Management Committee. The President of the said Committee Smt. Rasida (PW.10) states that the prosecutrix had also narrated the incident to her. We do find there is minor contradiction here, for according to this witness, prosecutrix was being subjected to sexual assault for the last 2-3 years, but then with regard to the last incident of 24.05.2013, there is no discrepancy. Also difference in duration of time cannot be said to be fatal. The incident in question was also disclosed to Mohammad Sahid (PW.8).

39. Thus, from the testimonies of the aforesaid witnesses, it is evident that prosecution has been able to prove its case, beyond reasonable doubt.

40. SI Trilok Singh (PW.21) also got the statement of the prosecutrix (Ex.PW.4/B) recorded before the Judicial Magistrate 1st Class, Una. Significantly there is no contradiction in her statement.

41. In the nature of corroborative evidence prosecution has proved on record other scientific evidence.

42. It is further urged that the accused ought to have been tried as a juvenile for first such alleged act, so committed by him was at the time when he was a juvenile. We do not find favour with such submission, for as on the date of last such offence, accused was more than 18 years of age, which fact is evident from his medical record as also statement recorded in Court.

43. The ocular version as also the documentary evidence clearly establishes complicity of the convict in the alleged crime. The testimonies of prosecution witnesses are totally reliable and their depositions believable. There are no major contradictions rendering their version to be unbelievable**.**

44. From the material placed on record, it stands clearly established by the prosecution witnesses, beyond reasonable doubt, that the convict is guilty of having committed the offences charged for. There is sufficient, clear, convincing, cogent and reliable piece of 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 convict 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 convict. 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 convict 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 also cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

45. Thus, from the material placed on record, it stands established by the prosecution, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that convict committed aggravated penetrative sexual assault on the victim child aged 8 years and also criminally intimidated her.

46. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and complete appreciation of the material so placed on record by the parties. Findings cannot be said to be erroneous in any manner. Hence, the appeal is dismissed.

Records of the Court below be immediately sent back.

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

Shimla Educational Society Trust and another ...Petitioners.

VERSUS

National Council for Teachers Education and Ors. ...Respondents.

CWP No.4755 of 2015
Reserved on: 16.03.2016
Pronounced on: March 22, 2016.

Constitution of India, 1950- Article 226- Petitioner No. 1 is an educational Trust, which has established a Senior Secondary Public School and is also running a B.Ed. College- it applied to respondent No. 2 for introducing Diploma in Elementary Education- application was rejected- Writ Petition was filed- during the Writ Petition, an inspection was carried out- Writ Petition was disposed of with a direction to respondent No. 2 to take appropriate action in the light of the Inspection Report- again prayer was rejected- petitioner has preferred an appeal before the Appellate Authority which was accepted - Appellate Authority ordered the inspection which was conducted in the first week of March, 2013- a show cause notice was issued which was considered and the permission granted to run the course was kept in abeyance- it was further decided to withdraw the affiliation in respect of B.Ed. Course- again writ petition was filed which was disposed of with a direction to Appellate Authority to decide the appeal within 6 weeks- appeal was allowed and the matter was remanded to respondent no. 2 – the recognition in respect of the B.Ed. course was restored- a letter of intent was issued for running the course in question- however, case was again taken up and certain objections were raised- ultimately, the recognition was refused- again a Writ Petition was filed- direction was again issued- case was again rejected- held that permission was declined to the petitioner by respondent No. 2 on one pretext or the other- petitioner had to approach Appellate Authority as well as the Court by filing writ petition- Appellate Authority had also recorded that petitioner had finally completed the formalities under intimation to the NRC- Annexure P-33 quashed qua the petitioner and the respondent directed to pass fresh orders, within a period of three months, in the light of the orders passed by the Court from time to time, read with the decision made by the Member Secretary, National Council for Teachers Education. (Para- 5 to 19)

For the petitioners: Mr.Suneet Goel, Advocate.

For the Respondents: Mr.Sanjeev Bhushan, Senior Advocate, with Mr.Rajesh Kumar, Advocate, for respodnents No.1 and 2.
Mr.Lovneesh Kanwar, Advocate, for respondent No.3.
Nemo for respondent No.4.
Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Petitioners have invoked the jurisdiction of this Court under Article 226 of the Constitution of India and have prayed for the following main reliefs, on the grounds taken in the writ petition:

> *"(i) That the impugned decisions refusing recognition of D. El. Ed. Course of petitioners may be quashed and set aside.*
>
> *(ii) That the respondent No.2 may be directed to grant recognition for D. El. Ed. Course for sessions 2015-17 to the petitioners after setting aside the observations/findings recorded by respondent No.2 in the minutes of its meetings and consequently petitioner may be allowed to start D. El. Ed. /JBT course for 2015-17, with all consequential benefits; alternatively this Hon'ble court may grant recognition to the petitioners for the D. El. Ed./JBT course for 2015-17, with all consequential benefits.*
>
> *(iii) That the respondent No.3 may be directed to allow the petitioner to participate in counseling for D. El. Ed. Course session 2015-17.*
>
> *(iv) That Respondent No.3 may kindly be directed to grant affiliation to the petitioners for the session 2015-17 for D. El. Ed. Course (JBT Course)."*

2. Respondents No.1 to 3 have filed the replies, while respondent No.5 has opted not to file the same. It appears that the petitioners have been dragged from pillar to post and post to pillar, particularly, by respondents No.1 and 2.

3. Facts, as are coming forward, are summarized thus. Petitioner No.1 is an educational Trust, having established a Senior Secondary Public School and is also running a B.Ed. College in the name and style of 'Shimla College of Education'. In order to introduce new professional course i.e. Diploma in Elementary Education (hereinafter referred to as the course in question) in the Shimla Education of College, applied to respondent No.2 i.e. Northern Regional Committee, National Council for Teachers Education, (for short, NRC), initially in December, 2008, which application of the petitioners was rejected vide letter dated 15th January, 2009, applied again on 16th May, 2009, was again rejected by respondent No.2 on the ground of delay. Thereafter, the petitioners time and again applied to the respondents for grant of permission to run the course in question, but the said requests as also the appeals stood rejected by the respondents on different counts till 13th August, 2010, the details of which have been given in the writ petition.

4. Consequent thereto, the petitioners preferred a writ petition, being CWP No.5944 of 2010, before this Court. During the pendency of the writ petition, respondent No.2 carried out the inspection of the Institute of the petitioners. Therefore, the writ petition was disposed of, vide judgment dated 23rd April, 2012, with a direction to respondent No.2 to take appropriate action in light of the inspection report as also the action taken by the management of the institute. Again, the order was made against the petitioners.

5. Against the said order of rejection, the petitioners preferred an appeal before the Appellate Authority, which was accepted and the matter was again remanded to respondent No.2 with a direction to conduct inspection of the institute afresh. The inspection was conducted in the first week of March, 2013, upon which respondent No.2 issued show cause notice, dated 31st May, 2013, to the petitioners to submit a list of teaching faculty members for the B.Ed. course, which the petitioners were already running. Petitioners filed reply to the show cause notice, which was considered by respondent No.2 in its meeting held on 27th and 28th June, 2013, wherein it was observed as under:

> *"....Therefore, the NRC came to the conclusion that the institution is running the B.Ed. Course without approved faculty since the grant of recognition by the NRC, NCTE. It is a violation of the provisions of the NCTE Regulations."*

6. Upon the above observations, show cause notice was issued to the petitioners in regard to existing B.Ed. course, and the application for grant of permission to run the course in question was decided to be kept in abeyance. In the meeting of respondent No.2 held on 28th January, 2014, it was decided to withdraw the affiliation in respect of B.Ed. Course granted to the petitioners. Against the said decision, the petitioners preferred an appeal. When no decision was taken, the petitioners filed a writ petition, being CWP No.1062 of 2014, before this Court, which was disposed of vide order dated 1st May, 2014, with a direction to the Appellate Authority to decide the appeal within six weeks.

7. Subsequent thereto, the appeal of the petitioners was allowed and the matter was remanded to respondent No.2, whereafter, in the 235th meeting of respondent No.2, held on 15th to 18th April, 2015, the recognition in respect of the B.Ed. course was restored. In regard to granting of recognition in favour of the petitioners for running the course in question, a letter of intent dated 24th April, 2015, (Annexure P-10), was issued to the petitioners. In compliance to the said letter, the petitioners requested respondent No.3/Board, vide letter dated 25th April, 2015 (Annexure P-11), to constitute a selection committee for the selection of faculty/staff for running the course in question.

8. Respondent No.3, in turn, directed the Principal, District Institute of Education and Training, Shamlaghat to constitute a committee for the selection of faculty members. The said selection committee held meeting on 2nd May, 2015 in the office of the Chairman of Shimla College of Education, Sanjauli, Shimla and thereafter on 6th May, 2015. Vide letter dated 14th May, 2015, (Annexure P-13), issued by respondent No.3 to the petitioners, approval of the teaching faculty was conveyed, which, thereafter, was submitted to respondent No.2 by the petitioners alongwith other necessary documents.

9. The case of the petitioners for recognition was taken up on the last day of 238th meeting held between 20th to 31st May, 2015, despite it figured at agenda item No.2, and in respect of the case of the petitioners, certain objections were raised, which were responded to by the petitioners vide representation dated 4th June, 2015 (Annexure P-16). Petitioners also preferred representation dated 11th June, 2015 (Annexure P-17) pointing a finger at respondent No.4 that he was nurturing a grudge against the petitioners and also requested to issue formal recognition to the institute of the petitioners for running the course in question.

10. Again, the case of the petitioners was taken up in the meeting of respondent No.2 held on 30th June and 1st July, 2015, wherein the recognition for running the course in question was refused on the grounds mentioned in Annexure P-19. Against the said decision, the petitioners filed appeal before the Appellate Authority and also approached this Court by way of CWP No.3279 of 2015. The said writ petition was disposed of vide order dated 6th August, 2015 with a direction to respondent No.2 to examine the case of the

petitioners without associating respondent No.4 in the decision making process. It is apt to reproduce paragraph 3 and 4 of the said decision hereunder:

> *"3. The learned counsel for the petitioner submitted at the Bar that this petition may be disposed of at this stage by directing respondent No. 2 to examine the case of the petitioner and pass fresh orders but while doing so, respondent No. 4 be directed not to participate as a Member of the Consideration Committee.*
>
> *4. It appears that there is some dispute between petitioner and respondent No. 4 and the apprehension of the petitioner is that respondent No. 4 may try to influence the other members, particularly respondent No.2. Whether the apprehension is correct or otherwise, in order to have a fair chance and in the interest of justice, we deem it proper to dispose of this writ petition by directing respondent No. 2 to examine the case of the petitioner, without associating respondent No.4 in the process, within four weeks from today."*

11. As a consequence, the case of the petitioners was again considered in the 242nd meeting of respondent No.2 held between 1st to 3rd September, 2015, wherein also recognition was not granted to the institution for running the course in question, against which, the petitioners preferred an appeal to the Appellate Authority. The petitioners also preferred writ petition, being CWP No.3945 of 2015, before this Court, which was disposed of vide order dated 17th September, 2015, with a command to the Appellate Authority to decide the appeal within a period of six weeks. When the appeal was not decided, a letter was written to the Member Secretary of respondent No.1 for listing the appeal of the petitioners, but, when no action was taken, the petitioners filed CWP No.4283 of 2015, which was disposed of vide order dated 30th November, 2015, with the following directions:

> *"Learned counsel for the parties stated at the Bar that during the pendency of the writ petition, appeal was heard, the matter has been remanded and the lis is pending before respondent No.2. Their statement is taken on record.*
>
> *2. In the given circumstances, we deem it proper to dispose of this writ petition with a direction to respondent No.2 to decide the matter after hearing the parties within three weeks and report compliance before the Registrar (Judicial). The writ petitioners are at liberty to seek appropriate remedy at appropriate stage."*

12. Consequent thereto, the case of the petitioners was taken up by respondent No.2 in its 246th meeting held on 9th to 12th December, 2015 and stood rejected on the earlier grounds. It has been averred that during the decision making process, respondent No.4 was also associated.

13. The petitioners specifically alleged that respondent No.2 discriminated the petitioners viz. a viz. KLB DAV College of Girls, Palampur, District Kangra and Kshatriya College of Education, Indora, District Kangra, for which institutions, respondent No.2 has allowed the inclusion of existing B.Ed. faculty for teaching the students of the course in question.

14. In the above backdrop, the petitioners have filed this writ petition after long procedural hassles and fighting several rounds of litigation. The main ground of attack projected by the petitioners is that, despite specific directions passed by this Court vide judgment dated 6th August, 2015, in CWP No.3279 of 2015, respondent No.2 associated respondent No.4 in the decision making process.

15. Another ground urged by the petitioners is that respondent No.1, while remanding the case of the petitioners to respondent No.2, vide order dated 16th November, 2015, (Annexure P-29), has clearly observed that the petitioners have taken steps to remove

deficiency. It is apt to reproduce the operative paragraph of order, dated 16th November, 2015, hereunder:

> *"**AND WHEREAS** Appeal Committee noted that the Letter of Intent under Section 8(13) was issued to institution on 24.04.2015. The appellant institution furnished to N.R.C. on 30/5/2015, a revised list of faculty approved by the duly constituted selection Committee of the Himachal Pradesh Board of Scholl Education, Dharmshala. There is valid evidence that the appellant institution had taken steps to remove deficiency in the earlier select list. Committee also noted that the appellant institution vide its letter dated 22.06.2015 addressed to R.D., N.R.C. had furnished a further revised list of faculty approved by the Himachal Pradesh Board of School Education on 17.05.2015 in which names of faculty which were erstwhile noticed to be working as B.Ed. faculty were replaced by new faculty exclusively selected for the D.EI.Ed. course. Appeal Committee noted that the appellant institution as well as N.R.C. got entangled in leveling unnecessary allegations and counter allegation. The crux of the case is that the appellant institution was found fit for conducting D.EI.Ed. course subject to fulfillment of certain conditions and the institution has finally completed the formalities under intimation to the N.R.C. The refusal order dated 09.07.2015 is not justified and hence the matter deserved to be remanded to N.R.C. for taking note of the revised list of faculty and, if need be, after getting the overwriting (erasing) verified through the issuing authority. The N.R.C. may thereafter take further action as per the Regulation."*

16. Thus, from the above, it is clear that the petitioners, on one hand, were denied recognition on the ground that the deficiencies were not removed, and on the other hand, the Appellate Authority has categorically recorded that the petitioners have made efforts for removing the deficiencies.

17. The impugned order does not stand before the canons of law for yet another reason that the impugned order has been passed in breach of the orders passed by this Court (referred to above) for the reasons that respondent No.4 was associated in the decision making process, which factum is writ large from a perusal of the decision taken by respondent No.2 in its 246th meeting held between 9th to 12th December, 2015, Annexure P-33, wherein the names of all the Members have been mentioned and Prof. Y.K. Sharma (Retd.) (respondent No.4) figured at Sl.No.4, who has participated in the impugned decision making process, which, apparently, is contempt of the court and in breach of the orders passed by this Court.

18. The facts of the case also show that the petitioners, for the first time, applied to respondent No.2 for permission to run the course in question in the year 2008. However, the said permission was denied to the petitioners by respondent No.2 on one pretext or the other. As and when the case of the petitioners was rejected by respondent No.2, the petitioners immediately approached the Appellate Authority prescribed under the statue. The petitioners also approached this Court by way of filing writ petitions on different occasions. The Appellate Authority on many occasions remanded the matter to respondent No.2 to take the decision afresh, but respondent No.2, for the reasons best known to it, time and again, pointed out one deficiency after another. The motive of respondent No.2 can well be evaluated from the fact that once the recognition granted in favour of the petitioners to run B.Ed. College was also snatched, which order was set aside by the Appellate Authority. The Appellate Authority, in its order, dated 16th November, 2015, (Annexure P-29), has categorically recorded that the petitioners have finally completed the formalities under intimation to the NRC.

19. In view of the above discussion, Annexure P-33 is quashed qua the petitioners and the respondents are directed to pass orders afresh, within a period of three months, in view of the orders passed by this Court from time to time, read with the decision made by the Member Secretary, National Council for Teachers Education on 16th November, 2015, (Annexure P-29).

20. Keeping in view the decision of the Madras High Court in **Writ Appeal No.884 of 2005 titled Government of Tamil Nadu and another vs. Sri Nandha Educational Trust**, read with discussion made hereinabove, the respondents are directed to consider the case of the petitioners for allowing them to participate in the counseling process for the course in question for the academic year 2015-17 and admit the students.

21. The writ petition stands disposed of accordingly.

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

Aiyesha daughter of Shri Anil Khan ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 260 of 2016
Order Reserved on 17.03.2016
Date of Order 23rd March 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 306 read with Section 34 IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete- petitioner is woman and has special right of bail even in heinous offence- accused was presumed to be innocent till convicted by competent Court of law- bail granted. (Para- 6 to 10)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Mt. Choki vs. State, AIR 1957 Rajasthan 10

For the Petitioner: Mr. Sunil Chaudhary, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 162 of 2015 dated 26.9.2015 registered under Sections 498-A, 306 read with Section 34 IPC at P.S. Barmana District Bilaspur (H.P.)

2. It is pleaded that deceased Nahid alias Neha aged twenty six years was married with co-accused Ishan Khan according to Muslim customs on 24.2.2015 and it was an arranged marriage and after their marriage both Ishan Khan and Nahid alias Neha lived happily as husband and wife. It is pleaded that deceased was working in Animal dispensary department. It is pleaded that on 26.9.2015 one Ishan Akhtar brother of deceased on the basis of suicide note of deceased filed FIR in P.S. Barmana District Bilaspur. It is pleaded that petitioner is innocent and petitioner has not committed any offence and further pleaded that petitioner will comply any condition imposed by Court and will appear before the Court whenever and wherever directed to do so. It is pleaded that petitioner will join the investigation as and when called by Investigating Agency. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report deceased has written a suicide note. There is recital in police report that deceased died due to asphyxia as a result of drowning. As per police report there is recital in suicide note that accused persons used to harass the deceased and also used to beat the deceased and also used to demand dowry from deceased. There is recital in suicide note that deceased had committed suicide due to cruelty committed by accused persons upon deceased. There is recital in police report that husband of deceased intended to marry with Isha Sharma but due to difference of religion between Isha Sharma and Ishan Khan co-accused Isha Sharma refused to marry with co-accused Ishan Khan who is husband of deceased. There is recital in police report that husband of deceased namely Ishan Khan and Isha Sharma used to talk with each other by way of telephone. There is recital in police report that co-accused Ishan Khan husband of deceased used to pressure deceased for divorce. There is recital in police report that police took into possession two bags, suicide note, post mortem report and also recorded statements of witnesses. There is recital in police report that all accused persons are in judicial custody. There is also recital in police report that as per chemical analyst report SFSL Junga suicide note was written by deceased in her own handwriting. There is recital in police report that investigation is completed and challan stood filed in competent Court of law on 17.12.2015. There is recital in police report that in case petitioner is released on bail she will threat the prosecution witnesses and on this ground bail application be dismissed.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by woman petitioner is liable to be accepted as per special provision of bail for women and minors under the age of 16 years relating to heinous criminal offence punishable with death or imprisonment of life?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of petitioner that investigation is completed and petitioner is a woman and woman has special right of bail even in heinous offence punishable with death or imprisonment for life under proviso of Section 437 of Code of Criminal Procedure 1973 and on this ground bail application filed by woman co-accused be allowed is accepted for the reasons hereinafter mentioned.

7. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v)

Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702 titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. Court is of the opinion that there is special provision of bail to women and minors under the age of 16 years even in heinous offence punishable with death or imprisonment for life as per proviso of Section 437 of Code of Criminal Procedure 1973. In present case investigation is completed and final investigation report under Section 173 of Cr.P.C. is filed in competent Court of law and petitioner is in judicial custody. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. Court is of the opinion that in view of special provision of bail to women even in heinous criminal offence punishable with death or imprisonment for life it is expedient in the ends of justice to release the petitioner on bail. Court is of the opinion that if petitioner is released on bail at this stage then interest of State and general public will not be adversely affected. It was held in case reported in ***AIR 1957 Rajasthan 10 titled Mt. Choki vs. State*** that special treatment of women and children in bail matter is not inconsistant with Article 15 of Constitution of India.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will threat the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner. Court is also of the opinion that if petitioner will flout the terms and conditions of bail order then non-petitioner will be at liberty to file application for cancellation of bail as provided under Section 439 (2) of Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

10. In view of my findings on point No.1 bail application filed by petitioner under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That petitioner will not leave India without the prior permission of the Court. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of. All pending application(s) if any also disposed of.

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

Budhi Singh S/o Sh. Prem Singh ....Petitioner

Versus

Smt. Meena Devi W/o Budhi Singh & another ....Non-Petitioners

Cr.MMO No. 280 of 2015
Order Reserved on 16.3.2016
Date of Order 23.3.2016

Code of Criminal Procedure, 1973- Section 125- Petitioner filed a petition seeking maintenance pleading that she was tortured by her husband and family members- her husband had filed a divorce petition against her pleading that her daughter is not the daughter of her husband which amounts to cruelty- husband pleaded that a false case was filed by the wife against him- wife has deserted him and is not entitled for maintenance allowance- trial Court granted the maintenance allowance- a revision was preferred and the amount was enhanced by the Court of Sessions- it was contended that husband is getting a pension of Rs.7,225/- and is not able to pay maintenance of Rs.4,000/-- held, that while fixing maintenance, capacity of husband to earn and potentiality for earning are also to be given due weightage apart from his income - age of the husband is 36 years and he has potentiality of earning - Rs.4,000/- awarded to the petitioners cannot be said to be excessive- husband is under legal obligation to maintain his wife - object of Section 125 is to prevent vagrancy and destitution of women and minor children- husband has refused to keep his wife and minor child in his house- therefore, maintenance amount granted by the Courts cannot be faulted- petition dismissed. (Para-11 to 15)

Cases referred:

Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & another, AIR 1999 SC page 3348

Rajathi vs. C. Ganesan, AIR 1999 SC page 2374

For the petitioner: Ms. Leena Gularia, Advocate.

For the Non-petitioners: Mr. Devender K. Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Section 482 Code of Criminal Procedure against order dated 8.5.2015 passed by learned Sessions Judge Mandi in Criminal Revision No. 16 of 2014 titled Meera Devi & another vs. Budhi Singh.

Brief facts of the case:

2. Meena Devi wife of Budhi Singh and Neelam Kumari minor daughter of Budhi Singh filed petition under Section 125 Code of Criminal Procedure for grant of maintenance allowance pleaded therein that Meena Devi is the legally wedded wife of Budhi Singh and their marriage was solemnized on 3.3.1999 as per Hindu rites and customs at village Alag and out of their wedlock one daughter namely Neelam Kumari born on 29.10.2000. It is pleaded that Budhi Singh and his family members tortured Meena Devi and case under Sections 498-A 506 and 323 IPC read with Section 34 of Indian Penal Code was registered in Police Station Sadar District Mandi H.P. It is further pleaded that Budhi Singh filed divorce petition against Meena Devi pleaded therein that Neelam Kumari is not

the daughter of Budhi Singh. It is further pleaded that false allegation of adultery amounts to mental cruelty. It is further pleaded that after solemnization of marriage by Budhi Singh with Meena Devi, Budhi Singh also solemnized second marriage with Smt. Radha Devi D/o Sh. Jageshwar resident of Village Nahlog P.O. Baryara Sub Tehsil Kotli District Mandi H.P. and she has given birth to one daughter. It is further pleaded that Meena Devi is residing in old dilapidated house. It is further pleaded that Budhi Singh retired from military service. It is further pleaded that Meena Devi has no source of income to maintain herself as well as her minor daughter Neelam Kumari. It is further pleaded that Neelam Kumari is the student of 8th Class. It is further pleaded that Budhi Singh is getting pension to the tune of Rs. 20,000/- (Twenty thousand) per month. Maintenance allowance to the tune of Rs. 5000/- (Five thousand) per month sought to each of the petitioners.

3. Per contra response filed on behalf of Budhi Singh pleaded therein that a false case was filed under Sections 498-A, 506, 323 read with Section 34 Indian Penal Code. It is further pleaded that Meena Devi has deserted Budhi Singh since the year 2000 and she is not entitled for maintenance allowance. It is admitted that Budhi Singh retired from military service. It is also admitted that Neelam Kumari is student of 8th Class. It is denied that Budhi Singh is getting pension to the tune of Rs. 20,000/- (Twenty thousand) per month. It is further pleaded that Budhi Singh is getting pension to the tune of Rs. 7,225/- (Seven thousand two hundred and twenty five) per month. It is denied that Budhi Singh has solemnized second marriage with Smt. Radha Devi daughter of Jageshwar resident of Nahlog P.O. Baryara Sub Tehsil Kotli District Mandi H.P. Prayer for dismissal of maintenance petition sought.

4. Learned trial Court granted maintenance allowance to the tune of Rs. 1000/- (One thousand) per month to Meena Devi and learned trial Court granted maintenance allowance to the tune of Rs. 1500/- (One thousand five hundred) per month to minor Neelam Kumari from the date of order i.e. w.e.f. 25.6.2014.

5. Feeling aggrieved against the order of learned trial Court Meena Devi and Neelam Kumari filed revision petition before the learned Sessions Judge Mandi District Mandi H.P. and learned Sessions Judge vide order dated 8.5.2015 enhanced the maintenance allowance to the tune of Rs. 15,00/- (One thousand and five hundred) per month to petitioner No.1 Meena Devi and learned Sessions Judge enhanced maintenance allowance to the tune of Rs. 25,00/- (Two thousand and five hundred) per month to co-petitioner No.2 Neelam Kumari minor student of Class VIII.

6. Feeling aggrieved against the order dated 8.5.2015 passed by learned Sessions Judge Budhi Singh filed petition under Section 482 Code of Criminal Procedure.

7. Court heard learned Advocate appearing on behalf of the petitioner and learned Advocate appearing on behalf of non-petitioners and also perused the entire record carefully.

8. Following points arise for determination in this bail application:-

Point No. 1

Whether petition filed under Section 482 Code of Criminal Procedure by Budhi Singh S/o Prem Singh is liable to be accepted as mentioned in the memorandum of grounds of petition?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

9. AW-1 Meena Devi has stated that she was married with Budhi Singh on 3.3.1999 according to Hindu rites and customs. She has stated that on 23.10.2000 minor co-petitioner No.2 namely Neelam Kumari was born. She has stated that Budhi Singh and his family members demanded dowry and harassed her. She has stated that she filed criminal case under Section 498-A. She has stated that after filing of criminal case under Section 498-A Budhi Singh filed divorce petition against her and alleged that Neelam Kumari minor is not his daughter. She has stated that divorce petition filed by Budhi Singh was dismissed. She has stated that Budhi Singh has solemnized second marriage remarried with one Smt. Radha Devi and one daughter has been born from subsequent marriage. She has further stated that Budhi Singh has given her dilapidated room at the distance of half k.m. and facilities of latrine, bathroom and light are not available. She has further stated that Budhi Singh has served in the Army. She has further stated that Budhi Singh has received an amount to the tune of Rs. 20,00,000/- (Twenty lacs) when he retired from Army service and she has further stated that Budhi Singh is earning ten to fifteen thousand per month in addition to pension. She has further stated that she and her minor daughter have no source of income and cannot maintain themselves. She has stated that maintenance allowance to the tune of Rs. 5000/- (Five thousand) per month to each petitioners be granted. She has denied the suggestion that she did not serve Budhi Singh at any point of time. She has denied suggestion that she is working in NAREGA scheme in village. She has denied suggestion that Budhi Singh is getting Rs. 7225/- (Seven thousand two hundred and twenty five) as pension. She has denied suggestion that Budhi Singh is not performing any additional work. She has denied suggestion that she is performing work of stitching.

10. AW-2 Gauri Prasad has stated that Meena Devi is his daughter and Budhi Singh is his son-in-law. He has stated that Neelam Kumari co-petitioner No.2 is their daughter. He has stated that Budhi Singh used to beat Meena Devi in her matrimonial house. He has stated that Meena Devi has no source of income to maintain herself and her minor daughter. He has stated that Budhi Singh has retired from army and also performing additional work. He has stated that Neelam Kumari is studying in private school. He has denied suggestion that Budhi Singh is getting pension to the tune of Rs. 7200/- (Seven thousand and two hundred) per month. He has admitted that father and mother of Budhi Singh are residing along with Budhi Singh.

11. RW-1 Budhi Singh has stated that Meena Devi is his wife and Neelam Kumari is his daughter. He has stated that he retired in the month of October 2012. He has stated that age of his mother and father are 60 & 62 years and they remain sick and they are dependent upon him. He has stated that his father is patient of cancer and he is treating his father at place Chandigarh and Delhi. He has stated that he is getting pension to the tune of Rs. 7225/- (Seven thousand two hundred and twenty five) and tendered into evidence document Ext. RW-1/A. He has stated that he has been acquitted in criminal case filed against him under Section 498-A Code of Criminal Procedure. He has stated that his age is 36 years and he has obtained premature retirement. He has stated that he has served in army for 15 years. He has denied suggestion that he is getting pension to the tune of Rs. 10,000/- (Ten thousand). He has admitted that minor Neelam Kumari is student of 9th Class. He has stated that he is not ready to keep Meena Devi and Neelam Kumari along with him. He has denied suggestion that his father and mother are not in ailing condition.

12. Submission of learned Advocate appearing on behalf of petitioner Budhi Singh that petitioner is a retired person and getting pension to the tune of Rs. 7225/- (Seven thousand two hundred and twenty five) per month and has to maintain his old parents and

is not able to pay maintenance allowance to the tune of Rs. 4000/- (Four thousand) per month to Meena Devi wife and minor daughter Neelam Kumari and on this ground petition filed under Section 482 Code of Criminal Procedure be allowed is rejected being devoid of merit for the reasons hereinafter mentioned. It is well settled law that while fixing quantum of maintenance apart from income of husband his capacity to earn and potentialability for earning are also to be given due weightage. In the present case Budhi Singh has himself admitted that he is getting pension to the tune of Rs. 7225/- ((Seven thousand two hundred and twenty five)) per month. The age of Budhi Singh as of today is 36 years and he has potentialability of earning. It is held that maintenance allowance to the tune of Rs. 1500/- (One thousand and five hundred) to petitioner No.1 and Rs. 2500/- (Two thousand and five hundred) to minor daughter Neelam Kumari who is student of 9th Class granted by learned Sessions Judge is not excessive in nature.

13. Submission of learned Advocate appearing on behalf of petitioner Budhi Singh that it is not proved on record that petitioner has received Rs. 20,00,000/- (Twenty lacs) as retiral benefits and that it is not proved on record that Budhi Singh has solemnized second marriage with Radha Devi and on this ground petition filed under Section 482 Code of Criminal Procedure be allowed is rejected being devoid of merit for the reasons hereinafter mentioned. Court has carefully perused the testimony of Budhi Singh when he appeared in witness box. Budhi Singh has stated in positive manner that he would not keep Meena Devi and minor Neelam Kumari in his matrimonial house. In view of the fact that Budhi Singh has stated in a positive manner in his testimony that he would not keep Meena Devi wife and Neelam Kumari minor daughter in his matrimonial house it is held that learned Sessions Judge has rightly enhanced maintenance allowance in favour of Meena wife Devi and Neelam Kumari minor daughter of petitioner.

14. Submission of learned Advocate appearing on behalf of the petitioner that father of petitioner is patient of cancer and on this ground maintenance allowance granted by learned Sessions Judge be reduced is also rejected being devoid of merit for the reasons hereinafter mentioned. It is held that petitioner Budhi Singh is under legal obligation to maintain his legally wedded wife Meena Devi and also to maintain his minor daughter Neelam Kumari. It is proved on record that Neelam Kumari is student of 9th Class. It is held that object of Section 125 Code of Criminal Procedure is social justice to prevent vagrancy and destitution of women. It provides speedy remedy to deserted woman and minor children. ***See AIR 1999 SC page 3348 titled Dwarika Prasad Satpathy vs. Bidyut Prava Dixit & another.*** Meena Devi has specifically stated that Budhi Singh is residing with another woman namely Radha Devi daughter of Jageshwar resident of Nahlog P.O. Baryara Sub Tehsil Kotli District Mandi H.P. Budhi Singh did not adduce any positive rebuttal evidence in order to prove that Budhi Singh is not residing with Radha Devi. Budhi Singh did not examine Radha Devi in rebuttal. Fact that husband is living with another woman would entitle the wife to live separately and would amount to neglect and refusal to maintain. ***See AIR 1999 SC page 2374 titled Rajathi vs. C. Ganesan.*** There is huge hike in price index of necessary articles as of today.

15. In view of fact that Budhi Singh has refused to keep Meena Devi wife and minor daughter Neelam Kumari student of IX Class in his matrimonial house and in view of fact that Budhi Singh is able bodied person age thirty six years and in view of fact that Budhi Singh is drawing pension of Rs. 7225/- (Seven thousand two hundred twenty five) it is held that maintenance allowance granted by learned Sessions Judge is not excessive in nature. Point No.1 is answered in negative.

Point No. 2 (Final Order):

16. In view of findings upon point No.1 petition filed by Budhi Singh under Section 482 Code of Criminal Procedure is dismissed. Parties are left to bear their own costs. File of learned trial Court and learned Sessions Judge Mandi along with certified copy of order be sent back forthwith. Cr.MMO No. 280 of 2015 is disposed of. All pending application(s) if any also disposed of.

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

Chittra @ Najia wife of Shri Anil Khan ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 261 of 2016
Order Reserved on 17.03.2016
Date of Order 23rd March 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 306 read with Section 34 IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- investigation is complete- petitioner is woman and has special right of bail even in heinous offence- accused was presumed to be innocent till convicted by competent Court of law- bail granted. (Para- 6 to 10)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation, 2012 Cri. L.J. 702 Apex Court DB 702
Mt. Choki vs. State, AIR 1957 Rajasthan 10

For the Petitioner: Mr. Sunil Chaudhary, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 162 of 2015 dated 26.9.2015 registered under Sections 498-A, 306 read with Section 34 IPC at P.S. Barmana District Bilaspur (H.P.)

2. It is pleaded that deceased Nahid alias Neha aged twenty six years was married with co-accused Ishan Khan according to Muslim customs on 24.2.2015 and it was an arranged marriage and after their marriage both Ishan Khan and Nahid lived happily as husband and wife. It is pleaded that deceased was working in Animal dispensary department. It is pleaded that on 26.9.2015 one Ishan Akhtar brother of deceased on the

basis of suicide note of deceased filed FIR in P.S. Barmana District Bilaspur. It is pleaded that petitioner is innocent and petitioner has not committed any offence and further pleaded that petitioner will comply any condition imposed by Court and will appear before the Court whenever and wherever directed to do so. It is pleaded that petitioner will join the investigation as and when called by Investigating Agency. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report deceased has written a suicide note. There is recital in police report that deceased died due to asphyxia as a result of drowning. As per police report there is recital in suicide note that accused persons used to harass the deceased and also used to beat the deceased and also used to demand dowry from deceased. There is recital in suicide note that deceased had committed suicide due to cruelty committed by accused persons upon the deceased. There is recital in police report that husband of deceased intended to marry with Isha Sharma but due to difference of religion between Isha Sharma and Ishan Khan co-accused Isha Sharma refused to marry with co-accused Ishan Khan who is husband of deceased. There is recital in police report that husband of deceased namely Ishan Khan and Isha Sharma used to talk with each other by way of telephone. There is recital in police report that co-accused Ishan Khan husband of deceased used to pressure deceased for divorce. There is recital in police report that police took into possession two bags, suicide note, post mortem report and also recorded statements of witnesses. There is recital in police report that all accused persons are in judicial custody. There is also recital in police report that as per chemical analyst report SFSL Junga suicide note was written by deceased in her own handwriting. There is recital in police report that investigation is completed and challan stood filed in competent Court of law on 17.12.2015. There is recital in police report that in case petitioner is released on bail she will threat the prosecution witnesses and on this ground bail application be dismissed.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in this bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by woman petitioner is liable to be accepted as per special provision of bail for women and minors under the age of 16 years relating to heinous criminal offence punishable with death or imprisonment of life?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of petitioner that investigation is completed and petitioner is a woman and woman has special right of bail even in heinous offence punishable with death or imprisonment for life under proviso of Section 437 of Code of Criminal Procedure 1973 and on this ground bail application filed by woman co-accused be allowed is accepted for the reasons hereinafter mentioned.

7. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri. L.J. 702 Apex Court DB 702, titled Sanjay Chandra vs. Central Bureau of Investigation*** that object of bail is to secure the

appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period.

8. Court is of the opinion that there is special provision of bail to women and minors under the age of 16 years even in heinous offence punishable with death or imprisonment for life as per proviso of Section 437 of Code of Criminal Procedure 1973. In present case investigation is completed and final investigation report under Section 173 of Cr.P.C. is filed in competent Court of law and petitioner is in judicial custody. It is well settled law that accused is presumed to be innocent till convicted by competent Court of law. Court is of the opinion that in view of special provision of bail to women it is expedient in the ends of justice to release the petitioner on bail. Court is of the opinion that if petitioner is released on bail at this stage then interest of State and general public will not be adversely affected. It was held in case reported in ***AIR 1957 Rajasthan 10 titled Mt. Choki vs. State*** that special treatment of women and children in bail matter is not inconsistant with Article 15 of Constitution of India.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will threat the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to petitioner. Court is also of the opinion that if petitioner will flout the terms and conditions of bail order then non-petitioner will be at liberty to file application for cancellation of bail as provided under Section 439 (2) of Code of Criminal Procedure 1973. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order)

10. In view of my findings on point No.1 bail application filed by petitioner under Section 439 Cr.P.C. is allowed subject to furnishing personal bond to the tune of Rs. 1 lac (Rupees one lac only) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation of case whenever and wherever directed by Investigating Officer in accordance with law. (ii) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of trial of case. (iii) That petitioner will not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to the Court or to any police officer. (iv) That petitioner will not leave India without the prior permission of the Court. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 439 of Code of Criminal Procedure 1973. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of. All pending application(s) if any also disposed of.

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

RFA No. 42 of 2009 along with RFA No. 293 of 2009
Reserved on: 17.3.2016
Decided on: 23.3.2016

RFA No. 42 of 2009

Dr. Saif Ali Khan. ...Appellant.

Versus

State of H.P. and another. ...Respondents

RFA No. 293 of 2009

State of H.P. and another ...Appellants.

Versus

Dr. Saif Ali Khan. ...Respondent.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of Sanjauli-Dhalli bye pass road- Land Acquisition Collector assessed the compensation- aggrieved from the award of the collector a reference was sought- compensation was enhanced and was paid regardless of the nature and category of the land along with statutory benefits- aggrieved from the award , an appeal was preferred- reference Court has relied upon the award made with reference to a notification for the construction of Sanjauli-Dhalli bye pass road- reference Court had deducted 50% amount towards development charges- Reference Court had also enhanced the amount for structure but PW-3 stated that he had not visited the spot while preparing the report- since, land was acquired for the construction of the road, therefore, no development was to be made and classification of land is immaterial- Court had erred in deducting 50% amount towards development charges- appeal allowed and the award modified - market value of the land assessed @ 9,05,107/- per bigha along with statutory benefits- claimant held not entitled to increase in value of structure of the acquired building. (Para-19 to 30)

Cases referred:

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

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

The Special Land Acquisition Officer/Assistant Commissioner vs. Vyjanath (deceased by LRs), 2006 (1) AIR Kar R 691

Nelson Fernandes and others vs Special Land Acquisition Officer, South Goa and others, (2007) 9 SCC 447

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

Thakur Kuldeep Singh (Dead) through LRs and others versus Union of India and others, (2010) 3 SCC 794

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

Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392

For the Appellants : Mr. B.S Attri, Advocate for appellant in RFA No. 42/2009 and for respondent in RFA No. 293 of 2009.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G. for respondents in RFA No. 42/2009 and for appellants in RFA No. 293/2009.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. RFA No. 42 of 2009 has been instituted against the land reference No.40-S/4 of 08/06 rendered by the learned District Judge (F), Shimla on 23.12.2008 whereby the

reference court has awarded compensation of Rs. 5,32,416/- per bigha regardless the nature and category of the land alongwith statutory benefits. The claimants have been paid a sum of Rs.5,40,000/- for the structure standing on the acquired land. The State has also filed an appeal against the land reference No.40-S/4 of 08/06 dated 23.12.2008 for setting aside the award. According to the grounds taken in the appeal, the award made by the Land Acquisition Collector was in accordance with law.

3. The Government of Himachal Pradesh issued a notification under section 4 of the Land Acquisition Act, 1894 (hereafter referred to as the "Act" for brevity sake) to acquire the land of the claimants on 18.11.2003. The report under section 5-A(2) of the Act was sent to the Government on 7.4.2004. The notification under section 6 of the Act was issued on 17.6.2004. The notification under section 9 (1) of the Act was issued to the claimants and they were directed to appear before the Land Acquisition Collector on 17.8.2004 at 11.00 A.M. The Land Acquisition Collector assessed the value of the claimants' land @ Rs. 80,000/- per bigha. The claimants filed a petition under section 18 of the Act seeking enhancement of compensation of their land before the learned District Judge. The reference petition was allowed by the District Judge on 23.12.2008 and he awarded compensation of the acquired land @ Rs. 5,32,416/- per bigha regardless the nature and category of the land and the structure on it @ Rs. 5,40,000/-.

4. Mr. B.S. Attri, learned counsel for the appellant, has vehemently argued that his clients were entitled to compensation @ Rs. 10,64,832/- alongwith statutory benefits. He has also argued that adequate compensation has not been paid for the structure.

5. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the learned Land Acquisition Collector has rightly assessed the market value of the claimants' land @ Rs. 80,000/- per bigha.

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

7. The notification under section 4 of the Act was issued on 18.11.2004. PW-1 Gita Ram has proved Ex.P-1, i.e. record of consumer price index.

8. PW-2 Gauri Shankar has produced sale deed No.15 dated 15.1.2003 and sale deed No. 270 dated 26.6.2003 vide Ex.PW-2/A and Ex.PW-2/B.

9. PW-3 B.C. Sharma deposed that he has inspected the house of the claimant on 20.1.2005. He has proved the valuation report Ex.PW-3/A. He has noticed three sets comprising of two rooms and one room was partially constructed. The rent of one set was Rs. 3,000/-. While taking valuation, he has relied upon PWD Schedule of Rates (plinth area rate), i.e. Ex.PW-3/B. In his cross-examination, he has deposed that neither he has associated PWD official nor the official of revenue agency. He has not visited the spot while preparing the report. He has also not seen the vouchers of the construction material of the claimants.

10. PW-5 Roop Chand has proved agreement Ex.PW-5/A and receipt Ex.PW-5/B.

11. PW-6 Uma Shankar, Junior Assistant, has placed on record copy of award dated 30.7.2003 in RFA No. 171/95 alongwith RFA No. 173/1995 and RFA No. 70 of 1996.

12. PW-7 Saif Ali Khan deposed that his land was acquired for the construction of Sanjauli-Dhalli by pass road. He has purchased the land vide Ex.PW-5/A. His house was also acquired. He has been paid compensation of Rs. 4,07,370/-. It was inadequate. He has constructed three sets comprising of kitchen, bathroom and septic tank. He should

be paid the compensation on the basis of Ex.PW-3/A. The land was situated near Sanjauli. He has been displaced. In his cross-examination, he has deposed that he has constructed the house for his own purpose. His house was situated at a distance of 5-7 minutes walk from Sanjauli.

13. RW-1 Saran Dass has deposed that the land of Chilondi village is banjar. By road Chilondi is at a distance of one and half kilometer from Sanjauli. In his cross-examination, he has admitted that Mahal Sanjauli and Chilondi joins each other. It takes 5-10 minutes to reach Chilondi from Sanjauli Chowk. He has also deposed that the office of the LIC, Middle School and telephone exchange are there in village Chilondi.

14. RW-3 O.P. Bhardwaj deposed that the acquired land was Ghasani. There was no development on the acquired land. The people have developed the same after the construction of road. In his cross-examination, he has admitted that he has not conducted any survey qua the nature of the land. He has never visited the spot.

15. RW-4 Mohinder Singh Thakur deposed that assessment of house of the claimant was prepared by the Executive Engineer. He has proved the original drawing Ex.RW-4/A, Ex.RW-4/B, Ex.RW-4/C and Ex.RW-4/D. In his cross-examination, he has admitted that he has not visited the spot and he has never prepared these documents.

16. RW-5 Vijay Kumar Kashyap deposed that the house of claimant was situated in the acquired land. The valuation of the house is Ex.RW-4/A / Ex.PW-4/C. He has visited the spot. In his cross-examination, he has deposed that the acquired land was at a distance of 15 minutes walk from Sanjauli. He did not know how many sets the claimants had constructed.

17. RW-6 M.S. Jaswal (wrongly mentioned as RW-5) deposed that he has carried out the assessment of existing house of claimant on Dhalli by pass road. He has prepared the report Ex.RW-4/C and has also prepared building plan Ex.RW-4/D. In his cross-examination, he has deposed that 6 complete rooms were found in the ground floor. However, he could not tell the area of the rooms without calculating. There were 20 columns. He had prepared rough notes. The building was at a distance of about 500 meters from the cremation ground.

18. RW-7 Bhajan Dass (wrongly mentioned as RW-6) has proved average price vide Ex.RW-6/A.

19. The reference court has relied upon Ex.PX-1. This award is with reference to the same notification under section 4 of the Act. It pertains to the construction of Sanjauli-Dhalli by pass road. According to Ex.PX-1, the price of the acquired land was assessed at Rs. 5,32,416/- per bigha. The reference court has initially assessed the value @ Rs. 10,64,832/- per bigha, but has made 50% deductions for development charges. Since the land has been acquired for the purpose of construction of road, no developments were to be made. It is only in those cases where the land is acquired for the purpose of housing colony and allied matters. Thus, the reference court has erred in law by making 50% deductions towards development charges. Since the land acquired was for the construction of road, the classification of land was irrelevant. However, considering the smallness of the plot sold vide sale deed Ex.PW-2/A, the deductions of 15% is permissible and, as such, the value of per bigha land would be Rs. 10,64,832-15%, i.e. Rs.10,64,832- Rs.1,59,725 = Rs. 9,05,107/-.

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

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

Their Lordships have held as under:

[3] It is no doubt true that Courts adopt Comparable Sales Method of valuation of land while fixing the market value of the acquired land. While fixing the market value of the acquired land, Comparable Sales Method of valuation is preferred than other methods of valution of land such as Capitalisation of Net Income Method or Expert Opinion Method. Comparable Sales Method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for the acquired land if it has been sold in open market at the time of issue of notification under Section 4 of the Act. However, Comparable Sales Method of valuation of land for fixing the market value of the acquired land is not always conclusive. There are certain factors which are required to be fulfilled and on fulfillment of those factors the compensation can be awarded, according to the value of the land reflected in the sales. The factors laid down inter alia are : (1) the sale must be a genuine transaction, that (2) the sale-deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, that (3) the land covered by the sale must be in the vicinity of the acquired land, that (4) the land covered by the sales must be similar to the acquired land and that (5) the size of plot of the land covered by the sales be comparable to the land acquired. If all these factors are satisfied, then there is no reason why the sale vlaue of the land covered by the sales be not given for the acquired land. However, if there is a dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to Court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land. In the present case, what we find is that the first two factors are satisfied. The sale transaction covered by the sale Ex. A-4 is genuine, inasmuch as sale was executed in proximity to the date of notification under Section 4 of the Act. However, there is a difference in the similarity in the land acquired and the land covered by Ex.A-4. The land covered by Ex. A-4 is situated at Kottayam and Ernakulam, PWD Road, whereas the acquired land is situated at a distance of 3 furlong from the main road. There is no access to the acquired land and there exists only an internal mud

road which belonged to one of the claimants, whose land has also been acquired. Further, the land coverd by Ex.A-4 is a dry land and whereas the acquired land is a wet land. After acquisition, the acquired land has to be re-claimed and a lot of amount would be spent for filling the land. Moreover, the land covered by Ex.A-4 relates to a small piece of land which do not reflect the true market value of the acquired land. If it is often seen that a sale for a smaller plot of land fetches more consideration than larger or bigger piece of land. For all these reasons, the High Court was fully justified in lowering the rate of compensation than what was the market value of the land covered by Ex.A-4.We, therefore, do not find any infirmity in the judgment of the High Court."

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

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

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

22. Learned Single Judge of Karnataka High Court in ***The Special Land Acquisition Officer/Assistant Commissioner*** vs. ***Vyjanath (deceased by LRs),*** 2006 (1) AIR Kar R 691 has held that no deduction towards civic amenities is permissible. Deduction towards civic amenities is only in case where land is acquired for housing purpose.

23. Their Lordships of the Hon'ble Supreme Court in ***Nelson Fernandes and others*** vs ***Special Land Acquisition Officer, South Goa and others***, (2007) 9 SCC 447 have held that where the land acquired is for laying railway line, question of development of the land would not arise. Their Lordships have further held that the purpose for which land acquired is relevant for deciding whether deduction by way of development charges required or not. Their Lordships have held as under:

[25] Both the Special Land Acquisition Officer, the District Judge and of the High Court have failed to notice that the purpose of acquisition is for Railways and that the purpose is a relevant factor to be taken into consideration for fixing the compensation. In this context, we may usefully refer the judgment of this Court of Viluben Jhalejar Contractor (D) by Lrs. Vs. State of Gujarat reported in JT 2005 (4) SC 282. This Court held that the purpose for which the land is acquired must also be taken into consideration in fixing the market value and the deduction of development charges. In the above case, the lands were acquired because they were submerged under water of a dam. Owners claimed compensation of Rs. 40/- per sq. ft. LAO awarded compensation ranging from Rs. 35/- to Rs. 60/- per sq. mtr. Reference Court fixed the market

value of the land at Rs. 200/- per sq. mtr. and after deduction of development charges, determined the compensation @ Rs. 134/- per sq. mtr. In arriving at the compensation, Reference court placed reliance on the comparative sale of a piece of land measuring 46.30 sq. metre @ Rs. 270 per sq. mtr. On appeal, the High Court awarded compensation of Rs. 180/- per sq. mtr. in respect of large plots and Rs. 200/- per sq. mtr. in respect of smaller plots. On further appeal, this Court held that since the lands were acquired for being submerged in water of dam and had no potential value and the sale instance relied was a small plot measuring 46.30 sq. mtr. whereas the acquisition in the present case was in respect of large area, interest of justice would be subserved by awarding compensation of Rs. 160/- per sq. mtr. in respect of larger plots and Rs.175/- per sq. mtr. for smaller plots. In Basavva (Smt.) and Ors. Vs. Spl. LAO and Ors. reported in JT 1996 5 SC 580, this Court held that the purpose by which acquisition is made is also a relevant factor for determining the market value.

30. We are not, however, oblivious of the fact that normally 1/3 deduction of further amount of compensation has been directed in some cases. However, the purpose for which the land acquired must also be taken into consideration. In the instant case, the land was acquired for the construction of new BG line for the Konkan Railways. This Court in Hasanali Khanbhai & Sons & Ors. Vs. State of Gujarat, 1995 2 SCC 422 and L.A.O. vs. Nookala Rajamallu, 2003 (10) Scale 307 had noticed that where lands are acquired for specific purposes deduction by way of development charges is permissible. In the instant case, acquisition is for laying a railway line. Therefore, the question of development thereof would not arise. Therefore, the order passed by the High Court is liable to be set aside and in view of the availability of basic civic amenities such as school, bank, police station, water supply, electricity, high way, transport, post, petrol pump, industry, telecommunication and other businesses, the claim of compensation should reasonably be fixed @ Rs. 250/- per sq. mtr. with the deduction of 20%. The appellant shall be entitled to all other statutory benefits such as solatium, interest etc. etc. The appellants also will be entitled to compensation for the trees standing on the said land in a sum of Rs. 59,192 as fixed. I.A. No. 1 of 2006 for substitution is ordered as prayed for.

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

[4] In order to determine the compensation which the tenure- holders are entitled to get for their land which has been acquired, the main question to be considered is what is the market value of the land. Section 23(1) of the Act lays down what the Court has to take into consideration while Section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired. The expression 'market value' has been subject-matter of consideration by this Court in several cases. The market value is the

price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arms length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz., a price outcome of hypothetical sale expressed in terms of probabilities. See Thakur Kanta Prasad v. State of Bihar, AIR 1976 SC 2219; Prithvi Raj Taneja v. State of M. P., AIR 1977 SC 1560; Administrator General of West Bengal v. Collector, Varanasi, AIR 1988 SC 943 and Periyar v. State of Kerala, AIR 1990 SC 2192.

[5] For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. See Collector Raigarh v. Hari Singh Thakur, AIR 1979 SC 472, Raghubans Narain v. State of U.P., AIR 1969 SC 465 and Administrator General, W. B. v. Collector Varanasi, AIR 1988 SC 943. It has been held in Kaushalya Devi v. L.A.O. Aurangabad, AIR 1984 SC 892 and Suresh Kumar v. T.I. Trust, AIR 1980 SC 1222 that failing to consider potential value of the acquired land is an error of principle.

25. Their Lordships of the Hon'ble Supreme Court in ***Thakur Kuldeep Singh (Dead) through LRs and others*** versus ***Union of India and others***, (2010) 3 SCC 794 have held that it is the duty of the Land Acquisition Collector and the court to take into consideration the nature of the land, its suitability, nature of the use for which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally relevant to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Collector as well as the court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. Their Lordships have held as under:

"11. Sections 23 and 24 of the Act speak about the matters to be considered and to be neglected in determining compensation. Let us consider whether the appellants are entitled to higher compensation than that of the one fixed by the High Court or Union of India is justified in seeking reduction of the market value/compensation for the acquired land.

13. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification under Section 4(1) of the Act. In other words, the Judge who sits in the armchair of the willing buyer and seek an answer to the question whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable."

26. Their Lordships of the Hon'ble Supreme in ***Trishala Jain and another*** versus ***State of Uttaranchal and another***, (2011) 6 SCC 47 have held that the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their Lordships have held as under:

44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits."

27. Their Lordships of the Hon'ble Supreme Court in ***Himmat Singh and others*** versus ***State of Madhya Pradesh and another***, (2013) 16 SCC 392, in a case where the reference court has made three tier deductions viz. (i) 25% for leaving out portions of acquired land for purpose of laying roads, drains etc., (ii) 25% towards expenses for development work, and (iii) 50% towards smallness of plots sold, which was approved by High Court, have held that such approach was clearly erroneous since respondent State had not even suggested that such development work was undertaken for purpose of laying railway line. Hence, deductions made under first two heads were unsustainable.

28. In the present case, there is neither any evidence nor any suggestion that such development was undertaken while constructing Sanjauli-Dhalli by pass road.

29. The building of the claimant was also acquired. The reference court has awarded a sum of Rs. 5,40,000/- for the structure. PW-3 B.C Sharma has admitted that he has not visited the spot while preparing the report. He has also not associated the officials from the revenue department. The value of the house of claimant has been assessed as per the statements of RW-4 Mohinder Singh Thakur and RW-5 Vijay Kumar Kashyap, though RW-5 Vijay Kumar Kashyap has deposed that he has taken the HPPWD Schedule rate of 1999 for assessment. According to him, there was no increase in the price index. According to this index there was 33% increase in the price index from 1999 to 2003 and has increased the market value of the acquired structure by 33% and it came to Rs. 5,40,000/-. Thus, the market value of the structure is strictly in accordance with law.

30. Accordingly, In view of the analysis and discussion made hereinabove, RFA No. 42/2009 is partly allowed and the award dated 23.12.2008 is modified to the extent that the market value of the claimant's land is assessed at Rs. 9,05,107/- per bigha alongwith statutory benefits. The claimant is not entitled to the increase of the structure of the acquired building. RFA No.293 of 2009 is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

RFA No. 44 of 2009 alongwith RFA No. 181 of 2009
Reserved on: 17.3.2016
Decided on: 23.3.2016

RFA No. 44 of 2009

Geeta Devi and others. ...Appellants.

Versus

State of H.P. and another. ...Respondents

RFA No. 181 of 2009

State of H.P. and another ...Appellants.

Versus

Geeta Devi and others. ...Respondents.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of the Sanjauli-Dhalli bye pass road-compensation was awarded- aggrieved from the award, a reference was made- Reference Court enhanced the compensation – aggrieved from the award, appeal was preferred- claimants have relied upon the sale deeds- State relied upon one year average value of Village Lambidhar which is situated at a distance from the acquired land- no sale deed was proved by the State- sale deed filed by the claimant was executed within one year of notification - 50% deduction was made towards development charges- land was not required to be developed for construction of the road- development is required when the land is acquired for the construction of housing colony and allied matters- since, land was acquired for the construction of the road, the classification of land was irrelevant- appeal allowed and award modified to the extent that claimants are entitled to Rs. 9,05,107/- per bigha along with statutory benefits. (Para- 14 to 23)

Cases referred:

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

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

The Special Land Acquisition Officer/Assistant Commissioner vs. Vyjanath (deceased by LRs), 2006 (1) AIR Kar R 691
Nelson Fernandes and others vs Special Land Acquisition Officer, South Goa and others, (2007) 9 SCC 447
Atma Singh (Dead) through LRs and others vs. State of Haryana and another, (2008) 2 SCC 568
Thakur Kuldeep Singh (Dead) through LRs and others versus Union of India and others, (2010) 3 SCC 794
Trishala Jain and another versus State of Uttaranchal and another, (2011) 6 SCC 47
Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392

For the Appellants : Mr. Rahul, Advocate vice Mr. Ramesh Sharma, Advocate for appellants in RFA No.44/2009 and for respondents in RFA No.181/2009.

For the Respondents: Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G. for respondents in RFA No.44/2009 and for appellants in RFA No. 181/2009.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. RFA No. 44 of 2009 has been instituted against the land reference No.19-S/4 of 2005 rendered by the learned District Judge, Shimla on 6.12.2008 whereby the appellants were held entitled to enhanced amount of compensation at the rate of Rs. 5,32,416/- per bigha (752 square meters) alongwith all the statutory benefits. The present appeal has been filed for enhancement of amount of compensation. The State has also come in appeal against the land reference No.19-S/4 of 2005 dated 6.12.2008 for setting aside the award.

3. The Government of Himachal Pradesh issued a notification under section 4 of the Land Acquisition Act, 1894 (hereafter referred to as the "Act" for brevity sake) to acquire the land of the claimants on 18.11.2003. The report under section 5-A(2) of the Act was sent to the Government on 7.4.2004. The notification under section 6 of the Act was issued on 17.6.2004. The notification under section 9 (1) of the Act was issued to the claimants and they were directed to appear before the Land Acquisition Collector on 17.8.2004 at 11.00 A.M. The Land Acquisition Collector assessed the value of the claimants' land @ Rs. 80,000/- per bigha. The claimants filed a petition under section 18 of the Act seeking enhancement of compensation of their land before the learned District Judge. The reference petition was allowed by the District Judge on 6.12.2008 and he assessed the market value of the land @ Rs. 5,32,416/- per bigha (752 square meters) alongwith statutory benefits.

4. Mr. Rahul, learned vice counsel for the appellants, has vehemently argued that his clients were entitled to compensation @ Rs. 10,64,832/- alongwith statutory benefits.

5. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the learned Land Acquisition Collector has rightly assessed the market value of the claimants' land @ Rs. 80,000/- per bigha.

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

7. The notification under section 4 of the Act was issued on 18.11.2004. PW-1 Geeta Devi has proved copy of award Ex.PW-1/A vide which the market value of the acquired land has been assessed @ Rs. 80,000/- per bigha in consequence of notification under section 4 of the Act dated 18.11.2003. She testified that the acquired land was in the form of an orchard having two walnut and three Khurmani plants. She also deposed that the land was in the shape of fields and being used as agricultural land from where claimants were getting an income of Rs. 8000-9000 per annum. The acquired land was situated at a distance of five minutes walk from Sanjauli Chowk by the side of path. The mettled road was in existence on which jeeps were being plied. The acquired land was near to Middle School and veterinary hospital. The land fell within the territorial jurisdiction of Municipal Corporation, Shimla. Street lights were also provided in the acquired land. The land was located between the revenue estate Sanjauli Chowk and Chalaunti. They were paying house tax to the Tax Collector. Thus, the market value was wrongly assessed by the Land Acquisition Collector. The market value of the land should have been assessed as per the prevailing market value of Sanjauli Chowk.

8. PW-2 Smt. Bindu Mehta deposed that she was the general power of attorney of her father. She sold the land under sale deed Ex.PW-2/A for consideration of Rs. 1,57,000/- on 15.1.2003 in favour of Parkash Chand resident of village Mandhol. This land situated near Gurdwara of Sanjauli Chowk. The land was situated at ten minutes walk towards Engineghar on the path from Sanjauli Chowk. The buildings were in existence where the land was sold.

9. According to sale deed Ex.PW-2/A, the land comprised in Khata Khatauni No. 297/344, Khasra Nos. 1037 and 1038 kitas 2 measuring 110.90 square meters situated at Mauja Up-Mahal Sanjauli Chowk, Tehsil and District Shimla was sold for consideration of Rs. 1,57,000/-. The claimants have placed on record sale deed Ex.PW-1/D dated 7.11.2003 whereby Ram Chand has sold land comprised in Khata Khatauni No.99/113, Khasra No.1208 measuring 161.60 square meters "Jai Safed" situated at Mauja Sanjauli Chowk, Tehsil and District Shimla for sale consideration of Rs. 2,25,000/- in favour of Sh. Mukesh Thakur.

10. PW-3 Saran Dass Rohit was Patwari Patwar Circle, Sanjauli. He has proved in his evidence average value of the land with effect from 18.11.2002 to 17.11.2003 of Up Mahal Sanjauli Chowk Ex.PW-3/A. He has deposed that Chak Chalaunti was adjoining to Chak Sanjauli Chowk and it takes only 5-7 minutes to reach Chalaunti from Sanjauli Chowk.

11. Suraj Bhimta, Patwari has appeared as RW-1. He has proved copy of one year average value Ex.RW-1/A with effect from 18.11.2002 to 17.11.2003 of Mahal Lambidhar. According to him, the value of land in Mahal Lambidhar was Rs. 18,38,577/- per bigha of the kind of orchard and Bakhal Awal, Rs. 12,48,843/- of Bakhal Doam and Rs. 1,56,100/- of Ghasani. He has proved Khaka Dasti (location map) Ex.RW-1/B.

12. It is evident from Ex. RW-1/B that the boundaries of Sanjauli revenue estate and Tilla adjoin to the boundaries of village Chalaunti. The boundaries of revenue village Lambidhar do not adjoin to the boundaries of revenue village Chalaunti and village Tilla fell

between the boundaries of two villages. There is no reason assigned why the State has opted to obtain one year average of village Lambidhar instead of revenue village Sanjauli Chowk since the boundaries of revenue estate Sanjauli Chowk adjoin to village Chalaunti. The acquired land fell in village Chalaunti. Respondents have not placed on record any sale deed. RW-1 Suraj Bhimta has specifically admitted that during the period 18.11.2002 to 18.11.2003, no land was purchased or sold in Mahal Tilla. He has further admitted that revenue village Chalaunti adjoins Sanjauli Chowk. He has also admitted that the market value of Chalaunti Chak is higher than the value of the land situated in revenue village Lambidhar. PW-3 Saran Dass Rohit, Patwari Patwar Circle Sanjauli has deposed that it takes only 5-7 minutes to reach Chalaunti from Sanjauli Chowk. According to one year average value of the land w.e.f. 18.11.2002 to 17.11.2003 of Mahal Sanjauli Chowk Ex.PW-3/A, the market value of Kalahu Awal has been shown Rs. 7,444.52 per square meters, of Lahedi Awal Rs. 5,533.98 per square meters, of Lahedi Doam Rs. 3,689.32 per square meters and Banjar Kadim and Ghasani at Rs. 1,317.62 per square meters. Ex.PW-1/A has been prepared on the basis of various sale deeds, which took place between 18.11.2002 to 17.11.2003. The reference court has rightly discarded Ex.PW-1/D dated 7.11.2003. It was executed only ten days after the notification under section 4 of the Act. It was speculative deed. Moreover, neither the vendor nor vendee of the sale deed Ex.PW-1/D has been examined nor any evidence has been led in order to prove that the sale consideration shown in sale deed Ex.PW-1/D actually passed or not or whether the sale deed was a *bona fide* transaction.

13. According to sale deed Ex.PW-2/A, the land was sold for consideration of Rs. 1,57,000/-. PW-2 Smt. Bindu Mehta is an independent witness. The sale deed Ex.PW-2/A is dated 15.1.2003, i.e. 10 months prior to the notification under section 4 of the Act. The sale deed was made within one year of the notification under section 4 of the Act, i.e. 18.11.2003.

14. The learned reference court has made 50% deductions towards development charges. According to the reference court, at the time of notification, land was located on the side of the road. It was 10 minutes walk from Sanjauli Chowk. The nature of the land sold was "Jai Safed". It could be used for construction of a house. However, major portion of the acquired land was in the shape of sloppy land and Ghasani in nature. The land sold vide sale deed Ex.PW-2/A was in close proximity of the road. Fact of the matter is that land was acquired for the construction of the road. It was not required to be developed for the purpose of construction of road. The development is required where the land is acquired for the purpose of housing colony and allied matters. Thus, the reference court has erred in law by making 50% deductions towards development charges. Since the land acquired was for the construction of road, the classification of land was irrelevant. However, considering the smallness of the plot sold vide sale deed Ex.PW-2/A, the deductions of 15% is permissible and, as such, the value of per bigha land would be Rs. 10,64,832-15%, i.e. Rs.10,64,832-Rs.1,59,725 = Rs. 9,05,107/-.

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

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

4) that the land covered by the sales must be similar to the acquired land and

5) that the size of plot of the land covered by the sales be comparable to the land acquired.

Their Lordships have held as under:

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

than what was the market value of the land covered by Ex.A-4.We, therefore, do not find any infirmity in the judgment of the High Court."

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

> **[18] One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefore. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.**
>
> **[21] Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price."**

17. Learned Single Judge of Karnataka High Court in ***The Special Land Acquisition Officer/Assistant Commissioner*** vs. ***Vyjanath (deceased by LRs),*** 2006 (1) AIR Kar R 691 has held that no deduction towards civic amenities is permissible. Deduction towards civic amenities is only in case where land is acquired for housing purpose.

18. Their Lordships of the Hon'ble Supreme Court in ***Nelson Fernandes and others*** vs ***Special Land Acquisition Officer, South Goa and others***, (2007) 9 SCC 447 have held that where the land acquired is for laying railway line, question of development of the land would not arise. Their Lordships have further held that the purpose for which land acquired is relevant for deciding whether deduction by way of development charges required or not. Their Lordships have held as under:

> **[25] Both the Special Land Acquisition Officer, the District Judge and of the High Court have failed to notice that the purpose of acquisition is for Railways and that the purpose is a relevant factor to be taken into consideration for fixing the compensation. In this context, we may usefully refer the judgment of this Court of Viluben Jhalejar Contractor (D) by Lrs. Vs. State of Gujarat reported in JT 2005 (4) SC 282. This Court held that the purpose for which the land is acquired must also be taken into consideration in fixing the market value and the deduction of development charges. In the above case, the lands were acquired because they were submerged under water of a dam. Owners claimed compensation of Rs. 40/- per sq. ft. LAO awarded compensation ranging from Rs. 35/- to Rs. 60/- per sq. mtr. Reference Court fixed the market value of the land at Rs. 200/- per sq. mtr. and after deduction of development charges, determined the compensation @ Rs. 134/- per sq. mtr. In arriving at the compensation, Reference court placed reliance on the comparative sale of a piece of land measuring 46.30 sq. metre @ Rs. 270 per sq. mtr. On appeal, the High Court awarded compensation of Rs. 180/- per sq. mtr. in respect of large plots and Rs. 200/- per sq. mtr. in respect of smaller plots. On further appeal, this Court held that since the lands were acquired for being submerged in water of dam and had no potential value and the sale instance relied was a small plot**

measuring 46.30 sq. mtr. whereas the acquisition in the present case was in respect of large area, interest of justice would be subserved by awarding compensation of Rs. 160/- per sq. mtr. in respect of larger plots and Rs.175/- per sq. mtr. for smaller plots. In Basavva (Smt.) and Ors. Vs. Spl. LAO and Ors. reported in JT 1996 5 SC 580, this Court held that the purpose by which acquisition is made is also a relevant factor for determining the market value.

30. We are not, however, oblivious of the fact that normally 1/3 deduction of further amount of compensation has been directed in some cases. However, the purpose for which the land acquired must also be taken into consideration. In the instant case, the land was acquired for the construction of new BG line for the Konkan Railways. This Court in Hasanali Khanbhai & Sons & Ors. Vs. State of Gujarat, 1995 2 SCC 422 and L.A.O. vs. Nookala Rajamallu, 2003 (10) Scale 307 had noticed that where lands are acquired for specific purposes deduction by way of development charges is permissible. In the instant case, acquisition is for laying a railway line. Therefore, the question of development thereof would not arise. Therefore, the order passed by the High Court is liable to be set aside and in view of the availability of basic civic amenities such as school, bank, police station, water supply, electricity, high way, transport, post, petrol pump, industry, telecommunication and other businesses, the claim of compensation should reasonably be fixed @ Rs. 250/- per sq. mtr. with the deduction of 20%. The appellant shall be entitled to all other statutory benefits such as solatium, interest etc. etc. The appellants also will be entitled to compensation for the trees standing on the said land in a sum of Rs. 59,192 as fixed. I.A. No. 1 of 2006 for substitution is ordered as prayed for.

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

[4] In order to determine the compensation which the tenure- holders are entitled to get for their land which has been acquired, the main question to be considered is what is the market value of the land. Section 23(1) of the Act lays down what the Court has to take into consideration while Section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired. The expression 'market value' has been subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal

human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arms length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz., a price outcome of hypothetical sale expressed in terms of probabilities. See Thakur Kanta Prasad v. State of Bihar, AIR 1976 SC 2219; Prithvi Raj Taneja v. State of M. P., AIR 1977 SC 1560; Administrator General of West Bengal v. Collector, Varanasi, AIR 1988 SC 943 and Periyar v. State of Kerala, AIR 1990 SC 2192.

[5] For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. See Collector Raigarh v. Hari Singh Thakur, AIR 1979 SC 472, Raghubans Narain v. State of U.P., AIR 1969 SC 465 and Administrator General, W. B. v. Collector Varanasi, AIR 1988 SC 943. It has been held in Kaushalya Devi v. L.A.O. Aurangabad, AIR 1984 SC 892 and Suresh Kumar v. T.I. Trust, AIR 1980 SC 1222 that failing to consider potential value of the acquired land is an error of principle.

20. Their Lordships of the Hon'ble Supreme Court in ***Thakur Kuldeep Singh (Dead) through LRs and others*** versus ***Union of India and others***, (2010) 3 SCC 794 have held that it is the duty of the Land Acquisition Collector and the court to take into consideration the nature of the land, its suitability, nature of the use for which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally relevant to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Collector as well as the court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. Their Lordships have held as under:

"11. Sections 23 and 24 of the Act speak about the matters to be considered and to be neglected in determining compensation. Let us consider whether the appellants are entitled to higher compensation than that of the one fixed by the High Court or Union of India is justified in seeking reduction of the market value/compensation for the acquired land.

13. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While

doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification under Section 4(1) of the Act. In other words, the Judge who sits in the armchair of the willing buyer and seek an answer to the question whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable."

21. Their Lordships of the Hon'ble Supreme in ***Trishala Jain and another*** versus ***State of Uttaranchal and another***, (2011) 6 SCC 47 have held that the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their Lordships have held as under:

44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits."

22. Their Lordships of the Hon'ble Supreme Court in ***Himmat Singh and others*** versus ***State of Madhya Pradesh and another***, (2013) 16 SCC 392, in a case where the reference court has made three tier deductions viz. (i) 25% for leaving out portions of acquired land for purpose of laying roads, drains etc., (ii) 25% towards expenses for development work, and (iii) 50% towards smallness of plots sold, which was approved by High Court, have held that such approach was clearly erroneous since respondent State had not even suggested that such development work was undertaken for purpose of laying railway line. Hence, deductions made under first two heads were unsustainable.

23. In the present case, there is neither any evidence nor any suggestion that such development was undertaken while constructing Sanjauli-Dhalli by pass road.

24. Accordingly, In view of the analysis and discussion made hereinabove, RFA No. 44/2009 is allowed and the award dated 6.12.2008 is modified to the extent that the claimants are entitled to Rs. 9,05,107/- per bigha alongwith statutory benefits. RFA No.181 of 2009 is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Kali Dass ...Appellants

Versus

Minki Devi & others

...Respondents.

RSA No.61 of 2005
Reserved on : March 14, 2016
Date of Decision: March 23, 2016

Indian Succession Act, 1925- Section 63- Will was executed by the deceased- executant was 90 years of age, all of the natural heirs were excluded- the beneficiary is not a direct descendant, but is a collateral, being son of a distant brother of the testator- the identifier and the attesting witness are close relatives of the beneficiary- defendant claimed the ownership of the land which was resisted by the plaintiff by filing a civil suit- civil suit was decreed and the Will was set aside- appeal was also dismissed- held, that onus of proving the Will is upon the beneficiary- testimony of beneficiary is not truthful and believable- his version that testator was ill only one month prior to his death stands contradicted from the Will wherein it was stated that the testator was not maintaining good health for the last few years- it was not proved that testator was in a sound disposing state of mind- witness was residing in another village and it was established that plaintiff had taken care of the deceased till his death- there was no proof of the beneficiary having shared food or shelter or having rendered services to the testator- there are material contradictions in the testimonies of beneficiary, identifier and attesting witness- hence, in these circumstances, it cannot be said that findings returned by the Court are illegal, perverse and erroneous – appeal dismissed.

Cases referred:

M.B. Ramesh (Dead) by LRs. Versus K.M. Veeraje URS (Dead by LRs. And others, (2013) 7 SCC 490

Indu Bala Bose and others versus Manindra Chandra Bose and another, (1982) 1 SCC 20

Niranjan Umeshchandra Joshi versus Mrudula Jyoti Rao and others, (2006) 13 SCC 433

Gopal Swaroop versus Krishna Murari Mangal and others, (2010) 14 SCC 266

For the Appellant : Dr. Lalit K. Sharma, Advocate.

For the Respondents : Mr. G.R. Palsara, Advocate, for respondent No.1.
None for other respondents.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Defendant-appellant Kali Dass, hereinafter referred to as the defendant, has filed the present appeal under the provisions of Section 100 of the Code of Civil Procedure, assailing the judgment and decree dated 30.10.2004, passed by the learned Additional District Judge, Mandi, Himachal Pradesh, in Civil Appeal No.34 of 2000, titled as *Kali Dass v. Minki Devi & others,* whereby judgment and decree dated 2.5.2000, passed by the Sub Judge 1st Class, Jogindernagar, District Mandi, Himachal Pradesh, in Civil Suit No.42/95, titled as *Minki Devi v. Kali Dass & others,* stands affirmed.

2. The core issue, which arises for consideration in the present appeal, is as to whether the Will (Ex.D-1) propounded by the beneficiary (defendant) can be said to be genuine; and proven to have been validly executed by the testator, through the testimonies of scribe Shri Shamsher Chand (DW-2), identifier Shri Ramesh Kumar (DW-3) and attesting witness Shri Bishan Dass (DW-5).

3. Certain facts are not in dispute. (i) Jawahar (testator) is stated to have executed Will dated 10.4.1989 (Ex. D-1), which was registered on 19.4.1989. The challenge is to its validity. (ii) testator died in the year 1990, (iii) at the time of execution of the Will, deceased was 90 years of age, (iv) all of the natural heirs stand excluded. (v) the beneficiary, i.e. Kali Dass is not a direct descendant, being a collateral son of a distant brother of the testator, and (vi) the identifier (DW-3) (a Lawyer) and the attesting witness (DW-4), are close relatives of the beneficiary.

4. On the strength of the Will, defendant claimed ownership of the suit land and the property constructed thereupon, which came to be resisted by plaintiff Minki Devi (daughter-in-law of the testator), by way of filing suit for declaration and consequential relief of injunction.

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

1. Whether the will dt. 10-4-1989 alleged to have been executed by deceased Jawahar is null and void as alleged? OPP
2. Whether the plaintiff is entitled for the relief of permanent injunction as prayed?OPP
3. Whether the suit is not maintainable?OPD
4. Whether the suit is barred by limitation?OPD
5. Whether the deceased executed a Will in favour of the defendant No.1 as alleged?OPD
6. Relief.

6. Appreciating the evidence led by the parties, and answering the issues in favour of the plaintiffs, trial Court decreed the suit in the following manner:

> "In view of my findings on the aforesaid issues, the suit of the plaintiff is decreed and the impugned will dt. 10-4-1989 alleged to have been executed by deceased Jawahar in favour of defendant No.1 is declared to be null, void and not binding upon the plaintiff and other legal heirs of deceased Jawahar with no order as to cost. Decree sheet be accordingly drawn and file be consigned to the record room after doing the needful."

7. The lower Appellate Court found the testimony of the attesting witness to be contradictory and also not inspiring in confidence. The Will was found not to have been proven as required under law.

8. The present appeal stands admitted on the following substantial question of law:

> Whether the trial Court and the first appellate court erred in holding that the will was invalid because one of the natural heirs has been disinherited?

9. Heard learned counsel for the parties as also perused the record.

10. In *M.B. Ramesh (Dead) by LRs. Versus K.M. Veeraje URS (Dead by LRs. And others,* (2013) 7 SCC 490, Supreme Court has reiterated the following principles to be applied, in a case where validity of execution of a Will is in question:

> 1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
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> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.
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> 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
>
> 4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.
>
> 5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.
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> 6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

11. In *Smt. Indu Bala Bose and others versus Manindra Chandra Bose and another,* (1982) 1 SCC 20, the apex court has held that mere registration of a will is not proof enough of its valid execution. The onus is on the propounder to remove all doubts and explain the suspicious circumstance, if any, to the fullest satisfaction of the Court. But then it clarified that it is not that any and every circumstance would tantamount to a suspicious circumstance. A circumstance can be said to be suspicious only when it is not normal or is not normally expected of a normal person. However, in *Niranjan Umeshchandra Joshi versus Mrudula Jyoti Rao and others,* (2006) 13 SCC 433, the apex Court held that suspicious circumstance would exist when a doubt is created in connection with the condition of mind of the testator; his signatures on the Will; disposition appears to be unnatural or wholly unfair in the light of the relevant circumstances. In *Gopal Swaroop versus Krishna Murari Mangal and others,* (2010) 14 SCC 266, it has been held that there cannot by any mathematical certainty with regard to proof of Will.

12. Onus of proving the Will, particularly where the direct descendants and close relatives stand excluded, and that too of a person, who is aged, is upon the beneficiary. It is also a settled principle of law that the Will has to be proved to have been validly executed, in the manner stipulated under the provisions of Section 63 of the Indian Succession Act.

13. Deceased Jawahar had three daughters and one son Devi Ram, who died at a young age of 35 years, leaving behind his widow (plaintiff Minki Devi) and three daughters. Defendant Kali Dass, who is a Government servant, wants the Court to believe that (a) after the death of Devi Ram, he shifted his residence and started residing with Jawahar in his village Banbar, (b) plaintiff Minki Devi, widow of Devi Ram and his three daughters were being looked after by him, (c) he incurred the expenditure for marrying all the three daughters of Devi Ram, and (d) out of his own volition, Jawahar executed a Will in his favour, which was in the knowledge of Minki Devi.

14. Testimony of defendant Kali Dass cannot be said to be truthful or believable. On the question of health of the testator, he has lied. His version that testator became ill only one month prior to his death, till when he enjoyed good health, stands contradicted, in fact belied, from the very document, i.e. Will (Ex. D-1), wherein it is categorically recorded that the testator has not been maintaining good health for the last few years. Thus, whether the testator was in a sound disposing state of mind or not remains unproven on record. Court further finds that except for bald statement of the defendant, there is nothing on record to establish (a) that the witness incurred any expenditure at the time of marriage of daughters of Devi Ram, (b) that either he or his family was staying with the testator, muchless taking care of anyone, including the widow and daughters of Devi Ram. In fact, the witness admits to have been residing in another village Dagwan. There is nothing on record to establish that this witness had been tilling the land or had raised any construction thereupon. The witness was employed with the Public Works Department, where he had served for 25 years. Throughout his service, he stayed away from home and as such there is no evidence of his having taken care of the deceased, even by his family members.

15. It is neither the pleaded case of the plaintiff nor the proven case of the beneficiary that deceased was not having cordial relations with his legal heirs. To the contrary, it stands established through the testimony of plaintiff's witnesses Shri Arjun Singh (PW-1), Shri Daulat Ram (PW-2) and Shri Kahan Singh (PW-3), that it was the plaintiff, who had been taking care of the deceased till he left for his heavenly abode. Thus, there was no reason to exclude the dependants, who were direct beneficiaries.

16. Further, it is admitted case of the defendant, as has come in the unrebutted testimony of Shri Damodar Dass (DW-4), who is the uncle of the beneficiary, that Jawahar "*was rich person and he used to give money on interest*". This admission renders the version of not only this witness but also that of the beneficiary, of incurring expenditure for the marriages to be improbable and untrue. There is no proof of the defendant having shared food or shelter or having rendered services to the deceased/testator. The Will is not free from suspicion.

17. There are material contradictions in the testimonies of the beneficiary, the scribe, the identifier and the attesting witness.

18. Scribe Shri Shamsher Chand states that Will (Ex. D-1) was scribed at the instance of the testator in the Court complex, Jogindernagar. Though the witness admits of having maintained record thereof, but has chosen not to produce the same. Be that as it may, this version of his stands contradicted by Shri Ramesh Chand, a practicing Advocate and a close relative of the beneficiary, who, in no uncertain terms, states that it was he who had asked the scribe to write the Will. Also, after it was reduced into writing, he explained the same to the testator and thereafter they all went to the office of Sub Registrar at Jogindernagar, where after detailed enquiry the Will was attested. He wants the Court to believe that the Will was scribed and registered the very same day. But, this contradicts the version of the attesting witnesses. Significantly, none from the office of the Sub Registrar stands examined in Court.

19. There is yet another version, which has come on record through the testimony of Shri Damodar Dass (DW-4), who states that Jawahar had sought his opinion with regard to execution of the Will to which he had expressed his no objection. Perhaps his opinion was sought for the reason that he was his son-in-law. Witness states that Shri Bishan Dass accompanied the testator to Jogindernagar for executing the Will. The witness may have been the son-in-law of the deceased, but then, he is also the uncle of the beneficiary.

20. Now, Shri Bishan Dass does not support the version of this witness. He simply states that Jawahar had expressed his desire of executing the Will in favour of the beneficiary, as he wanted to retain the property only in his family. He alongwith Jawahar went to the Tehsil, where Jawahar got prepared the Will from the Petition Writer and after admitting the contents thereof to be correct, Jawahar put his initials in his presence. He further states that he also appended his signatures in the presence of Jawahar and after 8-10 days, Will (Ex. D-1) was registered. Now, Will (Ex. D-1) reveals that there are no initials of the testator. There is only thumb impression. Also, the witness does not record the presence of either Shri Damodar Dass or Shri Ramesh Kumar. Crucially, the witness does not even remember the date of the execution of the Will or its registration. His version of Jawahar of having died two years after the execution of the Will is factually incorrect.

21. As such, it cannot be held that findings returned by the Courts below are illegal, perverse and erroneous, warranting interference by this Court. Substantial question of law is answered accordingly.

For all the aforesaid reasons, the appeal is dismissed, so also the pending application(s), if any.

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

M/s Cecil Instant Power Company ...Petitioner

Versus

Punjab National Bank and others . ...Respondents.

CWP No. 618 of 2016
Judgment reserved on: 19.3.2016
Date of Decision : March 23, 2016.

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Sections 13(2) and 17- Petitioner had taken a loan and had defaulted in the repayment- negotiation took place between the bank and the petitioner, whereby the unit was restored to the petitioner subject to the terms and conditions- petitioner again defaulted – his assets were taken over by the respondent- held, that petitioner has an alternative and efficacious remedy under Section 17 of the SARFAESI Act- a complete mechanism has been provided under the Act which has overriding effect over other laws- hence, writ petition is not maintainable and the petitioner is at liberty to avail the remedy under SARFAESI Act. (Para-3 to 15)

Cases referred:

SPS Steels Rolling Mills Ltd. vs. State of Himachal Pradesh and others, I L R 2015 (III) HP 1387 D.B.

M/s Madras Petrochem Ltd. and another vs. BIRF and others AIR 2016 SC 898.

Punjab National Bank vs. O.C. Krishnan and others (2001) 6 SCC 569

United Bank of India vs. Satyawati Tondon and others (2010) 8 SCC 110

Kanaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others (2011) 2 SCC 782

For the Petitioner :Mr. Sanjeev Bhushan, Senior Advocate,
with Mr. Rajesh Kumar, Advocate.

For the respondents :

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The writ petitioner has prayed for the following reliefs:

"(i) That letter dated 9.9.2015 as well as letter dated 3.9.2015, as contained in Annexure P-8 may very kindly be quashed and set-aside.

(ii) That the respondents may very kindly be directed to restructure the loan account of the petitioner for which they have agreed in principle, by allowing petitioner to run his unit.

(iii) That taking over the possession of the petitioner's unit on 9.2.2016, without following due process of law, may very kindly be declared as null and void."

2. The facts are not in dispute. The petitioner had availed loan and on account of the default in its repayment, proceedings under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short

'SARFAESI' Act) were resorted to by the respondent bank. This was followed by notice under Section 13 (4) of the SARFAESI Act.

3. However, certain negotiations took place between the petitioner and respondent bank whereby the unit of the petitioner was restored back to it subject to certain terms and conditions as set out in the supplementary agreement dated 28.1.2014.

4. Thereafter, the petitioner again defaulted and its assets have now taken over by the respondent. Though, the petitioner has not placed on record the copy of taken over notice on the allegation that no such copy was supplied, nonetheless, we have no reason to doubt that the alleged take over has been resorted to in exercise of power conferred upon the bank under Section 13 (4) of the SARFAESI Act.

5. Before we proceed any further, it would be relevant to make note of the certain provisions of the SARFAESI Act. Section 13(2), 13 (3), 13(4) and Section 17 of the Act read as under:

> ***13. Enforcement of security interest (1)*** *Notwithstanding anything ontained in section 6 9 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.*
>
> ***(2)*** *Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).*
>
> ***(3)*** *The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.*
>
> *(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:*
>
> *Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.*
>
> ***(4)*** *In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--*
>
> > *(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;*

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

17. Right to appeal *(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:*

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

....."

6. The moot question at this stage is as to whether the writ petition is maintainable especially when the petitioner has an alternative and efficacious remedy available to it under Section 17 of the SARFAESI Act.

7. Identical question has already been considered by this Court in ***CWP No. 2783 of 2015-I, titled SPS Steels Rolling Mills Ltd.*** vs. ***State of Himachal Pradesh and others, decided on 25th June, 2015*** wherein it was held as under:

"5. It appears that action has been drawn against the writ petitioner in terms of Section 13 (4) of The Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002 (for short "SARFAESI Act"). SARFAESI Act is a self-contained mechanism and the aggrieved party has to invoke the remedies provided by the SARFAESI Act. The writ petitioner has remedy of appeal as per the mandate of Section 17 of the SARFAESI Act. It is apt to reproduce relevant portion of Section 17 of the SARFAESI Act herein:

"**17. Right to appeal.** - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

....."

6. The Apex Court in a series of judgments in the cases titled as United Bank of India versus Satyawati Tondon and others, reported in (2010) 8 Supreme Court Cases 110; Union Bank of India and another versus Panchanan Subudhi,reported in (2010) 15 Supreme Court Cases 552; Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors., reported in 2010 AIR SCW 4751; Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others, reported in (2011) 2 Supreme Court Cases 782; Standard Chartered Bank versus V. Noble Kumar and others with Senior Manager, State Bank of India and another versus R. Shiva Subramaniyan and another, reported in (2013) 9 Supreme Court Cases 620; J. Rajiv Subramaniyan and another versus Pandiyas and others, reported in (2014) 5 Supreme Court Cases 651; and Keshavlal Khemchand and sons Private Limited and others versus Union of India and others, reported in (2015) 4 Supreme Court Cases 770, has discussed the issue and held that the writ petition is not maintainable.

7. This Court in CWP No. 4779 of 2014,titled as M/s Indian Technomac Company Ltd. versus State of H.P. & ors.,decided on 04.08.2014, held that when an alternate remedy is available, writ petition is not maintainable. The said judgment of this Court has been upheld by the Apex Court on 22.08.2014 in SLP (C) No. 22626-22641 of 2014.

8. The Apex Court in a latest judgment in the case titled as Union of India and others versus Major General Shri Kant Sharma and another, reported in 2015 AIR SCW 2497, held that when an alternate efficacious remedy is available to the writ petitioner, he should not be allowed to give a slip to law.

9. The Apex Court in the case titled as Sadashiv Prasad Singh versus Harender Singh and others, reported in (2015) 5 Supreme Court Cases 574, held that the writ petition is not maintainable when a remedy of appeal is available to the writ petitioner. It is apt to reproduce para 23.3 of the judgment herein:

"23.3. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, which is being extracted herein to assail the order dated 5-5-2008:

> " **30. Appeal against the order of Recovery Officer.** - (1) Notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.
>
> (2) On receipt on an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive)."

The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh."

10. Learned counsel for the writ petitioner has placed reliance on the judgment rendered by the Apex Court in a case titled as KSL and Industries Limited versus Arihant Threads Limited and others, reported in (2015) 1 Supreme Court Cases 166, is not applicable in the facts and circumstances of this case.

11. Having said so, the writ petition is not maintainable."

8. A similar reiteration of law is found in ***CWP No. 4878 of 2015 titled M/s United Hotel and Resort Kufri*** vs. ***State Bank of India, decided on 7th January, 2016.***

9. Apart from the above, we may also notice that not only does the SARFAESI Act, provide for a complete mechanism for the aggrieved party, but the same even has overriding effect over many other laws as held by the Hon'ble Supreme Court in its recent decision in ***M/s Madras Petrochem Ltd. and another*** vs. ***BIRF and others AIR 2016 SC 898***.

10. It cannot also be disputed that it was only on account of the poor working of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 that the SARFAESI Act was brought into force in the year 2002 and this has been duly noticed by the Hon'ble Supreme Court in ***M/s Madras Petrochem Ltd***. (supra) wherein it was held as under:

> *".**18.** Regard being had to the poor working of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was brought into force in the year 2002. The statement of objects and reasons for this Act reads as under:-*
>
> *"STATEMENT OF OBJECTS AND REASONS OF THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002*
>
> *The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry*

in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisition and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction.

2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—

(a) registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;

(b) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities;

(c) facilitating easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of a debenture;

(d) empowering securitisation companies' or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers;

(e) facilitating reconstruction of financial assets acquired by exercising powers of enforcement of securities or change of management or other powers which are proposed to be conferred on the banks and financial institutions;

(f) declaration of any securitisation company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of section 4A of the Companies Act, 1956;

(g) defining 'security interest' as any type of security including mortgage and change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time;

(i) the rights of a secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rules made by the Central Government;

(j) an appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(k) setting up or causing to be set up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest;

(l) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities;

(m) non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding rupees one lakh and cases where eighty per cent, of the loans are repaid by the borrower.

3. The Bill seeks to achieve the above objects."

19. *This Act was brought into force as a result of two committee reports which opined that recovery of debts due to banks and financial institutions was not moving as speedily as expected, and that, therefore, certain other measures would have to be put in place in order that these banks and financial institutions would better be able to recover debts owing to them.*

20. *In a challenge made to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in Mardia Chemicals Ltd. Etc. v. Union of India (UOI) and Ors. Etc. Etc., (2004) 4 SCC 311, this Court went into the circumstances under which the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted, as follows:-*

"Some facts which need to be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the

Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field, namely, the Recovery of Debts Due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

"8.1. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries...."

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or

that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.

We may now consider the main enforcing provision which is pivotal to the whole controversy, namely, Section 13 in Chapter III of the Act. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13, the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub- section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. It may also be noted that as per sub-section (3) of Section 13 a notice given to the borrower must contain the details of the amounts payable and the secured assets against which the secured creditor proposes to proceed in the event of non-compliance with the notice given under sub-section (2) of Section 13." [at para 34,36 and 38]

21. *The "pivotal" provision namely Section 13 of the said Act makes it clear that banks and financial institutions would now no longer have to wait for a Tribunal judgment under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 to be able to recover debts owing to them. They could, by following the procedure laid down in Section 13, take direct action against the debtors by taking possession of secured assets and selling them; they could also take over the management of the business of the borrower. They could also appoint any person to manage the secured assets possession of which has been taken over by them, and could require, at any time by notice in writing to any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due from the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt.*

22. *In order to further the objects of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Act contains a non obstante clause in Section 35 and also contains various Acts in Section 37 which are to be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of*

Security Interest Act, 2002. Three of these Acts, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956 and the Securities and Exchange Board of India Act, 1992, relate to securities generally, whereas the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 relates to recovery of debts due to banks and financial institutions. Significantly, under Section 41 of this Act, three Acts are, by the schedule to this Act, amended. We are concerned with the third of such Acts, namely, the Sick Industrial Companies (Special Provisions) Act, 1985, in Section 15(1) of which two provisos have been added. It is the correct interpretation of the second of these provisos on which the fate of these appeals ultimately hangs.".

11. The question relating to entertaining of petitions under Articles 226 and 227 of the Constitution of India against recovery of dues to banks has been under consideration before the Hon'ble Supreme Court from time to time.

12. In the case of ***Punjab National Bank*** vs**. *O.C. Krishnan and others (2001) 6 SCC 569***, the Hon'ble Supreme Court held that where there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the constitutional scheme. This would be evident from the observations contained in paras 5 and 6 of the judgment which read thus:

"5.*In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We Jo not propose to go into the correctness of the decision of the High Court an I whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.*

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this last track procedure cannot be allowed to be derailed either b> taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

13. In ***United Bank of India*** vs. ***Satyawati Tondon and others (2010) 8 SCC 110*** after referring to various precedents on the subject, the Hon'ble Supreme Court held that Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest as would be evident from the following observations:

"12. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this

Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non- performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4).

13. Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non- acceptance are required to be communicated within one week.

14. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower.

15. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer.

16. Sub-section (9) of Section 13 deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree for such a course.

17. There are five unnumbered provisos to Section 13(9) which deal with pari passu charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realise its security instead of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529-A.

18. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529-A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of the fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

19. Sub-section (10) of Section 13 lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets.

20. Sub-section (12) of Section 13 lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice without prior written consent of the secured creditor.

21. In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If

any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

22. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1).

23. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt.

24. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously.

25. Section 18 provides for an appeal to the Appellate Tribunal.

26. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

The Hon'ble Supreme Court thereafter took serious note of the fact that the High Courts overlooked the settled law and continued to entertain petitions under Article 226 of the Constitution when an effective remedy was available to the aggrieved person and this rule applied with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of the banks and other financial institutions. It shall be apt to reproduce the following observations as contained in paragraph 43*:*

> *"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."*

Not only this, the Hon'ble Supreme Court showed its serious concern that despite repeated pronouncements by it, the High Courts were still ignoring the availability of statutory remedies under the DRT and the SARFAESI Act and exercising jurisdiction under Article 226 of the Constitution, by passing orders which had serious adverse impact on the rights of the bank and other financial institutions to recover their dues as would be evident from the following observations:

> "55. *It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."*

14. In line with the aforesaid observation, the Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev and others*** vs. ***State of Maharashtra and others (2011) 2 SCC 782*** held as under:

> "25. *In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."*

15. In view of the settled legal position noticed above, it can safely be concluded that this writ petition is not maintainable and is accordingly dismissed. However, liberty is reserved to the petitioner to take recourse to the remedy provided under the SARFAESI Act and raise all contentions as have been raised in this petition before the competent authority. It is further made clear that the time spent in this litigation shall not come in the way of the petitioner while computing limitation.

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 RAJIV SHARMA, J.

RFA No. 49 of 2009 alongwith RFA No. 294 of 2009
Reserved on: 17.3.2016
Decided on: 23.3.2016

RFA No. 49 of 2009

Shankari. ...Appellant.

Versus

State of H.P. and another. ...Respondents

RFA No. 294 of 2009

State of H.P. and another ...Appellants.

Versus

Shankari. ...Respondent.

Land Acquisition Act, 1894- Section 18- Land was acquired for the construction of the Sanjauli-Dhalli bye pass road-compensation was awarded by land acquisition collector- aggrieved from the award a reference was made- Reference petition was allowed by the District Judge– aggrieved from the award, appeal was preferred- Reference Court has relied upon the award announced regarding the acquisition of the road for the construction of Sanjauli-Dhalli bye pass road – Reference Court had deducted 50% of the amount for development charges- land was not required to be developed for construction of the road- development is required when the land is acquired for the construction of housing colony and allied matters- since, land was acquired for the construction of the road, the classification of land was irrelevant- appeal allowed and award modified to the extent that claimants are entitled to Rs.9,05,107/- per bigha along with statutory benefits.

(Para-4 to 23)

Cases referred:

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

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

The Special Land Acquisition Officer/Assistant Commissioner vs. Vyjanath (deceased by LRs), 2006 (1) AIR Kar R 691

Nelson Fernandes and others vs Special Land Acquisition Officer, South Goa and others, (2007) 9 SCC 447

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

Thakur Kuldeep Singh (Dead) through LRs and others versus Union of India and others, (2010) 3 SCC 794
Trishala Jain and another versus State of Uttaranchal and another, (2011) 6 SCC 47
Himmat Singh and others versus State of Madhya Pradesh and another, (2013) 16 SCC 392

For the Appellants :	Mr. B.S Attri, Advocate for appellant in RFA No. 49/2009 and for respondent in RFA No. 294 of 2009.
For the Respondents:	Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G. for respondents in RFA No. 49/2009 and for appellants in RFA No. 294/2009.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. RFA No. 49 of 2009 has been instituted against the land reference No.39-S/4 of 08/06 rendered by the learned District Judge (F), Shimla on 23.12.2008 whereby the reference court has awarded compensation of Rs. 5,32,416/- per bigha regardless the nature and category of the land alongwith statutory benefits. The State has also filed an appeal against the land reference No.39-S/4 of 08/06 dated 23.12.2008 for setting aside the award. According to the grounds taken in the appeal, the award made by the Land Acquisition Collector was in accordance with law.

3. The Government of Himachal Pradesh issued a notification under section 4 of the Land Acquisition Act, 1894 (hereafter referred to as the "Act" for brevity sake) to acquire the land of the claimants on 18.11.2003. The report under section 5-A(2) of the Act was sent to the Government on 7.4.2004. The notification under section 6 of the Act was issued on 17.6.2004. The notification under section 9 (1) of the Act was issued to the claimants and they were directed to appear before the Land Acquisition Collector on 17.8.2004 at 11.00 A.M. The Land Acquisition Collector assessed the value of the claimants' land @ Rs. 80,000/- per bigha. The claimants filed a petition under section 18 of the Act seeking enhancement of compensation of their land before the learned District Judge. The reference petition was allowed by the District Judge on 23.12.2008 and he awarded compensation of the acquired land @ Rs. 5,32,416/- per bigha regardless the nature and category of the land and the structure on it @ Rs. 5,40,000/-.

4. Mr. B.S. Attri, learned counsel for the appellant, has vehemently argued that his clients were entitled to compensation @ Rs. 10,64,832/- alongwith statutory benefits.

5. Mr. Parmod Thakur, learned Additional Advocate General has vehemently argued that the learned Land Acquisition Collector has rightly assessed the market value of the claimants' land @ Rs. 80,000/- per bigha.

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

7. The notification under section 4 of the Act was issued on 18.11.2004. PW-1 Gita Ram has proved Ex.P-1, i.e. record of consumer price index.

8. PW-2 Gauri Shankar has produced sale deed No.15 dated 15.1.2003 and sale deed No. 270 dated 26.6.2003 vide Ex.PW-2/A and Ex.PW-2/B.

9. PW-4 Uma Shankar has produced record of RFA No. 171/95 alongwith RFA No. 173/1995 and RFA No. 70 of 1996.

10. PW-6 Shankari Devi deposed that she was owner of the land. The compensation paid to her was inadequate. Chalaunti has all the facilities. Office of LIC is near Chalaunti.

11. RW-1 Saran Dass, Patwari has deposed that Chilondi is at a distance of one and half kilometer from Sanjauli. No land was sold in the village. He admitted that if the distance between Chilondi and Sanjauli Chowk is covered on foot it takes 5-10 minutes. He also admitted that the office of the LIC, Middle School and telephone exchange are in village Chilondi.

12. RW-3 O.P. Bhardwaj deposed that earlier the area was not developed and now the people have developed the same. In his cross-examination, he has admitted that he has not conducted survey.

13. RW-4 Bhajan Dass has proved average price vide Ex.RW-4/A.

14. The reference court has relied upon Ex.PX-1. This award is with reference to the same notification under section 4 of the Act. It pertains to the construction of Sanjauli-Dhalli by pass road. According to Ex.PX-1, the price of the acquired land was assessed at Rs. 5,32,416/- per bigha. The reference court has initially assessed the value @ Rs. 10,64,832/- per bigha, but has made 50% deductions for development charges. Since the land has been acquired for the purpose of construction of road, no developments were to be made. It is only in those cases where the land is acquired for the purpose of housing colony and allied matters. Thus, the reference court has erred in law by making 50% deductions towards development charges. Since the land acquired was for the construction of road, the classification of land was irrelevant. However, considering the smallness of the plot sold vide sale deed Ex.PW-2/A, the deductions of 15% is permissible and, as such, the value of per bigha land would be Rs. 10,64,832-15%, i.e. Rs.10,64,832- Rs.1,59,725 = Rs. 9,05,107/-.

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

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

Their Lordships have held as under:

[3] It is no doubt true that Courts adopt Comparable Sales Method of valuation of land while fixing the market value of the acquired land. While fixing the market value of the acquired land, Comparable Sales

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

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

[18] One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefore. It is beyond any cavil that the price of the land which a willing and informed buyer would offer

would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

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

17. Learned Single Judge of Karnataka High Court in ***The Special Land Acquisition Officer/Assistant Commissioner*** vs. ***Vyjanath (deceased by LRs),*** 2006 (1) AIR Kar R 691 has held that no deduction towards civic amenities is permissible. Deduction towards civic amenities is only in case where land is acquired for housing purpose.

18. Their Lordships of the Hon'ble Supreme Court in ***Nelson Fernandes and others*** vs ***Special Land Acquisition Officer, South Goa and others***, (2007) 9 SCC 447 have held that where the land acquired is for laying railway line, question of development of the land would not arise. Their Lordships have further held that the purpose for which land acquired is relevant for deciding whether deduction by way of development charges required or not. Their Lordships have held as under:

[25] Both the Special Land Acquisition Officer, the District Judge and of the High Court have failed to notice that the purpose of acquisition is for Railways and that the purpose is a relevant factor to be taken into consideration for fixing the compensation. In this context, we may usefully refer the judgment of this Court of Viluben Jhalejar Contractor (D) by Lrs. Vs. State of Gujarat reported in JT 2005 (4) SC 282. This Court held that the purpose for which the land is acquired must also be taken into consideration in fixing the market value and the deduction of development charges. In the above case, the lands were acquired because they were submerged under water of a dam. Owners claimed compensation of Rs. 40/- per sq. ft. LAO awarded compensation ranging from Rs. 35/- to Rs. 60/- per sq. mtr. Reference Court fixed the market value of the land at Rs. 200/- per sq. mtr. and after deduction of development charges, determined the compensation @ Rs. 134/- per sq. mtr. In arriving at the compensation, Reference court placed reliance on the comparative sale of a piece of land measuring 46.30 sq. metre @ Rs. 270 per sq. mtr. On appeal, the High Court awarded compensation of Rs. 180/- per sq. mtr. in respect of large plots and Rs. 200/- per sq. mtr. in respect of smaller plots. On further appeal, this Court held that since the lands were acquired for being submerged in water of dam and had no potential value and the sale instance relied was a small plot measuring 46.30 sq. mtr. whereas the acquisition in the present case was in respect of large area, interest of justice would be subserved by awarding compensation of Rs. 160/- per sq. mtr. in respect of larger plots and Rs.175/- per sq. mtr. for smaller plots. In Basavva (Smt.) and Ors. Vs. Spl. LAO and Ors. reported in JT 1996 5 SC 580, this Court held that the purpose by which acquisition is made is also a relevant factor for determining the market value.

30. We are not, however, oblivious of the fact that normally 1/3 deduction of further amount of compensation has been directed in some cases. However, the purpose for which the land acquired must

also be taken into consideration. In the instant case, the land was acquired for the construction of new BG line for the Konkan Railways. This Court in Hasanali Khanbhai & Sons & Ors. Vs. State of Gujarat, 1995 2 SCC 422 and L.A.O. vs. Nookala Rajamallu, 2003 (10) Scale 307 had noticed that where lands are acquired for specific purposes deduction by way of development charges is permissible. In the instant case, acquisition is for laying a railway line. Therefore, the question of development thereof would not arise. Therefore, the order passed by the High Court is liable to be set aside and in view of the availability of basic civic amenities such as school, bank, police station, water supply, electricity, high way, transport, post, petrol pump, industry, telecommunication and other businesses, the claim of compensation should reasonably be fixed @ Rs. 250/- per sq. mtr. with the deduction of 20%. The appellant shall be entitled to all other statutory benefits such as solatium, interest etc. etc. The appellants also will be entitled to compensation for the trees standing on the said land in a sum of Rs. 59,192 as fixed. I.A. No. 1 of 2006 for substitution is ordered as prayed for.

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

[4] In order to determine the compensation which the tenure- holders are entitled to get for their land which has been acquired, the main question to be considered is what is the market value of the land. Section 23(1) of the Act lays down what the Court has to take into consideration while Section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired. The expression 'market value' has been subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arms length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz., a price outcome of hypothetical sale expressed in terms of probabilities. See Thakur Kanta Prasad v. State of Bihar, AIR 1976 SC 2219; Prithvi Raj Taneja v. State of M. P., AIR 1977 SC 1560; Administrator General of West Bengal v. Collector, Varanasi, AIR 1988 SC 943 and Periyar v. State of Kerala, AIR 1990 SC 2192.

[5] For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. See Collector Raigarh v. Hari Singh Thakur, AIR 1979 SC 472, Raghubans Narain v. State of U.P., AIR 1969 SC 465 and Administrator General, W. B. v. Collector Varanasi, AIR 1988 SC 943. It has been held in Kaushalya Devi v. L.A.O. Aurangabad, AIR 1984 SC 892 and Suresh Kumar v. T.I. Trust, AIR 1980 SC 1222 that failing to consider potential value of the acquired land is an error of principle.

20. Their Lordships of the Hon'ble Supreme Court in ***Thakur Kuldeep Singh (Dead) through LRs and others*** versus ***Union of India and others***, (2010) 3 SCC 794 have held that it is the duty of the Land Acquisition Collector and the court to take into consideration the nature of the land, its suitability, nature of the use for which the lands are sought to be acquired on the date of notification, income derived or derivable from or any other special distinctive feature which the land is possessed of, the sale transactions in respect of land covered by the same notification are all relevant factors to be taken into consideration in determining the market value. It is equally relevant to consider the suitability of neighbourhood lands as are possessed of similar potentiality or any advantageous features or any special characteristics available. The Collector as well as the court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. Their Lordships have held as under:

"11. Sections 23 and 24 of the Act speak about the matters to be considered and to be neglected in determining compensation. Let us consider whether the appellants are entitled to higher compensation than that of the one fixed by the High Court or Union of India is justified in seeking reduction of the market value/compensation for the acquired land.

13. The Land Acquisition Collector as well as the Court should always keep in their mind that the object of assessment is to arrive at a reasonable and adequate market value of the land. While doing so, imagination should be eschewed and mechanical assessment of evidence should be avoided. More attention should be on the bona fide and genuine sale transactions as guiding star in evaluating the evidence. The relevant factor would be that of the hypothetical willing vendor would offer for the land and what a willing purchaser of normal human conduct would be willing to buy as a prudent man in normal market conditions prevailing in the open market in the locality in which the acquired lands are situated as on the date of notification under Section 4(1) of the Act. In other words, the Judge who sits in the armchair of the willing buyer and seek an answer to the question

whether in the given set of circumstances as a prudent buyer he would offer the same market value which the court proposed to fix for the acquired lands in the available market conditions. The market value so determined should be just, adequate and reasonable."

21. Their Lordships of the Hon'ble Supreme in ***Trishala Jain and another*** versus ***State of Uttaranchal and another***, (2011) 6 SCC 47 have held that the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their Lordships have held as under:

44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits."

22. Their Lordships of the Hon'ble Supreme Court in ***Himmat Singh and others*** versus ***State of Madhya Pradesh and another***, (2013) 16 SCC 392, in a case where the reference court has made three tier deductions viz. (i) 25% for leaving out portions of acquired land for purpose of laying roads, drains etc., (ii) 25% towards expenses for development work, and (iii) 50% towards smallness of plots sold, which was approved by High Court, have held that such approach was clearly erroneous since respondent State had not even suggested that such development work was undertaken for purpose of laying railway line. Hence, deductions made under first two heads were unsustainable.

23. In the present case, there is neither any evidence nor any suggestion that such development was undertaken while constructing Sanjauli-Dhalli by pass road.

24. Accordingly, In view of the analysis and discussion made hereinabove, RFA No. 49/2009 is allowed and the award dated 23.12.2008 is modified to the extent that the market value of the claimant's land is assessed Rs. 9,05,107/- per bigha alongwith statutory benefits. RFA No.294 of 2009 is dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

The New India Assurance Company Ltd. ...Petitioner

Versus

Sh. Jagdish Lakhanpal and others. ...Respondents

CWP No. 933 of 2011
Judgment reserved on: 11.3.2016
Date of Decision : 22.3.2016.

Cases referred:

The Roman Catholic Mission Vs. The State of Madras, AIR 1966 SC 1457

Marwari Khumhar & Others Vs. Bhagwanpuri Guru Ganeshpuri & Another, AIR 2000 SC 2629
R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple & Another, AIR 2003 SC 4548
Dayamathi Bai Vs. K.M. Shaffi, AIR 2004 SC 4082 and Life Insurance Corporation of India & Another Vs. Rampal Singh Bisen, (2010) 4 SCC 491
Jakir Hussein Vs. Sabir (2015) 7 SCC 252

Motor Vehicles Act, 1988- Section 166- Respondent No.1 boarded the bus which met with an accident on account of rash and negligent driving of the driver—he sustained multiple injuries and was taken to hospital- he filed a claim petition which was allowed- compensation of Rs.26,17,576/- was assessed by the trial Court- however, compensation was restricted to Rs.25 lacs as claimant had only claimed Rs.25 lacs as compensation- claimant had not examined any witness to prove the bills produced on record- mere admission of a document does not amount to proof – the Tribunal could not have relied upon the un-exhibited documents to award the compensation - no evidence was led to prove the future medical expenses- claimant is a government servant and would be entitled to reimbursement from the government- claimant had not produced the bills of travelling by taxi and no person in whose vehicle the claimant had travelled was examined by the claimant- earned/commuted leave was sanctioned by the government- therefore, claimant had not suffered any loss during the period he was on leave - the increment was granted to the claimant immediately after he joined and thus he had not suffered future loss of income- Medical Officer categorically stated that disability will not be improved by the physiotherapy- therefore, amount for physiotherapy could not be awarded to the claimant- further, it was doubtful that claimant had taken treatment from PW-4- claimant had claimed attendant charges @ Rs.5,000/- p.m.- it is difficult to believe that claimant who was drawing salary of Rs.12,500/- would be paying Rs.5,000/- p.m to PW-9- claimant had become partially paralytic for life- hence the sum of Rs. 3 lacs awarded under pain and suffering was reasonable- he had suffered 50% disability and the amount of Rs. 3 lacs towards future discomforts, inconvenience, hardship and frustration was reasonable- thus, amount reduced to Rs.9,61,309/- along with interest @ 9% per annum (Para-4 to 65)

For the petitioner:	Mr.B.M. Chauhan, Advocate.
For the respondents:	Mr. R.L. Chaudhary, Advocate, for respondent No. 1 Mr.Tara Singh Chauhan, Advocate for respondent No. 2. Mr.Lovneesh Kanwar, Advocate, for respondent No. 3. Mr.Shyam Singh Chauhan, Advocate vice Mr.Adarsh K. Vashishta, Advocate, for respondents No. 4 and 5. Mr.Virender Kumar Verma, Ms.Meenaishi Sharma, Additional Advocate Generals with Ms. Parul Negi, Deputy Advocate General, for respondent No. 7.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The Motor Vehicle Act, 1988 provides for compensation in motor vehicle accidents, which should be equitable, fair, reasonable and not arbitrary. But then what would be the "just compensation" is a vexed question and there can be no golden rule applicable to all cases for measuring the value of human life or a limb. It is more than

settled that there must be material before the Court to arrive at a compensation and the same cannot be awarded as a windfall or bonanza for the victim and the statutory provisions clearly indicate that the compensation must be just and not a source of profit or an extravagant one and unjust enrichment should be discarded. But at the same time, the compensation should not be a pittance.

2. The difficulty in awarding just compensation has been aptly pointed out by the Hon'ble Supreme Court in ***K. Suresh Vs. New India Assurance Company Limited and another (2012) 12 SCC 274***, wherein it was held:-

> *"2. Despite many a pronouncement in the field, it still remains a challenging situation warranting sensitive as well as dispassionate exercise how to determine the incalculable sum in calculable terms of money in cases of personal injuries. In such assessment neither sentiments nor emotions have any role. It has been stated in Davies v. Powell Duffryn Associate Collieries Ltd. (No. 2) 1942 AC 601 that it is a matter of Pounds, Shillings and Pence. There cannot be actual compensation for anguish of the heart or for mental tribulations. The quintessentiality lies in the pragmatic computation of the loss sustained which has to be in the realm of realistic approximation. Therefore, Section 168 of the Motor Vehicles Act, 1988 (for brevity "the Act") stipulates that there should be grant of "just compensation". Thus, it becomes a challenge for a court of law to determine "just compensation" which is neither a bonanza nor a windfall, and simultaneously, should not be a pittance.*
>
> *3. In Jai Bhagwan v. Laxman Singh (1994) 5 SCC 5, a three-Judge Bench of this Court, while considering the assessment of damages in personal-injury-actions, reproduced the following passage from the decision by the House of Lords in H.West & Son, Ltd. v. Shephard (1963) All ER 625 (HL):*
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> > *"My Lords, the damages which are to be awarded for a tort are those which 'so far as money can compensate, will give the injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act' [Admiralty Commissioners v. Susquehanna (Owners), The Susquehanna 1926 AC 655]. The words 'so far as money can compensate' point to the impossibility of equating money with human suffering or personal deprivations. A money award can be calculated so as to make good a financial loss. Money may be awarded so that something tangible may be procured to replace something else of like nature which has been destroyed or lost. But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common assent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional." (Jai Bhagwan case (1964) 5 SCC P. 7, para 9)*

4. *In the said case in Jai Bhagwan reference was made to a passage from Clerk and Lindsell on Torts (16th Edn.) which is apposite to reproduce as it relates to the awards for non-pecuniary losses: (SCC pp. 7-8, para 10)*

> *"10.…'In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed respectively as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible of direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non- pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In respect of the former, it is submitted, the court should and usually does seek to achieve restitutio in integrum in the sense described above, while for the latter it seeks to award 'fair compensation'. This distinction between pecuniary and non-pecuniary damage by no means corresponds to the traditional pleading distinction between special and general damages, for while the former is necessarily concerned solely with pecuniary losses notably accrued loss of earnings and out-of- pocket expenses the latter comprises not only non-pecuniary losses but also prospective loss of earnings and other future pecuniary damage.*

5. In this regard, we may refer with profit the decision of this Court in Nagappa v. Gurudayal Singh and others (2003) 2 SCC 274 wherein the observations of Lord Denning M.R. in Lim Poh Choo v. Camden and Islington Area Health Authority 1979 QB 196 were quoted with approval. They read thus: -

> *"25……The practice is now established and cannot be gainsaid that, in personal injury cases, the award of damages is assessed under four main heads: first, special damages in the shape of money actually expended; second, cost of future nursing and attendance and medical expenses; third, pain and suffering and loss of amenities; fourth, loss of future earnings.*

6. While having respect for the conventional determination there has been evolution of a pattern and the same, from time to time, has been kept in accord with the changes in the value of money. Therefore, in the case of Ward v. James (1996) 1 QB 273 it has been expressed thus: -

> *"(iii) Loss during his shortened span----Although you cannot give a man so gravely injured much for his lost years, you can, however, compensate him for his loss during his shortened span, that is, during his expected years of survival. You can compensate him for his loss of earnings during that time, and for the cost of treatment, nursing and attendance. But how can you compensate him for being rendered a helpless invalid? He may, owing to brain injury, be rendered unconscious for the rest of his days, or, owing to a back injury, be unable to rise from his bed. He has lost everything that makes life worthwhile. Money is no good to him. Yet judges and juries have to do the best they can and give him what they think is fair. No wonder they find it well nigh insoluble. They are being asked to calculate the*

> *incalculable. The figure is bound to be for the most part a conventional sum. The judges have worked out a pattern, and they keep it in line with the changes in the value of money."*

7. While assessing the damages there is a command to exclude considerations which are in the realm of speculation or fancy though some guess work or some conjecture to a limited extent is inevitable. That is what has been stated in C.K. Subramania Iyer v. T. Kunhikuttan Nair (1969) 3 SCC 64. Thus, some guess work, some hypothetical considerations and some sympathy come into play but, a significant one, the ultimate determination is to be viewed with some objective standards. To elaborate, neither the tribunal nor a court can take a flight in fancy and award an exorbitant sum, for the concept of conventional sum, fall of money value and reasonableness are to be kept in view.

Ergo, in conceptual eventuality just compensation plays a dominant role.

8. The conception of "just compensation" is fundamentally concretized on certain well established principles and accepted legal parameters as well as principles of equity and good conscience. In Yadav Kumar v. Divisional Manager, National Insurance Company Limited and another (2010) 10 SCC 341, a two-Judge Bench, while dealing with the facet of just compensation, has stated thus: -

> *"15....It goes without saying that in matters of determination of compensation both the tribunal and the court are statutorily charged with a responsibility of fixing a just compensation. It is obviously true that determination of just compensation cannot be equated to a bonanza. At the same time the concept of just compensation obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. This reasonableness on the part of the tribunal and the court must be on a large peripheral field."*

In Concord of India Insurance Co. Ltd. v. Nirmala Devi (1979) 4 SCC 365 this Court has expressed thus: -

> *"2....The determination of the quantum must be liberal, not niggardly since the law values life and limb in free country in generous scales."*

9. In Helen C. Rebello and others v. Maharashtra SRTC (1999) 1 SCC 90, while dealing with concept of "just compensation", it has been ruled that:

> *"28....The word just, as its nomenclature, denotes equitability, fairness and reasonableness having large peripheral field. The largeness is, of course, not arbitrary; it is restricted by the conscience which is fair, reasonable and equitable, if it exceeds; it is termed as unfair, unreasonable, unequitable, not just."*

The field of wider discretion of the tribunal has to be within the said limitations. It is required to make an award determining the amount of compensation which in turn appears to be just and reasonable, for compensation for loss of limbs or life can hardly be weighed in golden scales as has been stated in State of Haryana and another v. Jasbir Kaur and others (2003) 7 SCC 484.

10. It is noteworthy to state that an adjudicating authority, while determining quantum of compensation, has to keep in view the sufferings of the injured person which would include his inability to lead a full life, his incapacity to

enjoy the normal amenities which he would have enjoyed but for the injuries and his ability to earn as much as he used to earn or could have earned. Hence, while computing compensation the approach of the tribunal or a court has to be broad based. Needless to say, it would involve some guesswork as there cannot be any mathematical exactitude or a precise formula to determine the quantum of compensation. In determination of compensation the fundamental criterion of just compensation should be inhered."

3. This writ petition has been preferred by the Insurance Company questioning the award passed by learned Motor Accident Claims Tribunal on the ground that the same is a windfall and a bonanza for the claimant. The award is not only an extravagant one, but is virtually a source of profit and being totally perverse, is liable to be set aside.

The facts in brief may be noticed.

4. On 19.9.1999 claimant/respondent No. 1 (herein after referred to as claimant) boarded Bus bearing No. HP-24-4295 at Ghagas. When the bus reached at Khudi Nallah on Ghagas-Hamirpur Road, on account of rash and negligent driving by its driver, respondent No. 3, it struck against truck bearing No. HP-28-1515. As a result of this accident claimant sustained multiple injuries on his head and other parts of body. He was firstly taken to Ayurvedic Hospital, Kandraur, from where he was referred to IGMC, Shimla. The claimant remained admitted in the said hospital for 20 days w.e.f. 19.2.1999 to 9.10.1999. On his discharge he was advised rest and remained on leave from his duty w.e.f. 19.9.1999 to 21.8.2000.

5. Claimant filed a claim petition before the MACT, Mandi alleging therein that he had undergone treatment in various hospitals for which he had incurred an expenditure of about Rs.4,00,000/-. It was further alleged that he was still undergoing physiotherapy from the date of his accident till the filing of the petition. It was further alleged that he suffered 50% disability on account of the accident and on these basis a total compensation of Rs.25,00,000/- was claimed by him from the petitioner, as also respondents No. 2 to 6.

6. Petitioner in its reply did not dispute the accident. However raised the plea that the driver of the offending vehicle was not possessing valid and effective driving lisence at the time of accident.

7. Learned tribunal on 4.11.2008 and 25.8.2009 respectively framed the following issues/additional issues:-

"1. Whether the petitioner sustained grievous injuries on 19.9.1999 at Khuddi-Nala near Ghagas at about 10 A.M. due to rash and negligent driving of Bus No. 24-4295 by respondent No. 2, as alleged? OPP

2. Whether the petitioner is entitled to the compensation amount if so to what amount and from whom? OPP

3. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPRs.

4. Whether the accident has taken place due to rash & negligent driving by the driver of Truck No. H.P-28-1515?OPRs.

4(a) Whether the Truck No. H.P-28-1515 was not insured with respondent No. 6, as alleged? OPR-6

4(b) Whether the driver of the vehicle involved in the accident was not holding valid and effective driving licence to drive the vehicle involved in the accident? OPR-6

5. Relief."

8. The learned tribunal after recording evidence and evaluating the same awarded compensation of Rs.26,17,576/-, but since the claimant had only claimed Rs.25,00,000/- as compensation, he was awarded compensation of Rs.25,00,000/- only and was further held entitled to interest over this amount @ 9% per annum from the date of filing of the petition till deposit of the awarded amount.

9. Mr.B.M. Chauhan, Advocate learned counsel for the petitioner has vehemently argued that the award passed by the learned tribunal is totally perverse and based on no evidence and therefore, no compensation, much less a whooping compensation of Rs.25,00,000/- could have been awarded in favour of claimant.

10. On the other hand, Mr.R.L. Chaudhary, learned counsel for the claimant has sought to support the award as just and legal and prayed for dismissal of the writ petition.

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

11. It is more than settled that compensation in personal injury cases has to be determined under the following heads:-

Pecuniary damages (special damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity."

12. The learned Tribunal has awarded a total compensation of Rs.26,17,576/- under the following heads:-

"1.	*Past and Present Medical: Expenses on Medicines.*	*1,04,935/-*
2.	*Future Medical expenses: in future medicines.*	*50,000/-*
3.	*Transportation charges past: & present.*	*1,00,000/-*
4.	*Transportation charges in: future.*	*10,000/-*
5.	*Loss of Past Earning:*	*1,42,692/-*
6.	*Loss of future income:*	*3,49,440/-*
7.	*Past and present Physiotherapy: Treatment charges.*	*2,47,200/-*
8.	*Physiotherapy treatment:*	*1,40,000/-*

	charges fur future.	
9.	*Attendant charges for the Period from 19-9-99 till 19-8-2000*	*66,000/-*
10.	*Attendant charges from August: 2000 till today.*	*6,00,000/-*
11.	*Attendant charges in future:*	*1,40,000/-*
12.	*Consultation charges:*	*10,000/-*
13.	*Lodging & Boarding charges:*	*27,309/-*
14.	*Laboratory charges:*	*10,000/-*
15.	*M.R.I. Charges:*	*20,000/-*
16.	*Pain & suffering:*	*3,00,000/-*
17.	*Future discomforts, inconvenience hardship and frustration etc.*	*3,00,000/-*
	Total:	*26,17,576/-*

13. Before proceeding further, certain undisputed facts may be noticed. Claimant at the time of the accident was a Government servant, working as Assistant District Attorney and had resumed his duties after availing total leave of 335 days and at the time of passing of award had been promoted as District Attorney. Bearing in mind these facts, I now proceed to analyze the legality and correctness of the compensation awarded under different heads:-

Heads No. 1 & 2

14. Learned tribunal has awarded a sum of Rs.1,04,935/- towards past and present medical expenses on medicines and another sum of Rs.50,000/- towards future medical expenses towards medicines, by relying upon the bills of medicines mark A-1 to A-72, the discharge slip of IGMC Shimla Ex. PW-2/B and treatment chits Ex.PW-2/C to Ex. PW-2/C-21.

15. It is more than settled that mere admission of document in evidence does not amount to its proof. In other words, mere marking of "exhibit or mark" on a document does not dispense with its proof, and the same is required to be proved in accordance with law. (Refer ***The Roman Catholic Mission Vs. The State of Madras, AIR 1966 SC 1457; Marwari Khumhar & Others Vs. Bhagwanpuri Guru Ganeshpuri & Another, AIR 2000 SC 2629; R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple & Another, AIR 2003 SC 4548; Smt.Dayamathi Bai Vs. K.M. Shaffi, AIR 2004 SC 4082 and Life Insurance Corporation of India & Another Vs. Rampal Singh Bisen, (2010) 4 SCC 491).***

16. Indisputably, save and except the sole testimony of claimant, no other witness who may have issued these bills has been examined and therefore, no credence can be placed on the same and it can safely be concluded that these bills have not been proved in accordance with law. These unexhibited documents could not have been relied upon and then formed basis to award compensation for the past and present medical expenses.

17. In so far as the future medical expenses towards medicines are concerned, the claimant has lead no evidence whatsoever whereby it could be gathered that he would require this amount towards purchase of medicines in future. That apart, the claimant is

otherwise a government servant and would be entitled to reimbursement in accordance with rules. Therefore, the claimant is not entitled to any compensation under both these heads.

Head No. 3.

18. Claimant has been awarded a sum of Rs.1,00,000/- under this head on the premise that he had visited various hospitals at Chandigarh, Kullu, Delhi, Panchkula and Sangrur (Punjab) at different occasions and looking into the nature of injury sustained by him, it would not have been possible for him to undertake the journey by public transport and the same must have been undertaken by taxi.

19. I am not convinced by this logic, for the simple reason that the learned tribunal appears to be totally oblivious of the fact that it was dealing with the case where the claimant is not a layman, but a law knowing person working as an Assistant District Attorney. In case the claimant had in fact traveled by taxi, then I see no reason why the bills thereof should not be forthcoming. If claimant could have kept all the documents relating to all the aforesaid hospitals along with various other documents exhibited on the record, then what prevented him from keeping the bills of such travel.

20. That apart, the claimant even failed to examine those witnesses in whose vehicle he had undertaken the journeys to these hospitals. But nonetheless, it cannot be denied that the claimant must have incurred at least some expenses for traveling to these hospitals, therefore, in place of Rs.1,00,000/- as awarded by the tribunal, the claimant is awarded a sum of Rs.20,000/- under this head.

Head No. 4

21. The learned tribunal has awarded a sum of Rs.10,000/- towards transportation charges for future, I find it to be just and reasonable and therefore, this finding call for no interference.

Heads No. 5 and 6

22. Since both these heads are interconnected and interrelated, therefore, they are decided through common reasoning.

23. The learned tribunal for awarding a sum of Rs.1,42,692/- towards loss of past earning has accorded the following reasons:

> *"PW-6 has stated that the petitioner remained on earned leave for 174 days and medical leave for 161 days. Thus, the petitioner remained on leave for total 335 days. He would have not remained on leave, had he not sustained injuries. He could have encashed his leave at the time of retirement. He could have reserved this leave for any other contingency. Thus, the petitioner, who per force remained on leave on account of injuries, is also entitled to get compensation on account of loss of earning. Ex.PW6/A shows that the salary of the petitioner in the year 2000 was Rs.12,972/-. He remained on leave for 11 months. Thus, the loss of earning for the leave period comes to Rs.12972X11=1,42,692/- and as such, the petitioner is awarded compensation of Rs.1,42,962/- on account of loss of earning."*

24. Before I proceed any further, it would be noticed that even at the time when the matter was pending admission before this Court, a learned Division Bench of this Court on 1.7.2011, passed the following order:-

> *"Learned counsel for the first respondent seeks two weeks' time to file reply. He shall produce along with the reply the particulars of the Doctor, who issued medical Certificates to him, including the medical Certificate he has produced*

for fitness to joint duty. He will also explain as to what is the jurisdiction in claiming the salary and other benefits for the period he had not actually worked. Still further he will explain as to what is the jurisdiction of making the various claims before the Tribunal. There shall also be a particular explanation to the claim for an amount of around Rs.8 lacs for Attendant. The particulars of the Physiotherapist, who has been allegedly paid more than Rs. 3 lacs shall also be furnished."

25. In compliance to the aforesaid directions, the claimant did file his reply, but failed to produce any new document and in fact annexed copies of those very documents which had been produced by him before the learned tribunal.

26. The case thereafter came to be listed at various dates the learned Division Bench on 22.9.2011 passed the following order:-

"There will be a direction to the Director, Prosecution, to file a statement showing the pay and allowances, as admissible to the first respondent, Shri Jagdish Lakhanpal, who was functioning as Additional District Attorney, Bilaspur between September, 1999 to February, 2002. The service book of the first respondent shall also be made available. The Registry will communicate this order to the Director, Prosecution."

27. In compliance to the aforesaid order, the employer clarified that in so far as the earned leave/commuted leave of claimant was concerned, the same was sent to the Government for approval and necessary sanction inturn was accorded by the Government. Therefore, on such basis it can safely be concluded that the claimant had not suffered on any account during the period he was on leave and is therefore, not entitled to any compensation under the head loss of past earning.

28. Now in so far as the loss of future earning is concerned, the learned tribunal for awarding a sum of Rs.3,49,440/- has recorded the following reasons:-

"PW-6 has specifically stated that on account of leave, the petitioner has suffered loss of an increment of Rs.2,912/-. Thus, the annual loss to the petitioner on account of loss of increment comes to Rs.2912x12=34,944/-. Considering the fact that the amount is to be paid in lump sum, it would be just and proper if multiplier of 10 is applied. By applying multiplier of 10, the future loss of income of the petitioner comes to Rs.3,49,440/-. Accordingly, the petitioner is awarded an amount of Rs.3,49,440/- on account of loss of future income."

29. To say the least the reasoning is fallacious because there was no recurring loss to respondent No. 1 and this fact is clear from the reply filed by the employer of the claimant, more particularly para 3 thereof, which reads as under:-

"3. That as far as loss of income mentioned at Sr. No. 6 at page 16 in the award of Motor Accident Claimants Tribunal is concerned, it is humbly submitted that the respondent No. 1 has remained on leave w.e.f. 19.9.1999 to 20.8.2000 and his increment was due on 1.1.2000 but it was deferred till 20.8.2000 because respondent No. 1 joined his duties on 21.8.2000, after availing the leave. His increment was granted on 21.8.2000 and as such there was loss of Rs.2912/- only which is not a recurring loss for future. Hence, future loss of income of respondent No. 1 amounting to Rs.*3,49,440/- is not correctly awarded by the Ld. Motor Accident Claims Tribunal."*

30. The claimant has though filed a counter affidavit to the aforesaid reply, but then the aforesaid averments have not been denied. Rather, the claimant has tried to set up an entirely new case by claiming that the award of Rs.3,49,440/- was for future loss of income, which he had incurred as an agriculturist, because of the injuries sustained in the accident.

31. At this stage it would be apt to notice that the employer in its reply has categorically stated that the claimant remained on leave w.e.f. 19.9.1999 to 20.8.2000 and because of this, his increment which was otherwise due on 1.1.2000 was deferred till 20.8.2000. Upon his joining on 21.8.2000 the increment was granted immediately on 21.8.2000 itself and as such there was no loss of even Rs.2912/-, much less, recurring loss. That apart, it is specifically pleaded that the future loss of income of Rs.3,49,440 has not been correctly awarded by the learned MACT.

32. In view of my findings recorded above, the claimant is not entitled to any compensation under either of these heads.

Heads No. 7 and 8

33. Learned tribunal has proceeded to award a sum of Rs.2,47,200/- towards past and present Physiotherapy treatment charges and a further sum of Rs.1,40,000/- towards future Physiotherapy treatment charges.

34. Learned tribunal has awarded this compensation solely on the basis of statement of PW-4 Dr. Abdul Rehman, who has stated that the claimant was being administered physiotherapy by him since 2003, for which he had been charging a sum of Rs.2100/- per month. It is apt to reproduce paras 38 and 39 of the award, which read thus:-

> *"38. PW-4 Dr. Abdul Rehman has stated that the petitioner is under his physiotherapy treatment since, 2003 and he is charging Rs.2100/- per month. It is well known that for the victim of road accidents, physiotherapy is one of the acknowledged mode of treatment which requires to be pursued for a long duration. Ex. PW2/B is discharge slip which shows that the petitioner was discharged from the hospital with advise to undergo physiotherapy since October, 1999. If the petitioner is paying Rs.2100/- per month to physiotherapist then the amount spent on physiotherapy treatment by the petitioner till today comes to Rs.2100X12=2,47,200/- and as such, the petitioner is awarded an amount of Rs.2,47,200 on account of past and present physiotherapy treatment.*
>
> *39. PW-4, Dr. Abdul Rehman has stated that the petitioner is still under his physiotherapy treatment. It is a well known fact that the victims of road accidents require to take physiotherapy treatment for a long duration and in some cases throughout life. In the present case, since the petitioner has suffered 50% permanent disability qua brain and nerve, he is likely to take physiotherapy treatment throughout his life. Hence, it would be just and proper, if any amount of Rs.1,40,000/- is awarded to the petitioner on account of future physiotherapy treatment."*

It is evident from the aforesaid that the leaned tribunal has completely ignored the statement of PW-5, Dr.Mangal Kumar, who was one of the signatories to the disability certificate and had in his cross-examination categorically stated that the disability suffered by the claimant could not improve with the help of physiotherapy. The relevant portion of his statement in cross-examination reads thus:-

"It is incorrect to suggest that this disability can improve with the help of physiotherapy."

Further the learned tribunal has proceeded to award compensation under this head by taking judicial notice of the fact that the victim of road accident are required to take physiotherapy treatment for a long duration of time and in some cases throughout life time. The learned tribunal was obviously not an expert on the subject and its observations are otherwise contrary to the aforesaid statement of PW-5, who is qualified doctor and expert on the subject.

35. Leaving all these contentions aside, the question arises as to whether the claimant had in fact taken treatment from PW-4. At this stage, it would be relevant to make a note of the cross-examination of PW-4, which is reproduced in its entirety and reads as follows:-

"xxxxx(cross-examination by respondents No. 1)xxxx

When patient came to us for treatment I maintained the record. I have not maintained the record in this case. Self stated I used to give the treatment at the house of petitioner. I am not issued any receipt with regard to the receipt of Rs.2100/- PM. I have not seen the previous record of petitioner. Self stated I have already seen the record when I started the treatment of the petitioner. I have 25 patients in OPD and 5 patients in home visit. I remember the record of each and every patient.

xxxx(cross-examination by respondents No. 3 and 6)xxxx

I have seen the record of discharge from Chandigarh Hospital when he came to me first time. That belongs to some physiotherapy centre. It is incorrect that I have not seen any record. I have not maintained any file of petitioner. When patient was come to me he was suffering from disability. I cannot say how much disability he was suffering. It is correct to suggest that the disability which he was earlier facing when he came to me is improve now a days. It is also correct that petitioner can do his daily routine work. Self stated that daily routine work means is light and petty work. This disability may or may not improve in future. It is incorrect to suggest that I am giving physiotherapy treatment to the petitioner and deposing falsely."

36. It is evident from the reading of the above statement of PW-4 that he was a procured witness or else like any other patients, records of the treatment of claimant would have certainly been maintained by him, that too irrespective of the fact that the alleged treatment was being given at home. Having failed to prove the physiotherapy treatment, the claimant cannot be held entitled to any amount under these heads.

Heads No. 9, 10 and 11

37. Learned tribunal has awarded a sum of Rs.66,000/- as attendant charges for the period from 19.9.1999 to 19.8.2000, and thereafter Rs.6,00,000/- towards attendant charges have been awarded for the period commencing from August, 2000 till date of passing of the award and yet another sum of Rs.1,40,000/- towards future attendant charges have been awarded.

38. In doing so, the learned tribunal has relied upon the statements of the claimant and one Mahesh Thakur, PW-9. The claimant had stated that after joining his duties, he had employed a permanent attendant and was paying a sum of Rs.3,000/- per month to him. He had further stated that he had hired a three-wheeler for going to his office and back and paying a sum of Rs.2,000/- per month to him. Surprisingly, it is PW-9, who

is supposed to be both the three-wheeler driver, as also the attendant. But then, even this witness has not produced on record any receipt acknowledging the receipt of any amounts, which cumulatively work out to Rs.8,00,000/-. It has come in the statement of PW-9 that he is graduate and whereas his father was a shopkeeper having very good business. Then why would PW-9 work as an attendant and also drive a three-wheeler is difficult to comprehend.

39. That apart, it has come on record that the claimant himself in year 1999 was drawing a salary of Rs.12,500/- and it is, therefore, unbelievable that out of this amount, he was parting with Rs.5,000/- to PW-9, who was not even a full time attendant. At this stage, it shall be apt to reproduce the cross-examination of PW-9 in entirety and the same reads:-

> *"xxx(cross-examination by Ld. counsel for the respondent)xxx*
>
> *I am graduate. I passed my graduation in the year, 2002. I did my graduation from Govt. Post Graduate College Mandi. I was regular student for first year and thereafter private student. My father is a shop-keeper. My father shop is confessionary shop. My father is having very good business. I not used to go to the shop of my father. The three wheeler which I have purchased is financed from Bajaj finance company, Gutkar. I pay installment of finance myself and for that I plied my three wheeler in bajar. From the house of Jagdish Lakhanpal Mandi Court is 3 K.M. in one side. Normal three wheeler charged is Rs.30/- for one side. I left the petitioner in the court and thereafter I do my own work. Thereafter petitioner do his work himself. It is incorrect to suggest that the petitioner is not giving me Rs.3000/- monthly remuneration for attendance and Rs.2000/- for three wheeler charges. I returned from the bajar at 8.30 P.M. to my house. In the morning first of all I do my business Auto and thereafter pick the petitioner. It is incorrect to suggest that I do not attend the petitioner at his home. It is incorrect that I am deposing falsely."*

40. In case the entire statement coupled with the cross-examination of PW-9 is read, then one would come to an inescapable conclusion that he was not at all employed as an attendant and at best had only been picking up and dropping respondent No. 1 to his work place and residence and nothing more. Thus, the claimant cannot be awarded any compensation towards attendant charges. Therefore, claimant cannot be held entitled to any compensation under Head No. 9.

41. Now in so far as the picking and dropping charges are concerned, it has come in the statement of PW-9 that normal three-wheeler were charging a sum of Rs.30/- for one side, which means that the claimant had been spending about Rs.2,000/- per month towards his commuting/transportation charges.

42. The aforesaid transportation charges would be reasonable keeping in view the nature of injuries sustained by the claimant and accordingly, the claimant is held entitled to the transportation charges at the rate of Rs.2,000/- per month from 21.8.2000 till passing of the award i.e. 20.9.2010 i.e. ten years one month and the same works out to be Rs.2,64,000/-.

Heads No. 12 and 13

43. Since nominal amounts of Rs.10,000/- and Rs.27,309/- respectively have been awarded under these heads, the same call for no interference.

Heads No. 14 and 15

44. The claimant has been awarded a sum of Rs.10,000/- and Rs.20,000/- under these heads, the same are not being interfered with only because it has come in the affidavit of the employer that the claimant had not claimed any reimbursement of medical expenses from the department w.e.f. 19.2.2000 to 26.2.2002.

Heads No. 16 and 17

45. The learned tribunal has awarded to the claimant a sum of Rs.3,00,000/- towards pain and suffering and a further sum of Rs.3,00,000/- towards future discomforts, inconvenience, hardship and frustration etc.

46. It is more than settled that in an accident, if a person loses limb or eye or sustains an injury, the Court while computing damages for the loss of organs or physical injury, does not value the limb or eye in isolation, but only values totality of harm which the loss has entailed, the loss of amenities of life and infliction of pain and suffering; the loss of the good things of life, joys of life and the positive infliction of pain and distress. However, the compensation cannot be put in a straight jacket formula and shall have to be worked out on case to case basis. Since the monetary compensation for pain and suffering is above palliative, the correct dose of which, in the last analysis, will have to be determined on case to case basis.

47. PW-5, Dr. Mangal Kumar, has duly proved on record the disability certificate, Ex. PW-5/A which proves that the claimant was suffering left side hemipresis and there was a paralysis of the seventh nerve. Therefore, taking into consideration the entirety of the injuries, which has left the claimant partially paralytic for life, I see no reason to interfere with the findings recorded by the learned tribunal, thereby awarding a sum of Rs.3,00,000/- towards pain and suffering.

48. Learned tribunal has awarded a further sum of Rs.3,00,000/- as compensation towards future discomforts, inconvenience, hardship and frustration etc.

49. It is more than settled that a victim of injury is required to be compensated for the loss of amenities of life, which may include verity of matters i.e. on account of injuries the claimant may not be able to work, run or sit. His normal longevity of life may be shortened because of the injury. That apart, as a result of the injury, the victim will have to face inconvenience, hardship, distress, discomfort, frustration and mental stress in life, therefore, award in such cases should be just, which means that the compensation should to the extent possible to restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered, as a result of wrong done as far as money can do so in a fair, reasonable and equitable manner.

50. Learned counsel for the petitioner has vehemently argued that once the claimant had submitted his fitness certificate, then there was no occasion for the learned tribunal to award any compensation under both these heads, i.e. heads No. 16 and 17, as the claimant was deemed to be fit to discharge his duties.

51. I am afraid, I cannot agree with the contention as put forth by learned counsel for the petitioner. It has categorically come in the statement of PW-5, Dr. Mangal Kumar that the claimant has sustained 50% disability and not only suffered left side hemipresis, but there was also paralysis of seventh nerve. He had further stated that it was only a miracle which could cure the claimant, as his physical condition would not improve with the passage of time. In so far as the question of fitness certificate is concerned, the petitioner has not cared to produce the same on record.

52. Learned counsel for the petitioner would then argue that at the time of accident, the claimant was working as Assistant District Attorney and thereafter promoted as Deputy District Attorney on 7.1.2004 and thereafter as District Attorney on 24.8.2009, which in itself establishes that respondent No. 1 had not suffered any disability and was fit enough to do his work.

53. Even this contention cannot be accepted for the simple reason that the petitioner firstly has failed to prove on record the fitness certificate and that apart it has specifically come in the affidavit of the employer that respondent No. 1 had in fact suffered permanent disability to the extent of 50%.

54. Moreover, the injuries sustained by claimant had adverse affect on his physical frame, but that does not mean that there was any defect in his mental faculties. Mere fact that the claimant continue to work and attained promotions would only go to show that his mental faculties were intact, but in no manner prove that the physical condition of the claimant was normal.

55. Moreover, looking into the nature of injuries sustained by the claimant, when he was barely 39 years of age, it cannot be denied that he shall in future be put to lot of distress, discomfort, inconvenience, hardship, which inturn will create a lot of frustration. Therefore, the sum awarded under this head calls for no interference.

CONCLUSION

56. Resultantly in view of the foregoing discussion and findings, the claimant would now be entitled to the following compensation under different heads:-

"1.	*Past and Present Medical: Expenses on Medicines.*	*Nil*
2.	*Future Medical expenses: in future medicines.*	*Nil*
3.	*Transportation charges past: & present.*	*20,000/-*
4.	*Transportation charges in: future.*	*10,000/-*
5.	*Loss of Past Earning:*	*Nil*
6.	*Loss of future income:*	*Nil*
7.	*Past and present Physiotherapy: Treatment charges.*	*Nil*
8.	*Physiotherapy treatment: charges fur future.*	*Nil*
9.	*Attendant charges for the Period from 19-9-99 till 19-8-2000*	*} } } taxi charges } 2,64,000/-*
10.	*Attendant charges from August: } 2000 till today.*	*}*
11.	*Attendant charges in future:*	*Nil*
12.	*Consultation charges:*	*10,000/-*
13.	*Lodging & Boarding charges:*	*27,309/-*
14.	*Laboratory charges:*	*10,000/-*
15.	*M.R.I. Charges:*	*20,000/-*

16.	*Pain & suffering:*	*3,00,000/-*
17.	*Future discomforts, inconvenience hardship and frustration etc.*	*3,00,000/-*
	Total	*Rs.9.61,309/-*

INTEREST

57. Learned counsel for the petitioner has laid challenge to the grant of interest, that too, from the date of filing of the petition till date of actual deposit and has further questioned the rate at which such interest has been awarded i.e. 9% per annum.

58. It is vehemently argued by learned counsel for the petitioner that though the petition had been filed on 26.2.2000, it was on account of in action and negligence on part of the claimant that issues could only be framed on 4.11.2008 and thereafter additional issues were framed on 25.8.2009 and therefore, in such circumstances, no interest could have been awarded for the aforesaid period or else that would amount to granting premium to the claimant for his own inaction and negligence.

59. Section 171 of the Motor Vehicles Act provides for grant of interest in cases arising out of compensation under the Motor Vehicles Act, which reads thus:-

> ***"171. Award of interest where any claim is allowed.***
>
> *Where any claims Tribunal allows a claim for compensation made under this Act, such Tribunal may direct that in addition to the amount of compensation simple interest shall also be paid at such rate and from such date not earlier than the date of making the claim as it may specify in this behalf."*

The aforesaid provision provides for awarding of simple interest on the compensation awarded at such rate and from such date, not earlier than the date of making the claim, as it may specify in this behalf. The interest is not awarded for the damage done. Interest is awarded to the claimant for being illegally kept away from the due money, which ought to have been paid to him. Conversely, the claimant cannot claim interest as a matter of right for the proved delay, inaction or negligence on his part.

60. It would be evident from the records of the case that the matter initially remained pending w.e.f. 2.3.2002 till 26.8.2003 for service. Thereafter from 20.10.2003 till 6.8.2004, the parties were afforded opportunity to reconcile the matter. On 6.8.2004, the claimant himself made an offer of Rs.7,00,000/-. The matter remained under conciliation till the year 2007, when for some strange reasons the case was fixed for evidence of the claimant, though issues were yet to be framed. This fact was subsequently detected only on 17.5.2008 and thereafter the case was listed for framing of issues on 4.11.2008.

61. It would also be evident from the orders passed from time to time that at no stage can it be said that the claimant was negligent, much less, grossly negligent in pursuing his case. It cannot also be said that there was any culpable inaction on his part, rather he had already put forth his offer on 6.8.2004 and it was thereafter for the petitioner to take a call by taking action on such proposal. Thus no fault can be found with the findings of the tribunal when it awarded interest from the date of filing of the petition till its deposit.

62. Now coming to challenge laid with respect to the rate of interest, it would be noticed that the recent trend of the Hon'ble Supreme Court clearly indicates that instead of

awarding 7 or 8%, as is canvassed by the learned counsel for the petitioner, it has been awarding interest @ 9% per annum. Here I need only refer to a recent judgment of the Hon'ble Supreme in ***Jakir Hussein Vs. Sabir (2015) 7 SCC 252***, wherein it was held:-

> *"20. As regards the rate of interest to be awarded on the compensation awarded in this appeal, we are of the view that the Tribunal and the High Court have erred in granting interest @ 7% p.a. and 8% p.a., respectively on the total compensation amount instead of 9% p.a. by applying the decision of this Court in MCD Vs. Uphaar Tragedy Victims Assn. (2011) 14 SCC 481. Accordingly, we award the interest @ 9% p.a. on the compensation determined in the present appeal."*

Therefore, I see no reason to interfere even with the rate of interest, as awarded by the learned tribunal below.

63. In view of the aforesaid discussion, the petition is partly allowed and instead of Rs.25,00,000/- as awarded by the learned tribunal below, the claimant/respondent No. 1 is held entitled to the total compensation of Rs.9,61,209/- along with simple interest @9% per annum from the date of filing of the petition i.e. 26.2.2002 till the deposit of the award amount.

64. However, it is clarified that the interest shall not be payable on the amount directed to be paid under Head No. 17. Since the bus involved in the accident was insured with the petitioner, the amount of compensation along with interest shall be paid only by the petitioner. It is further clarified that in case the claimant has withdrawn the amount of Rs.5,00,000/- deposited by the petitioner pursuant to the directions passed by this Court on 16.3.2011, then the same shall be adjusted on pro-rata basis.

65. With these observations the writ petition is partly allowed in the aforesaid terms, leaving the parties to bear their costs.

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

Gramin Janta Kalyan Samiti, Kuthera ...Petitioner.

Versus

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

CWP No.4044 of 2015
Decided on: March 28, 2016.

Constitution of India, 1950- Article 226- Petitioner has sought writ of mandamus commanding the respondent to shift the office of Gram Panchayat Kuthera to village Kuthera from Makriri, or in the alternative to create a separate Panchayat for village Kuthera- held, that creation of panchayat or shifting office thereof is entirely in the domain of the Executive and not of any other agency- Court cannot interfere unless decision is prima facie illegal or suffers from arbitrariness- petition dismissed with liberty granted to the petitioner to approach the Competent Authority by way of representation. (Para-2 to 7)

Case referred:

Vijay Kumar Gupta versus State of H.P. and others, I L R 2015 (I) HP 351 D.B.

For the petitioner: Mr.Surender Saklani, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.M.A. Khan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of the instant writ petition, the petitioner has sought quashment of order, dated 24th August, 2015, Annexure P-11, on the grounds taken in the memo of writ petition.

2. Precisely, the petitioner has sought writ of mandamus commanding the respondents to shift the office of Gram Panchayat Kuthera to village Kuthera from Makriri, or in the alternative, the petitioner has prayed that the respondents be directed to create a separate Panchayat for village Kuthera.

3. The moot question is – Whether this Court has jurisdiction to command the respondents to make such an order. The answer is in the negative for the following reasons.

4. The creation of Panchayat or shifting the office thereof is entirely in the domain of the Executive and not of any other agency. The Court cannot interfere unless the decision is *prima facie* illegal or suffers from arbitrariness.

5. This Court has dealt with the similar issue in ***CWP No. 621 of 2014*** titled ***Nand Lal and another versus State of H.P. and others*** decided on 21.5.2014. It is apt to reproduce paras 9 to 17 of the said judgment herein.

> *"9. The Apex Court in Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.*
>
> *10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616, also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:*
>
> > *"14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."*
>
> *11. The respondents in their reply have specifically averred that they have considered the issue and it was found that Village Ramshehar is at the distance of 19 kilometers from the existing Government College at Nalagarh, whereas the distance between the Government College Nalagarh and Diggal is 40 kilometers and the justification for opening a Government College at Diggal was found more appropriate than at Ramshehar, as per the norms and policy. It is apt to reproduce paras 3 to 5 of the reply herein:*
>
> > *"3 to 5.That in reply to these paras, it is submitted that on the demand of the people of Ramshehar area feasibility report was sought from Principal, Govt. College Nalagarh through Director of Higher Education. From the perusal of report it is revealed that Ramshehar is at the distance of 19 km from the existing Govt. College Nalagarh. As per norms/guidelines the distance of*

existing nearby College to proposed college shall not be usually less than 25 Kms. The distance condition can be relaxed depending upon the need of the area/town where the existing Colleges are overcrowded and having the enrolment of students more than 3000 but the enrolment of G.C. Nalagarh is only 1855 which is at a distance of 19 Km from Ramshehar. Keeping in view the norms for opening of new Govt. College and on the basis of report submitted Principal of Govt. College Nalagarh, the proposal was examined carefully and was turned down."

12. The petitioners have filed rejoinder to the reply filed by the respondents and have not specifically denied the said pleadings contained in the reply.

13. The respondents have also specifically pleaded in their reply that the decision was made after taking all aspects in view. It is apt to reproduce paras 6 & 7 of the reply herein:-

"6 & 7. That in reply to this para it is submitted that both the proposals/feasibility reports in respect of opening of new Govt. College at Ramshehar and at Diggal was received. From the perusal of the report it is gathered that GC Nalagarh is at the distance of 19km from Ramshehar, whereas nearest Colleges to Diggal are GC Nalagarh and GC Arki at the distance of 38 and 40km respectively. Hence if the College is notified at Ramshehar instead of Diggal then the genuine dema of the people of Diggal area would be ignored, who are in dire need of College. It is worthwhile to mention here that out of 13 fedding Senior Secondary Schools of Ramshehar area 6 schools i.e. Digal, Badhalag, Chandi, Chmadhar, Goyla and Chhiachhi are more approachable/near to Diggal instead of Ramshehar."

14. The Apex Court in the case titled as Mrs.Asha Sharma versus Chandigarh Administration and others, reported in 2011 AIR SCW 5636 has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 herein:

"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and nonarbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court can not sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another versus Adikanda Biswal and others, reported in (2012) 11 SCC 731 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making

process and not on the correctness of the decision itself. The Court confines itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

16. It is not known that in which capacity, the petitioners have filed the present writ petition and whether they have sought permission to file the writ petition in the representative capacity or as Public Interest Litigation.

17. We find no ground for interference in this writ petition, hence it is dismissed alongwith all pending application(s), if any."

6. The similar principles of law have also been laid down by this Court in ***CWP No. 9480 of 2014*** alongwith connected matter titled ***Vijay Kumar Gupta versus State of H.P. and others*** decided on 9.1.2015 and ***CWP No. 4625 of 2012*** titled ***Gurbachan versus State of H.P. and others*** decided on 15.7.2014.

7. Having said so, there is no merit in the writ petition and the same is dismissed, alongwith pending CMPs, if any. However, for the redressal of its grievance, the petitioner is at liberty to approach the competent Authority by way of representation.

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

Kamlesh Kumar and others ...Petitioners.

VERSUS

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

CWP No.5200 of 2012
Decided on: March 28, 2016.

Constitution of India, 1950- Article 226- Petitioner has sought writ of mandamus directing the respondents no. 1 to 4 to ensure that no truck registered with respondent no. 4 be permitted to operate in any other area or from any other club or society- other reliefs prayed by the petitioner are covered by the judgment passed in CWP No. 1257 of 2009 titled Rajesh Kumar Khanna vs. State of H.P. & Ors. decided on 11.3.2014- hence, writ petition disposed of in terms of judgment passed by the High Court- petitioner granted liberty to approach the competent authority by way of representation and competent authority directed to take a decision within a period of 6 weeks from the date of filing of the representation. (Para-2 to 6

For the petitioners: Mr.Karan Singh Kanwar, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.M.A. Khan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G. for respondents No.1 to 3.

Mr.Ramakant Sharma, Advocate, for respondent No.4.

Mr.K.D. Sood, Senior Advocate, with Mr.Mukul Sood, Advocate, for respondents No.5 and 6.

Nemo for remaining respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Mr.Romesh Verma, learned Additional Advocate General, stated that the case of the petitioners is covered by the judgment, dated 11th March, 2014, rendered by this Court in CWP No.1257 of 2009, titled Rajesh Kumar Khanna vs. State of H.P. & Ors., and connected matters and prayed that this petition may be disposed of in terms of the said judgment. He also filed across the Board a copy of the judgment supra, made part of the file.

2. At this stage, the learned counsel for the petitioners stated that the reliefs No.(i) to (iii) claimed by the petitioners through the instant writ petition are covered by the judgment supra, however, submitted that the writ petition survives viz. a viz. relief No.(iv).

3. Relief No.(iv) is reproduced hereunder:

> *"Issue a writ of Mandamus or direction in the nature of writ of Mandamus directing the respondent No.1-4 to ensure that no truck registered with the respondent No.4 be permitted to operate in any other area or from any other club or society."*

4. It is a moot question whether such a prayer can be granted by this Court.

5. Without determining the said question, we deem it proper to dispose of the writ petition in terms of the judgment referred to supra, so far as reliefs No.(i) to (iii) are concerned. Ordered accordingly. The judgment supra shall form part of this order also.

6. Qua relief No.(iv), the petitioners are at liberty to approach the competent Authority by way of representation and the competent Authority is directed to make a decision thereon within a period of six weeks from the date of filing of the representation.

7. The writ petition as also the pending CMPs, if any, stand disposed of accordingly.

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

Khayali Ram and others. ...Petitioners.

Versus

State of H.P. and another. ...Respondents.

Cr.M.M.O No. : 73/2016
Decided on: 28.3.2016

Code of Criminal Procedure, 1973- Section 482- Petitioner No. 1 and the complainant are neighbours- respondent No. 2, complainant and deceased had advised K and his family members to construct pillars in their own land - deceased raised objection on pillar being raised by the petitioners on his land- complainant and his family members saw V, S, K and A quarrel with the deceased- deceased died in the incident- an FIR was registered- petitioner approached the Court for quashing the FIR- held, that contents of the FIR prima facie disclose the commission of offence- land was found in possession of the deceased- power under section 482 has to be exercised sparingly and cautiously to prevent abuse of process of court and to secure ends of justice- High Court would be justified in quashing the

proceedings, if the allegations in complaint without adding or subtracting anything made out no offence- since, allegations in the complaint make out a prima facie case, petition dismissed. (Para-7 to 9)

Cases referred:

N. Soundaram versus P.K. Pounraj and another, (2014) 10 SCC 616
Manik Taneja and another versus State of Karnataka and another, (2015) 7 SCC 423

For the Petitioners : Mr. Subhash Sharma, Advocate.
For the Respondents : Mr. Parmod Thakur, Addl. A.G. with
Mr. Neeraj K. Sharma, Dy. A.G. for respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral).

Present petition has been filed under section 482 of the Code of Criminal Procedure for quashing of FIR No. 236 dated 5.11.2014 registered at Police Station, Ghumarwin, District Bilaspur, H.P. under sections 451, 447, 323 and 34 of the Indian Penal Code and proceedings pending before the learned Judicial Magistrate, 1st Class, Court No.3, Ghumarwin.

2. "Key facts" necessary for the adjudication of this petition are that petitioner No.1 and respondent-2-complainant are neighbours. On 5.11.2014 in the morning at about 10.00 A.M., respondent-2 complainant and deceased had advised Khayali Ram and his family members to construct pillars in their own land as they were trying to raise pillar in his land (complainant's land). Deceased raised objection of pillar being raised by the petitioners on his land. Complainant and his family members saw Vinod Kumar, Sunil Kumar, Amarati Devi and Khyali Ram quarreling with the deceased. Vinod Kumar had given danda blows on the chest of deceased Brahm Dass while Sunil Kumar, Khyali Ram and Amarati Devi had also attacked him. Brahm Dass was taken to hospital where he was declared brought dead. On the basis of statement of respondent No.2 recorded under section 154 Cr.P.C., FIR was registered at Police Station, Ghumarwin. Site plan was prepared. Photographs were taken. Post-mortem of deceased Brahm Dass was conducted at Regional Hospital, Bilaspur. The viscera was sent for chemical analysis to RFSL, Mandi. Demarcation report was carried out by the Field Kanungo. It is placed on record. Danda was recovered on the basis of disclosure statement made by Vinod Kumar.

3. I have gone through FIR No.236/2014 dated 5.11.2014.

4. The contents of FIR prima facie discloses commission of offence. Demarcation report is dated 26.11.2014. According to the demarcation report dated 26.11.2014, the disputed land was found in possession of Brahm Dass. It shall be open to the petitioners to assail demarcation report in accordance with law during the course of trial. The allegations contained in the FIR make prima facie case against the accused when the complaint is read as a whole. The admissibility and reliability of the documents and the evidence produced by the prosecution cannot be looked into at this stage.

5. Petitioners had earlier approached this Court seeking quashing of FIR by way of Cr.M.M.O. No.67 of 2015. It was permitted to be withdrawn on 28.9.2015.

6. There is no merit in the contention of Mr. Subhash Sharma that a civil case has been converted into a criminal case.

7. Their Lordships of the Hon'ble Supreme Court in ***N. Soundaram*** versus ***P.K. Pounraj and another***, (2014) 10 SCC 616 have held that power under section 482 has to be exercised sparingly and cautiously to prevent abuse of process of court and to secure ends of justice. Their Lordships have further held that it is only if, taking the allegations and complaint as they were, without adding or subtracting anything, if no offence was made out, only then High Court would be justified in quashing the proceedings. Their Lordships have held as under:

> **"[13] It is well settled by this Court in catena of cases that the power Under Section 482 Code of Criminal Procedure has to be exercised sparingly and cautiously to prevent the abuse of process of any Court and to secure the ends of justice State of Haryana v. Bhajanlal, 1992 Supp1 SCC 335. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court should refrain from giving a prima facie decision unless there are compelling circumstances to do so. Taking the allegations and the complaint as they were, without adding or subtracting anything, if no offence was made out, only then the High Court would be justified in quashing the proceedings in the exercise of its power Under Section 482, Code of Criminal Procedure Municipal Coron. of Delhi v. Ram Kishan Rohtagi, 1983 1 SCC 1. An investigation should not be shut out at the threshold if the allegations have some substance Vinod Raghuvanshi v. Ajay Arora, 2013 10 SCC 581."**

8. Their Lordships of the Hon'ble Supreme Court in ***Manik Taneja and another*** versus ***State of Karnataka and another***, (2015) 7 SCC 423 have held that in exercise of its jurisdiction under section 482 Cr.P.C., the Court should be extremely cautious to interfere with the investigation or trial of a criminal case and should not stall the investigation, save and except when it is convinced beyond any manner of doubt that the FIR does not disclose commission of offence, and that continuance of the criminal prosecution would amount to abuse of process of the court. Their Lordships have held as under:

> **"[13] Of course, in exercise of its jurisdiction under Section 482 Cr.P.C., the court should be extremely cautious to interfere with the investigation or trial of a criminal case and should not stall the investigation, save except when it is convinced beyond any manner of doubt that the FIR does not disclose commission of offence and that continuance of the criminal prosecution would amount to abuse of process of the court. As noted earlier, the page created by the traffic police on the Facebook was a forum for the public to put forth their grievances. In our considered view, the appellants might have posted the comment online under the bona fide belief that it was within the permissible limits. As discussed earlier, even going by the uncontroverted allegations in the FIR, in our view, none of the ingredients of the alleged offences are satisfied. We are of the view that in the facts and circumstances of the case, it would be unjust to allow the process of the court to be continued against the appellants and consequently the order of the High Court is liable to be set aside."**

9. Accordingly, in view of discussion and analysis made hereinabove, there is no merit in the present petition and the same is dismissed. Pending application(s), if any, also stands disposed of.

10. Any observation made hereinabove shall not be construed to be a reflection on the merits of the case and shall remain confined to the disposal of this petition.

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

Jagdish Kumar @ Nitu ..... Appellant
Versus
State of Himachal Pradesh .....Respondent

Cr. Appeal No. 250/2014
Reserved on: March 28, 2016
Decided on: March 29, 2016

N.D.P.S. Act, 1985- Section 20 and 50- Police was checking vehicle- a nano car was signaled to stop- driver was asked to show the documents but he got frightened, police got suspicious- an option was given to the accused that he could give his personal search to Magistrate or Gazetted Officer- accused gave consent to be searched by the police officials- 988 grams charas was recovered from the car- accused was tried and convicted by the trial Court- held in appeal that accused is to be apprised of his legal right to be searched before a Gazetted Officer or a Magistrate- in this case consent was sought for being searched before the police officer, Gazetted Officer or Magistrate- thus, memo is not in accordance with Section 50 of the Act- it was not necessary to carry out the personal search of the accused when bag was recovered from the car but personal search of the accused was conducted and compliance of Section 50 of N.D.P.S. Act was required to be made- independent witnesses have not supported the prosecution case- there are contradictions in the testimonies of the police officials- the person who took the case property from Malkhana to Court was not examined- entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was acquitted. (Para-14 to 24)

Cases referred:
Suresh v. State of M.P., (2013) 1 SCC 550
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant : Ms. Tim Saran, Advocate.
For the respondent : Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment /Order dated 28.7.2014 rendered by learned Special Judge, Ghumarwin, District Bilaspur, HP camp at Bilaspur in Sessions Trial No. 13/3 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 a period of four years and to pay a fine of Rs.10,000/-, and, in default of payment of fine, to further undergo simple imprisonment, for two months.

2. Case of the prosecution, in a nutshell, is that ASI Amar Nath (PW-12), alongwith HC Ranjeet Singh (PW-10), HC Kartar Singh (PW-9) and C. Kamal Kishore was present at Barmana Chowk for streamlining the traffic and for checking of the vehicles on 25.8.2012 at about 9.00 AM. At about 11.00 AM, a Nano car bearing registration No. HP-33A-Temp.9295 came from Slapper side. ASI Amar Nath signalled the car to stop. ASI Amar Nath asked the driver to show the documents. As the driver got frightened, police got suspicious. Accused disclosed his name. Accused was apprised by the ASI Amar Nath that they wanted to search the vehicle as they suspected that there was some contraband in the vehicle. Accused was apprised that he could give his personal search to a Magistrate or a Gazetted Officer. Accused gave his consent to be searched by the police officials. Consent memo Ext PW-1/A was prepared to this effect. Witnesses Prem Lal (PW-1) and Daleep Singh (PW-2) were associated in the investigation by ASI Amar Nath. ASI Amar Nath and others gave their personal search to the accused in the presence of Prem Lal and Daleep Singh. Memo Ext. PW-1/B was prepared in this regard. Vehicle was searched in the presence of witnesses and a carry bag Ext P2, red, blue and yellow in colour was recovered from beneath the driver's seat. It was checked and found to be containing a transparent polythene bag Ext. P3, which was having stick, round and pan cake shaped black substance. It was found to be Charas. It weighed 988 grams. It was put back in the same polythene bag and thereafter put in the carry bag from which it was recovered. Carry bag was sealed in a parcel of cloth Ext. P1. Bag was signed by witnesses Daleep Singh and Prem Lal and also by accused. NCB form in triplicate was filled in. Sample seal was taken on a separate piece of cloth, one of which is Ext. PW-9/B. Seal impression was also put on NCB form and seal was handed over to witness Daleep Singh after use. Seizure memo Ext. PW-1/C was prepared, which was signed by witnesses Daleep Singh, Prem Lal, HC Kartar Singh and by accused. Rukka Ext PW-6/A was drawn and handed over to HC Ranjeet Singh with the direction to carry it to the Police Station Barmana for registration of FIR. HC Ranjeet Singh had handed over the rukka to PW-6 SI Govind Ram. Case property was deposited with HC Roshan Lal. He entered the same in Malkhana Register at Sr. No. 1189. He handed over the case property to HC Thakur Dass (PW-13) on 27.8.2012 for carrying the same to the SFSL Junga vide rc No. 80/12. He deposited the same in safe condition with the SFSL Junga and handed over receipt to the MHC. Special report was prepared and sent to the ASP Bilaspur. Report of chemical analysis is Ext. PA. According to Ext. PA, sample of Charas contained 25.71% W/W resin in it. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court convicted the accused. Hence, this appeal.

4. Ms. Tim Saran, 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 the judgment/order of conviction dated 28.7.2014.

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

7. PW-1 Prem Lal testified that he is a taxi operator at Barmana. He was sitting in his office when police called him. They told him that some contraband had been recovered from a boy who was sitting with the police officials in a shop. He did not know about the quantity of the contraband. Contraband was not recovered in his presence. He was declared hostile and cross-examined by the public prosecutor. He admitted in his cross-examination that on 25.8.2012 at about 11.00 AM, he alongwith Daleep Singh was present in the office of Taxi Union. He denied that he was standing at the gate of ACC Cement Factory at Barmana Chowk when there was a traffic jam. He also denied that police was trying to streamline the traffic. He further denied that at that time, a sky blue coloured Nano car came from the side of Slapper. He denied that the vehicle was checked and driver could not produce document. He denied portion A to A of his statement mark 'P'. He also denied that the driver got frightened. He further denied that he was in possession of some contraband. He denied that the police apprised accused of his right to get searched before a Gazetted Officer or the Magistrate. He denied portion B to B of his statement mark 'P'. He admitted his signatures on Ext. PW-1/A. He denied that the police officials had given their personal search to the accused. He admitted his signatures on Ext. PW-1/B. He denied the suggestion that on conducting search of bag, one carry bag blue, red and yellow, was recovered. He denied that it contained one polythene bag, which was containing black sticks and Chapati shaped substances. He denied that the substance was found to be Charas. He also denied that Charas was weighed in his presence and was found to be 988 grams. He denied that recovered Charas was put back in the same polythene packet and thereafter in the same carry bag and then sealed in a cloth parcel with nine seal impressions 'T'. He denied that sealed parcel was taken into possession by the police vide seizure memo. He admitted his signatures on Ext. PW-1/C. He admitted that Daleep Singh was present with him when all the documents were signed by him. He admitted that all the documents were written when he signed them. He also denied portion C to C of his statement mark 'P'.

8. PW-2 Daleep Singh deposed that he was working as a taxi operator and owned taxi bearing No.HP-01B-0679. Nothing has happened in his presence. He was called to the police station by the police. He was made to sign the documents. He was declared hostile and cross-examined by the Public Prosecutor. He denied the suggestion, in his cross-examination, that on 25.8.2012 at about 11.00 AM, he alongwith Prem Lal was standing near the gate of ACC Cement Factory at Barmana Chowk and police was streamlining the traffic. He denied that a blue coloured Nano car came from Slapper side. He denied that vehicle was checked and driver could not produce documents. He denied that the police suspected the accused to be in possession of some contraband. He also denied that accused was apprised by the police of his right to get himself searched before the Gazetted Officer or Magistrate. He admitted his signatures on Ext. PW-1/A in circle 'B'. He denied that the police officials have given their personal search to the accused. He admitted his signatures on Ext. PW-1/B. He denied that on conducting search of car, one carry bag blue, red and yellow was recovered from beneath the driver's seat. He denied that on opening carry bag, one polythene bag was found which contained black coloured substance in sticks and chapatti shapes. He denied that the substance was Charas. He further denied that Charas weighed 988 grams. He also denied that Charas was put back in polythene bag and then in carry bag and sealed in cloth parcel with nine seal impressions 'T'. He denied that the cloth parcel was taken into possession by the police. He admitted his signatures on Ext. PW-1/C. He denied that Prem Lal was present with him when all the documents were written, and he signed them. He denied portion A to A of his statement mark 'D'. In his cross-examination by the learned Defence Counsel, he admitted that in his presence car was not searched. He admitted that no contraband was recovered in his presence from the car. He also admitted that documents were signed by him in the Police Station.

9. PW-3 HC Roshan Lal deposed that on 25.8.2012 at about 3.25 PM, SI Govind Ram deposited a parcel duly sealed with nine seal impressions 'T' and five seal impressions of 'H' stated to be containing 988 grams of Charas in a carry bag, specimen of seals 'T' and 'H' and NCB form in triplicate. He made entry in Malkhana Register at Sr. No. 1189. On the same day, ASI Amar Nath had deposited with him a Nano car bearing registration No. HP-33A-Temp.-9295. He deposed that he filled in column No. 12 of NCB form in triplicate on 27.8.2012, and sent the parcels alongwith specimen of seals, NBC form in triplicate and copy of FIR and copy of Memo through Constable Thakur Dass to SFSL Junga vide RC No. 80/12.

10. PW-6 SI Govind Ram, testified that on 25.8.2012 at about 1.10 PM, he received a Rukka Ext. PW-6/A, on the basis of which FR Ext. PW-6/B was registered in the Police Station. He made an endorsement in red circle 'A' on Rukka Ext. PW-6/A. At about 3.00 PM, ASI Amar Nath produced before him a sealed parcel duly sealed with 9 seal impressions of 'T'. Parcel was stated to be containing 988 grams of Charas. Alongwith it , NCB form in triplicate and specimen of seal 'T' was also handed over to him by ASI Amar Nath. He resealed the same with 5 seal impressions of 'H'. Specimen of seal was taken on a separate piece of cloth Ext. PW-6/C and its impression was embossed on NCB. He issued resealing certificate Ext. PW-6/D. He deposited the case property alongwith specimen of seal and NCB form in triplicate with MHC of the police station. Case property was produced in the Court during the examination-in-chief of PW-6 Govind Ram. In his cross-examination, he admitted that the Rukka was received in the Police Station at about 1.10 PM through Ranjeet Singh and FIR was registered within 20 minutes. File was sent to the IO thereafter.

11. PW-9 HC Kartar Singh deposed that on 25.8.2012, he alongwith ASI Amar Nath, HC Ranjeet Singh and Constable Kamal Kishore was present at Barmana Chowk for traffic checking at about 9.00 AM. At about 11.00 AM, while the traffic was being regulated, one Nano car bearing registration No. HP-33A-Temp.-9295 came from the side of Slapper. It was signalled to stop. Identity of accused was established. He got frightened. Suspicion arose. IO informed the accused that they wanted to search his vehicle as they suspected contraband in it. Accused was apprised that he could give his personal search to the Magistrate or a Gazetted Officer. However, accused consented to be searched by the police. Memo Ext. PW-1/A was prepared. A carry bag was recovered from beneath the driver's seat. It was opened. It contained Charas, which weighed 988 grams. Sealing and sampling proceedings were completed. In his cross-examination, he admitted that shops were open at the time when he stopped vehicle. None of the shopkeepers was associated in the proceedings.

12. PW-10 Ranjeet Singh deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot on 25.8.2012. IO prepared Ext. PW-6/A. It was handed over to him to be taken to the Police Station. He handed over Rukka to MHC on the basis of which, FIR Ext. PW-6/B was registered. File was prepared and handed over to him for giving the same to the IO. He took the file and handed over it to the IO.

13. PW-12 ASI Amar Nath, deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot on 25.8.2012. Rukka Ext. PW-6/A was prepared and handed over to Ranjeet Singh for taking it to the Police Station for registration of FIR. He prepared the spot map Ext. PW-12/A. He produced the case property before SHO Govind Ram. He resealed the parcel with seal 'H' and issued certificate Ext PW-6/D. In his cross-examination, he has admitted that the spot is on National Highway. He admitted that on both the sides of National Highway, there were shops which remained open during day time. He admitted that on that day, shops were

open. He admitted that no shopkeeper was associated as witness. No file was received by him through HC Ranjeet Singh for investigation.

14. According to Section 50, accused is to be apprised of his legal right to be searched before a Gazetted Officer or a Magistrate. There is no third option to be searched by the police officer. In the case in hand, consent memo Ext. PW-1/A, consent of the accused was sought to be searched before a police officer or before a Gazetted Officer. Accused has a right to be searched before a Gazetted Officer or a Magistrate. Thus, Ext. PW-1/A was not in conformity with Section 50 of the Act. According to the mandate of Section 50 of the Act, accused is to be given option to be searched before a gazetted officer or a Magistrate but not before the police officer.

15. Their Lordships of the Hon'ble Supreme Court in **Suresh v. State of M.P.** reported in (2013) 1 SCC 550, have held as under:

> "16. The above panchnama indicates that the appellants were merely asked to give their consent for search by the police party and not apprised of their legal right provided under Section 50 of the NDPS Act to refuse/to allow the police party to take their search and opt for being search before the Gazetted officer or by the Magistrate. In other words, a reading of panchnama makes it clear that the appellants were not apprised about their right to be searched before a Gazetted Officer or a Magistrate but consent was a sought for their personal search. Merely asking them as to whether they would offer their personal search to him i.e. the police officer or to Gazetted Officer may not satisfy the protection afforded under Section 50 o the nds Act as interpreted in Baldev Singh case.
>
> 17. Further a reading of the judgments of the trial Court and the High Court also show that in the presence of Panchas, the SHO merely asked all the three appellants for their search by him and they simply agreed. This is reflected in the Panchnama. Though in Baldev Singh's case, this Court has not expressed any opinion as to whether the provisions of Section 50 are mandatory or directory but "failure to inform" the person concerned of his right as emanating from sub-section (1) of Section 50 may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law. In Vijaysinh Chandubha Jadeja's case , recently the Constitution Bench has explained the mandate provided under sub-section (1) of Section 50 and concluded that it is mandatory and requires strict compliance. The Bench also held that failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. The concept of substantial compliance as noted in Joseph Fernadez and Prabha Shankar Dubey were not acceptable by the Constitution Bench in Vijaysinh Chandubha Jadeja, accordingly, in view of the language as evident from the panchnama which we have quoted earlier, we hold that, in the case on hand, the search and seizure of the suspect from the person of the appellants is bad and conviction is unsustainable in law."

16. It was not necessary for the police to carry out personal search of the accused when bag was recovered from the accused. But personal search of accused was carried out. Thus, compliance of Section 50 of the Act, was required to be made in its letter and spirit.

17. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.
>
> 16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest Gazetted Officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest Gazetted Officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest Gazetted Officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of

> Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.
>
> 20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

18. Case of the prosecution has not at all been supported by PW-1 Prem Lal and PW-2 Daleep Singh. They have denied that the contraband was recovered in their presence. They have also denied that search, sealing and sampling proceedings were completed before them. It is settled law by now that the statements of official witnesses, if inspire confidence, can be taken into consideration. But, in the present case, there are material contradictions in the statements of official witnesses. PW-10 Ranjeet Singh, in his examination-in-chief, deposed that IO handed over Rukka Ext. PW-6/A, to be taken to the Police Station for registration of case. He gave rukka to the SHO, on the basis of which FIR Ext. PW-6/B was registered. File was prepared and handed over to him for taking to IO. He took the file and handed over the same to IO on the spot. However, in his cross-examination, he deposed that after depositing Rukka, he never came back to the spot with the file. PW-12 Amar Nath, in his examination-in-chief deposed that he was handed over file by HC Ranjeet Singh at the spot. This is a major contradiction, which casts doubt on the version of the prosecution. Vehicle was signalled to stop on a National Highway. Police has not associated any independent witnesses by associating shopkeepers when all the shops were open at the time when vehicle was stopped.

19. Case property was produced before the Court during the examination-in-chief of PW-6, Govind Ram. It was produced by the learned Public Prosecutor. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

20. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused.

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

> (2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.
>
> Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a

detail of the articles shall be given on the label and in the store-room register.

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

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

27.18. Safe custody of property.-

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

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

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

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

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

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

25. Thus, the prosecution has failed to prove its case against the accused.

26. Accordingly, the present appeal is allowed. Judgment /Order dated 28.7.2014 rendered by learned Special Judge, Ghumarwin, District Bilaspur, HP camp at Bilaspur in Sessions Trial No. 13/3 of 2013 is set aside. Accused is acquitted of the offence under Section 20 of the Act. He is ordered to be released, if not required to by the Police in any other case. Fine amount, if any deposited by the accused, be refunded to him. Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned, forthwith.

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

Mela Ram .....Petitioner

Versus

HPSEB Limited & others ....Respondents

CWP No. 9233 of 2014
Date of decision: 29.3.2016.

Constitution of India, 1950- Article 226- Petitioner claimed a writ to confer the work charge status after completion of ten years of daily waged service with all consequential benefits- services of the petitioner were terminated constraining him to approach the Industrial Tribunal-cum-Labour Court - award was passed and the termination order was quashed – award has attained finality- hence, petition allowed and respondents directed to grant work charge status to the petitioner, after completion of 10 years of service.

(Para-2 to 6)

For the petitioner : Mr. Hamender Singh Chandel, Advocate.
For the respondents: Ms. Sharmila Patial, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the petitioner has sought writ of mandamus, commanding the respondents to confer the work charge status upon him, w.e.f. January, 2004, after completion of ten years of daily waged service, with all consequential benefits, on the grounds taken in the memo of the writ petition.

2. The respondents have filed reply. It is apt to reproduce paras-2 and 9 of the reply, herein:-

> *"2 That in reply of Para 2, it is submitted that the applicant was initially engaged as casual workman on daily rated basis as a Beldar w.e.f. 25-6-1992 by the Assistant Engineer Electrical Sub-Division, HPSEB Baragaon in the exigency of Board's works and had worked under said office upto 24-1-1995. Thereafter he had left the job from Electrical Sub-Division, HPSEB, Baragaon with out any intimation. He has again enrolled his name under Assistant Engineer Electrical Sub Division, HPSEB Kumarsain w.e.f. 25-2-1996 to onwards. He had worked under the said office w.e.f. 25-2-96 to 24-9-97. Thereafter as per seasonal works under Electrical Sub-Division, HPSEB, Thanedhar he again enrolled his name under the said office and reported for duties in the said office on 07-01-1998 and worked up to 24-3-1998. Thereafter his service come to an end automatically, since the work against which he was engaged had completed and there was no fund/work available with the Electrical Sub-Division, HPSEB, Thanedhar.*
>
> *It is pertinent to mention here that the respondent has not allowed to any junior person in the job. The service of the petitioner has been terminated as per provision of Industrial Disputes Act and the standing*

orders framed by the respondent Board with policy of last come first go. As such the service of the petitioner was not dispensed of illegally.

3 to 8…….

9. That contents of Para 9 of the plaint is incorrect hence denied. The workcharge status was offered to the petitioner by the Addl. Superintending Engineer Electrical Division, HPSEBL, UNA (HP) vide memorandum No. 261066/KR/SK/2011-12- 10789-95 dated 24-11-11 and seniority assigned to the petitioner as per judgment passed on dated 23-12-10 by the Hon'ble High Court after retrenchment i.e. 25.3.98 when the petitioner completed ten years service on 25-8-08.

3. It is an admitted fact that the services of the petitioner were terminated w.e.f. 25th March, 1998, constraining him to approach the Industrial Tribunal-cum-Labour Court, Shimla, for short 'the Labour Court, by the medium of Reference No. 19 of 2007, titled **Mela Ram versus the Executive Engineer, Electrical Division, HPSEB**, award dated 05.06.2010 was made, whereby his termination order was quashed. It is apt to reproduce the relief granted by the Labour Court, herein:-

"*As a sequel to my findings on the aforesaid issues, the claim of the petitioner is allowed and it is ordered that he (petitioner) be reinstated in service, with seniority and continuity but without back wages, from the date of his termination i.e. 25.3.1998. Consequently, the reference stands answered in favour of the petitioner and against the respondent.....*"

4. Learned Counsel for the parties stated at the Bar that the aforesaid award dated 05.06.2010, has attained finality.

5. While going through the writ petition, it appears that the petitioner is entitled to work charge status w.e.f. January, 2004.

6. In the given circumstances, the respondents are directed to grant work charge status to the petitioner, after completion of 10 years of service, without back wages and also to fix his seniority, in terms of the award dated 5th June, 2010, passed by the Labour Court, *supra.* Needful be done within a period of three months.

7. Accordingly, the writ petition is disposed of alongwith pending applications.

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

CWP No.699 of 2016
with CWP No.700 of 2016
Reserved on: 28.3.2016
Decided on: 29.03.2016

CWP No.699 of 2016

Rustam Garg & ors …Petitioners

Versus

Himachal Pradesh Public Service Commission …Respondent

CWP No.700 of 2016
Divyanshu Sehgal & ors ....Petitioner
Versus
Himachal Pradesh Public Service Commission & anr ....Respondents

Constitution of India, 1950- Article 226- Petitioners appeared in H.P. Judicial service Judicial Service Preliminary Written Examination- respondents invited objections qua the answer key- petitioners filed objections to the same- respondents displayed the revised answer key - grievance of the petitioners is that revised answer key is wrong and some of the questions are beyond the syllabus- held, that it was not permissible for the Court to intervene and examine the question papers, even if the questions pertained to the law- Court does not have power to review the decision taken by the expert regarding the revised answer key- Court cannot undertake the task of the statutory authorities and substitute its own opinion for that of the experts- writ petition dismissed. (Para-5 to 17)

Cases referred:
Mukesh Thakur Vs. State of HP & others, reported in 2006 (1) Shim. L.C 134
H.P. Public Service Commission Vs. Mukesh Thakur & anr reported in (2010) 6 SCC 759
Arvind Kumar & ors Vs. Himachal Pradesh Public Service Commission, I L R 2014 (V) HP 905

For the Petitioners: Mr.Ankush Dass Sood, Senior Advocate with Dr.Lalit Kumar Sharma and Mr. Saurav Rattan, Advocates.
For the Respondents: Mr. D.K. Khanna, Advocate.
Mr. Shrawan Dogra, Advocate General with Mr.M.A. Khan, Mr. Romesh Verma, Addl. AGs and Mr. J.K. Verma, Deputy AG for respondent No.2 in CWP No. 700 of 2016

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

Since common questions of fact and law are involved in both these petitions, therefore, they were taken up together for hearing and are being disposed of by way of common judgment.

2. The necessary facts in nut shell are that the petitioners appeared in the Himachal Pradesh Judicial Service Preliminary Written Examination held by the respondents on 28.2.2016. The respondents, at the time of publishing the key answers, also invited objections qua the same. Petitioners filed their objections along with documentary proof for the questions to which they are now taking exception. However, respondents went ahead and declared the result and published the same on their website on 15.3.2016 and thereafter displayed the revised answer keys on their website on 16.3.2016.

3. The grievance of the petitioners is that in the multiple choice questions, there were certain questions where even the revised key answers as given are wrong and some of the questions are even beyond the syllabus. The petitioners have given the details of such questions along with their version of correct answers.

4. But the moot question is as to whether this court can act as an expert and set aside the answers given in the revised key.

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

5. It is vehemently argued by Sh. Ankush Sood, learned Senior Advocate, assisted by Dr. Lalit Kumar Sharma, Advocate that since all the disputed questions only relate to the field of law, therefore, this court is competent to act as an expert and correct the inconsistencies in framing of the questions and evaluate the answers. While on the other hand, Sh. D.K. Khanna, learned counsel for the respondent would argue that this court cannot act as an expert even though the questions may be confined only to the subject of law as this is entirely within the purview and domain of the experts in the subject.

6. This court in case titled ***Mukesh Thakur*** *Vs.* ***State of HP & others, reported in 2006 (1) Shim. L.C 134*** had found inconsistency in framing of the questions relating to this very examination in the subject of Civil Law-II and after evaluating the same, it quashed the result prepared by the Commission.

7. However, the matter was carried in appeal before the Hon'ble Supreme Court in case titled ***as H.P. Public Service Commission*** *Vs.* ***Mukesh Thakur & anr reported in (2010) 6 SCC 759*** and the Hon'ble Supreme Court held that it was not permissible for this court to have intervened and examined the question papers and answer sheets itself, even if these questions pertained to the subject of law, more particularly when the Commission had assessed the inter se merit of the candidates,. It would be apt to reproduce the following observations:

> *"20. In view of the above, it was not permissible for the High Court to examine the question papers and answer sheets itself, particularly, when the Commission had assessed the inter se merit of the candidates. If there was a discrepancy in framing the question or evaluation of the answer, it could be for all the candidates appearing for the examination and not for respondent No.1 only. It is a matter of chance that the High Court was examining the answer sheets relating to Law. Had it been other subjects like Physics, Chemistry and Mathematics, we are unable to understand as to whether such a course could have been adopted by the High Court. Therefore, we are of the considered opinion that such a course was not permissible to the High Court."*

8. In view of the aforesaid exposition of law, it is absolutely clear that this Court in exercise of its writ jurisdiction has no power to judicially review the decision taken by the experts in so far it relates to revised key answers.

9. Similar question regarding allegation of publication of incorrect revised key answers has been repeatedly coming up before this Court and it shall be profitable to make note of some of the decisions.

10. In a batch of writ petitions, the lead case being CWP No.9169 of 2013 titled ***Vivek Kaushal & ors*** *Vs.* ***H.P. Public Service Commission***, decided on 17.7.2014, this court was dealing with the key answers relating to the conduct of H.P. Administrative Services, Class-1 (gazetted) examinations and after taking into consideration the entire case law, more particularly, the observations of the Hon'ble Supreme Court in Mukesh Thakur's case (supra), held as under:

> "*16. The Apex Court, after discussing the authorities, which were governing the field till the date of the decision in the case, has used the words : ".....the Court should not generally direct revaluation". Meaning thereby, it suggests that if there is some mistake apparent on the face of it, the Court may interfere and may direct for revaluation.*

17. In the instant case, the Rules do prescribe for inviting objections before the Examiner examines the papers and before declaring the result, if the candidates files objections within seven days from displaying the key on the website. It appears that the purpose is just to examine those objections before declaring the result.

18. Applying the test to the instant case, it is specifically averred by the respondents, as discussed hereinabove, that they have invited the objections, asked the Experts to examine the objections, objections were examined, some mistakes were found, were rectified, the Examiners were asked to examine the papers in light of the Expert's opinion and thereafter, the result was declared. Thus, there is no case for interference. Had the Commission not invited the objections or had failed to take into account the said objections and the Expert's opinion, in that eventuality, the judicial review was permissible. Thus, on this count, these writ petitions are not maintainable.

19. The respondents have specifically pleaded that some of the petitioners have filed objections, but some have not filed the same. The respondents have furnished CWP-wise list of the petitioners, who have not represented/filed objections before the Commission, made part of the file. The respondents have also furnished opinion of Experts of Key-Committee on objected questions/key answers of the General Studies & Aptitude Test.

20. It is beaten law of land that the Courts are not Experts, have to honour the opinion of the Experts and cannot substitute the same. In the instant cases, the Experts have examined the questions and given their opinion.

21. We are of the considered view that the writ petitioners, who have not filed objections, have lost their right, are bound by the decision of the Commission and cannot now file writ petitions. Thus, the writ petitions are not maintainable so far it relate to them. Further, the objections raised by the candidates have been considered and judicial review is not permissible."

11. Notably, the judgment rendered in Vivek Kaushal's (supra) was assailed before the Hon'ble Supreme Court vide Special Leave to Appeal (C) Nos. 20992 to 20995/2014 and the same has been dismissed vide order dated 7.8.2014.

12. The above stated legal position was thereafter reiterated in a batch of writ petitions, the lead case being CWP No.6812 of 2014, titled ***Arvind Kumar & ors*** *Vs.* ***Himachal Pradesh Public Service Commission***, decided on 16.10.2014.

13. In ***Ashutosh Parmar*** *Vs.* ***State of HP & ors,*** CWP No. 1118 of 2014, decided on 1.10.2015, this court was again dealing with a case seeking correction of key answers to the H.P. Judicial Service Examination and it was observed as under:

"13.In Himachal Pradesh Public Service Commission Vs. Mukesh Thakur & anr, reported in (2010) 6 SCC 759, it was specifically held by the Hon'ble Supreme Court that it is not permissible for the High Court to examine the question paper and answer sheets itself, particularly, when the commission had assessed the inter se merit of the candidates. If there is any discrepancy in framing of the question or evaluation of the answer, it could be for all candidates appearing for the examination and not for an individual candidate."

14. Notably, even the aforesaid decision in Ashutosh Parmar's case (supra) was assailed before the Hon'ble Supreme Court by filing Special Leave to Appeal (C) No542/2016, however, the same was withdrawn on 18.1.2016.

15. Similar reiteration of the legal proposition is found in case titled ***Lalit Mohan Vs. H.P. Public Service Commission,*** CWP No. 3866 of 2015, decided on 2.11.2015.

16. The aforesaid legal position has yet again been reiterated by this court in its recent decision rendered in LPA No. 211 of 2015, titled ***H.P. Board of School Education, Dharamshala,*** *Vs.* ***Rajnesh & anr*** decided on 14th March, 2016. The court therein was dealing with the judgment rendered by the learned writ court wherein it had substituted the findings rendered by the expert by its own findings and this court held as under:

> *"2.The judgment, on the face of it, is not in tune with the judgment made by this Court in CWP No. 9169 of 2013 titled Vivek Kaushal and others versus H.P. Public Service Commission and other connected matters, decided on 10.7.2014, made by the Division Bench of this Court, and other cases. The judgment impugned is also bad in view of the judgment delivered by the apex Court in Himachal Pradesh Public Service Commission versus Mukesh Thakur and another reported in (2010) 6 SCC 759."*

17. In view of the aforesaid exposition of law, we have no doubt in our mind that even when the revised key answers are impugned with respect to questions relating to the subject of law, it is not permissible for this court to examine the question papers and answer sheets itself, particularly when the Commission has assessed the inter se merit of the candidates. It is not for the court to take upon itself the task of the statutory authorities and substitute its own opinion for that of the experts.

Having said so, we find no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear the costs. Miscellaneous application(s), if any is/are also dismissed.

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

Uma Devi .....Appellant

Versus

State of HP and others ....Respondents.

LPA No.42 of 2012

Date of decision: 29th March, 2016.

Constitution of India, 1950- Article 226- In view of Rule 54 and Government of India's Decision 20-A of the CCS (Pension) Rules the judgment is legal and valid and does not need any interference- LPA dismissed. (Para-2 and 3)

For the appellant: Mr.Sanjeev Bhushan, Sr. Advocate with Ms. Abhilasha Kaundal, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with M/s Romesh Verma and Anup Rattan, Additional Advocate Generals and Mr. J. K Verma, Deputy Advocate General for respondents No. 1 & 2.
Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Nipun Sharma, Advocate, for respondent No.3.
Mr. Arun Kumar, proxy Advocate, for Mr. Lokinder Paul Thakur, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

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

This Letters Patent Appeal is directed against the judgment dated 23.11.2011, made by the learned Single Judge of this Court in ***CWP No.1081*** of 2011 titled ***Uma Devi versus State of HP and others,*** whereby the writ petition filed by the petitioner came to be dismissed, hereinafter referred to as "the impugned judgment", for short, on the grounds taken in the memo of appeal.

2. It appears that the learned counsel for the petitioner was relying on the provisions of Rule 54, Government of India's Decision 20-A of the CCS (Pension) Rules, which was occupying the field before the amendment was made in the said Rule on 27th December, 2012. It is apt to reproduce Rule 54, Government of India's Decision 20-A (2) herein.

> *"(20-A) Eligibility of children from a void or voidable marriage for family pension.- The undersigned is directed to refer to this Department's O.M. No.1/16/96-P&PW (E), dated 2.12.1996, whereby it was clarified that pensionary benefits will be granted to children of a deceased Government servant/pensioner from void or voidable marriages when their turn comes in accordance with Rule 54 (8). It is mentioned in Para. 4 of the O.M. that "It may be noted that they will have no claim whatsoever to receive family pension as long as the legally wedded wife is the recipient of the same."*
>
> *(2). The matter has been re-examined in consultation with the Ministry of Law and Justice (Department of Legal Affairs) and Ministry of Finance (Department of Expenditure). It has been decided that in supersession of Para. 4 of the O.M., ibid, dated 2.12.1996, the share of children from illegally wedded wife in the family pension shall be payable to them in the manner given under sub-rule 7 (c) of Rule 54 of CCS (Pension) Rules, 1972, along with the legally wedded wife.*
>
> *It has also been decided that in past cases, no recovery from the previous beneficiary should be made. On receipt of an application from eligible child/children of the deceased government employee/pensioner born to an ineligible mother, a decision regarding division or otherwise of family pension may be taken by the competent authority after satisfying himself/herself about veracity of facts and entitlement of applicant(s)."*

3. In view of Rule 54, Government of India's Decision 20-A (2), reproduced above, the judgment is legal and valid one, needs no interference. Accordingly, the impugned judgment is upheld and the LPA is dismissed.

4. At this stage, the learned counsel for the appellant submitted that the Civil Suit is pending between the parties and the judgment made by this Court and the Writ Court may cause prejudice to the rights of the parties.

5. It is made clear that the judgment made by this Court and the Writ Court shall not cause any prejudice to the parties or influence the Civil Courts in any way.

6. Having said so, the LPA is disposed of, as indicated hereinabove, alongwith pending applications, if any.

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

Sh. R.R. Sharma, S/o Sh. Gurbardhan Sharma. ....Revisionist/Tenant.

Versus

Smt. Ram Kumari Wd/o late Sh. Karam Chand & others. ....Non-Revisionists/Landlords.

Civil Revision No. 66 of 2015
Order Reserved on 11.3.2016
Date of Order 30.3.2016

Himachal Pradesh Urban Rent Control Act, 1987- Section 14- Landlords filed a petition against the tenant for eviction which was allowed- appeal was preferred which was dismissed- civil revision was preferred which was disposed of with the direction that tenant would retain possession of the premises till the sanction of the map of building plan - it was further directed that tenant would continue to pay the use and occupation charges- landlords contended before Rent Controller that rider for production of building plan has been removed and prayed for issuance of warrant of possession- warrant of possession was issued on which tenant filed objections- Rent Controller held that landlords are not required to produce sanctioned building plan before executing court -Rent Controller dismissed the objections and ordered the eviction of the tenant- Civil Revision was preferred in which it was directed that tenant will continue to be in possession till the sanction of the building plan- Rent Controller was directed to determine the use and occupation charges which were assessed as Rs.10,000/- per month- revision petition has been filed against the order passed by Rent Controller- held, that many petitions were disposed of by single order - amount of use and occupation charges @ Rs.10,000/- per month was not set aside by the Hon'ble Supreme Court- order would be binding on all courts- landlords cannot demand different use and occupation charges from different tenants residing in the same building- revision petition dismissed. (Para- 9 to 16)

For the Revisionist: Mr. Ajay Kumar Sood, Sr. Advocate with Mr. Gautam Sood, Advocate.

For the Non-Revisionists : Mr. Mr. Janesh Gupta, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present Revision Petition is filed under Section 24 (5) of H.P. Urban Rent control Act 1987 against the order dated 30.3.2015 passed by learned Rent Controller Shimla H.P.

Brief facts of the case:

2. Landlords filed eviction petition No. No.13/2 of 2001/2000 under Section 14 of H.P. Urban Rent Control Act 1987 against tenant for eviction from the demised premises. Petition filed by the landlords allowed vide order dated 29.11.2007. Tenant preferred appeal before learned Appellate Authority which was dismissed. Tenant preferred Civil Revision No. 64 of 2011 before Hon'ble High Court of H.P. and Hon'ble High Court disposed of civil revision No. 64 of 2011 finally with direction that tenant would retain possession of the demised premises till the map of building for reconstruction is not sanctioned by competent authority in accordance with law. Hon'ble High Court of H.P. further directed in civil revision No. 64 of 2011 that tenant would pay arrears of use and occupation charge due upto 31.3.2012 to landlords within 30 days w.e.f. 26.4.2012 thereafter would pay use and occupation charges on quarterly basis regularly by 15th day of next month after the quarter for which such charges would be payable. Thereafter landlords contended before learned Rent controller that rider for production of building plan has been removed by latest judgment announced in CR No. 125 of 2012 decided on 16.8.2013 and prayed for issuance of warrant of possession. Thereafter learned Rent Controller on dated 2.9.2013 issued warrant of possession against tenant. Thereafter tenant filed objections before learned Rent controller. Learned Rent controller vide order dated 10.1.2014 held that in view of rulings given in CR No. 125 of 2012 decided on 16.8.2013 by H.P. High Court in case title Karam Chand and others vs. Jasbir Kaur and others and in view of ruling reported in 2013 (5) SCC 243 title Hari Dass Sharma vs. Vikas Sood and others landlord is not require to produce sanctioned building plan before executing court and dismissed objections filed by tenant and directed tenant to vacate premises forthwith keeping in view that eviction order against tenant passed on dated 29.11.2007. Thereafter tenant filed Civil Revision No. 9 of 2014 title Raniya Ram alias R.R. Sharma vs. Gopala and others against order of learned Rent controller which was disposed of by Hon'ble High Court of H.P. on 3.6.2014. Hon'ble High Court set aside order of learned Rent Controller with directions that tenant shall continue to retain possession of demised premises till map of building for reconstruction is not sanctioned by competent authority. Hon'ble High Court of H.P. further directed that use and occupation charges will be determined by learned Rent Controller. As per directions of Hon'ble High Court of H.P. learned Rent Controller determined use and occupation charges at the rate of Rs. 10,000/- (Ten thousand) per month of demised premises vide order dated 30.3.2015.

3. Feeling aggrieved against order of learned Rent Controller dated 30.3.2015 tenant filed present revision petition.

4. Court heard learned Advocate appearing on behalf of the revisionist and learned Advocate appearing on behalf of non-revisionists and also perused the entire record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether civil revision filed by tenant is liable to be accepted as mentioned in the memorandum of grounds of revision petition?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

6. AW-1 Vikas Sood has stated that R.R. Sharma is his tenant. He has stated that premises is situated in Lakkar market. He has stated that premises is residential in nature and he has stated that one room set is in possession of the tenant. He has stated

that there are seven tenants in the building. He has stated that he has filed eviction petition against all the tenants. He has stated that tenant has challenged the eviction order before Hon'ble High Court of H.P. and he has stated that on 3.6.2014 in Civil Revision No. 9 of 2014 compromise order was passed and he has further stated that copy of order is Ext. AW-1/A. He has stated that Hon'ble High Court has fixed use and occupation charges at the rate of Rs. 10,000/- (Ten thousand) per month. He has stated that certified copy of Hon'ble High Court in Civil Revision No. 111 of 2010 title Smt. Vidyawati vs. Karam Chand Sood & others is Ext. AW-1/B. He has also placed on record certified copy Ext. AW-1/C and Ext. AW-1/D. He has stated that use and occupation charges as of today is Rs. 15,000/- (Fifteen thousand) per month. He has stated that rent in the locality is 15000/- (Fifteen thousand) per month. He has also tendered into evidence certified copy of AW-1/E. He has stated that other co-tenants are paying use and occupation charges at the rate of Rs. 10,000/- (Ten thousand) per month. He has admitted that site plan of construction not approved till date. He has stated that he has submitted construction site plan before the competent authority. He has denied suggestion that construction is not permitted in the area where demised premises is situated. He has denied suggestion that he is not legally entitled for use and occupation charges. He has admitted suggestion that he has received Rs. 300/- (Three hundreds) per month as use and occupation charges from co-tenant Madan Lal w.e.f. 1.4.2002 to 31.3.2012.

7. RW-1 R.R. Sharma has stated that he is a tenant residing in building No. 12/13 Lakkar Market in 2nd Floor. He has stated that he is in possession of one room set comprising of one kitchen, one toilet and one bathroom. He has stated that eviction order was passed against him in the year 2007 vide Ext. RW-1/A. He has stated that he filed appeal and in appeal eviction order was upheld. He has stated that thereafter he filed Revision Petition No. 64 of 2011 before the Hon'ble High Court and same was decided on 26.4.2012. He has stated that copy of order is Ext. RW-1/B. He has stated that area in which the demised premises is situated is non-construction Zone. He has stated that use and occupation charges at the rate of Rs. 1800/- (Eighteen Hundred) per month has been decided vide Ext. RW-1/C. He has stated that all other co-tenants are depositing amount at the rate of contractual rent. He has stated that he is also depositing the amount of contractual rent. He has stated that Madan Lal co-tenant is residing in 3rd Floor of the building. He has also stated that landlord is receiving Rs. 300/- (Three hundred) from co-tenant Madan Lal as use and occupation charges residing in same building.

8. Following documentaries evidence filed by parties: (1) Ext. AW1/A order passed by Hon'ble High Court in CR No. 9 of 2014 decided on 3.6.2014 (2) Ext. AW1/B order passed by H.P. High Court in CR No. 111 of 2010 title Vidyawati vs. Karam Chand and others (3) AC1/C order passed by High Court in CR No. 112 of 2010 title Jasbir Kaur and others vs. Karam Chand (4) AW1/D order passed by Hon'ble Apex Court of India on 16.4.2013 in SLP No. 13527 of 2012 in case title Vidyawati vs. Karam Chand and others (5) Ext. AW1/E order passed by H.P. High Court in CR No. 64 of 2011 title R.R. Sharma vs. Karam Chand (6) Ext. RW1/A order passed by learned Rent Controller in case No. 13/2 of 2001/2000 title Karam Chand and others vs. R.R. Sharma (7) Ext. RW1/B consolidated order passed by H.P. High Court on 26.4.2012 in CR No. 180 of 2007 along with CR No. 181 of 2007, 3 & 19 of 2008, 111 & 112 of 2010 and 64 of 2011 (8) Ect. RW1/C order passed by Additional District Judge Shimla in Rent Appeal No. RBT 2-S/14 of 2011/12 title Arun Kumar vs. Brahmin Sahha (9) Ext. RW1/D certify copy of application filed in revision 181 of 2007 title Ajit Singh deceased through LR's Smt. Prakash Kaur and others vs. Karam Chand (10) Ext. RW1/E order dated 5.8.2013 passed in CR No. 181 of 2007 (11) Ext. RW1/F information received under Right to Information Act regarding rent paid by tenants in Lakkar Market.

9. In the present case it is proved on record that (i) Civil Revision No. 180 of 2007 title Surinder Sethi vs. Karam Chand Sood & others (ii) Civil Revision No. 181 of 2007 title Ajeet Singh (deceased) through LRs Smt. Parkash Kaur and others vs. Karam Chand & others (iii) Civil Revision No. 3 of 2008 title Madan Lal vs. Karam Chand & others (iv) Civil Revision No. 19 of 2008 title Karam Chand & others vs. Madan Lal (v) Civil Revision No. 111 of 2010 title Smt. Vidyawati vs. Karam Chand & others (vi) Civil Revision No. 112 of 2010 title Jasbir Kaur & others vs. Karam Chand & others (vii) Civil Revision No. 64 of 2011 title R.R. Sharma vs. Karam Chand & others were filed relating to same building. It is also proved on record that interim orders of use and occupation charges were passed in the above stated Civil Revision petitions and use and occupation charges vide interim orders fixed at Rs. 10,000/- (Ten thousand) per month. It is also proved on record that interim orders of use and occupation charges to the tune of Rs. 10,000/- (Ten thousand) per month challenged before Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 13527 of 2012 wherein interim order of Hon'ble High Court dated 13.9.2011 passed in Civil Revision No. 111 of 2010 CMP No. 49 of 2011 was assailed and on 16.4.2013 Hon'ble Apex Court ordered that order dated 13.9.2011 passed by the High Court of H.P. relating to use and occupation charges would revive subject to any further direction issued by the High Court in the final order dated 26.4.2012.

10. Hon'ble Apex Court in Special Leave to Appeal (Civil) No. 13527 of 2012 specifically held in positive manner that final order announced on 26.4.2012 would finally prevail over the interim orders. Order of Hon'ble Apex Court is quoted in toto:-

> "Order announced in SLP No. 13527 of 2012 title Vidyawati vs. Karam Chand Sood & others.
>
> **ORDER**
>
> This Special Leave Petition assails an Order dated 13th September 2011passed by the High Court of Himachal Pradesh at Shimla in CMP No. 49 of 2011 filed in C.R. No. 111 of 2010 whereby the petitioner was directed to deposit use and occupation charges for the suit premises at the rate of Rs. 10,000/- (Ten thousand) per month pending final disposal of the Civil Revision Petition filed by the petitioner.
>
> When this petition came up for preliminary hearing before us on 7th May 2012 we issued notice to the respondent and stayed the operation of the interim direction mentioned above subject to the petitioner depositing compensation for use and occupation of the premises in question at the rate of Rs. 5,000/- (Five thousand) with effect from the date of the eviction order passed by the Rent Controller. The High Court was by the same order requested to expedite the hearing of the revision petition.
>
> We are today informed by Mr. Suryanarayan Singh, learned counsel for the respondents that the High Court had already disposed of Civil Revision No. 111 of 2010 filed by the petitioner in terms of an Order dated 26th April 2012. This petition was therefore, infructuous even on the date this Court issued notice and granted an interim stay. This position is not disputed by the learned counsel appearing for the petitioner who submits that the revision petition having been disposed of by the High Court finally nothing really survives for consideration in this matter.
>
> In the circumstances, therefore, while dismissing this petition as infructuous we vacate the direction issued by us on 7th May 2012. We make it clear that the Order dated 13th September 2011 passed by the High Court regarding deposit of compensation for use and occupation shall stand

revived subject to any further direction issued by the High Court in the final Order dated 26th April 2012 passed by its.

No costs."

11. Hon'ble Apex Court of India on 16.4.2013 revived interim order of H.P. High Curt dated 13.9.2011 relating to deposit of use and occupation charges to the tune of Rs. 10,000/- (Ten thousand) per month subject to further directions issued by High Court of H.P. in final order dated 26.4.2012.

12. Interim order of Hon'ble High Court of H.P. dated 13.9.2011 passed in CR No. 111 of 2010 title Vidyawati vs. Karam Chand and others is quoted in toto:-

"13.9.2011:Present: Mr.G.D.Verma Senior Advocate with Mr.B.C.Verma Advocate.

Mr. G.C. Gupta, Senior Advocate with Mr. Pawan Sharma Advocate for the respondents.

Heard and gone through the record.

Order dated 4.10.2010 was passed in the presence of the parties and the reason given in the order is that in the case of another tenant under the same landlord, use and occupation charges had been fixed @ Rs 10,000/- per month, though agreed rate of rent was Rs. 34/- per month. In the present case agree rate of rent was Rs. 100/- per month and so the use and occupation charges could not have been lesser than the amount of Rs. 10,000/- per month fixed in the other case. Hence the petition is dismissed.

Sd/-

Judge High Court.

September 13, 2011."

13. It is proved on record that on 26.4.2012 Hon'ble High Court of H.P. in consolidated manner disposed of all civil revisions mentioned below by way of single order finally. (i) Civil Revision No. 180 of 2007 title Surinder Sethi vs. Karam Chand Sood & others (ii) Civil Revision No. 181 of 2007 title Ajeet Singh (deceased) through LRs vs. Karam Chand & others (iii) Civil Revision No. 3 of 2008 title Madan Lal vs. Karam Chand & others (iv) Civil Revision No. 19 of 2008 title Karam Chand & others vs. Madan Lal (v) Civil Revision No. 111 of 2010 title Smt. Vidyawati vs. Karam Chand & others (vi) Civil Revision No. 112 of 2010 title Jasbir Kaur & others vs. Karam Chand & others (vii) Civil Revision No. 64 of 2011 title R.R. Sharma vs. Karam Chand & others. It is well settled law that whenever several revisions petitions are disposed of in consolidated manner then final order passed would be operative on all the consolidated revision petitions. It is held that final consolidated order will also be operative in Civil Revision No. 64 of 2011 filed by R.R. Sharma present revisionist relating to use and occupation charges. Operative part of order dated 26.4.2012 passed by Hon'ble High Court of H.P. in consolidated order dated 26.4.2012 mentioned in para No.9 page 6 relating to use and occupation charges is quoted in toto:-

14. "Admittedly the tenant in CR No. 3 of 2008 Shri Madan Lal has paid up-to date use and occupation charges in respect of the demised premises being occupied by him to the land. In all other cases the tenants shall pay the arrears of use and occupation charges due upto 31.3.2012 to the landlords within 30 days from today thereafter they shall keep on paying/depositing future use and occupation charges on quarterly basis regularly by 15th day of the month next after the quarter for which such charges would be payable.

The tenant in CR No. 3 of 2008 shall also keep on paying future use and occupation charges on quarterly basis in the same manner."

15. Hon'ble High Court of H.P. on dated 26.4.2012 while disposing of all seven revision petitions in consolidated manner did not alter amount of use and occupation charges fixed at the rate of Rs. 10,000/- (Ten thousand) per month. Hon'ble High Court of H.P. on dated 26.4.2012 only modified modes of payment of use and occupation charges by tenants.

16. As per Article 141 of Constitution of India law declared by Apex Court of India would be binding on all courts. It is held that legally landlords cannot demand different use and occupation charges from different tenants residing in the same building as per Article 14 constitution of India which gives to all citizens of India fundamental rights of equality before law. Point No.1 is answered in negative.

Point No. 2 (Final Order):

17. In view of findings upon point No.1 civil revision petition is dismissed in view of fact that Hon'ble Apex Court of India in SLP No. 13527 of 2012 decided on 16.4.2013 revived order dated 13.9.2011 passed by H.P. High Court in civil revision No. 111 of 2010 title Smt. Vidyawati vs. Sh. Karam Chand and others relating to monthly use and occupation charges to the tune of Rs. 10,000/- (Ten thousand) subject to further directions issued by High Court in final order dated 26.4.2012 relating to same building and in view of fact that Hon'ble High Court of H.P. vide final order dated 26.4.2012 did not change monthly amount of use and occupation charges to be paid by tenants relating to same building except mode of payments. Revisionist will pay use and occupation charges proportionate to area of demised premises in possession of revisionist compare to co-tenant Smt. Vidyawati. File of learned Rent Controller along with certified copy of order be sent back forthwith. No order as to costs. Civil Revision No. 66 of 2015 is disposed of. All pending applications also disposed of. All interim orders vacated.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

State of Himachal Pradesh through
Principal Secretary (PWD) & others ...Appellants

Versus

Sh. Dave Ram & others ... Respondents

RFA No. 73 of 2009 alongwith
RFA Nos. 74 of 2009 to
RFA No. 89 of 2009.
Judgment reserved on : 16.03.2016.
Date of Decision : March 30, 2016

Land Acquisition Act, 1894- Section 18- Land was acquired for construction of Ramshilla – Bhekhali Road- compensation was awarded by the Collector- reference was made and the compensation was enhanced- aggrieved from the award, an appeal was preferred- sale deeds produced by the claimants show that value of the land is Rs.3,80,000/- per bigha or Rs.19,000/- per biswa- acquired land was put to public purpose- road was constructed upon it and there is no error in uniform determination of the market value of the acquired

land- determination of the market value of the acquired land has to be on the basis of objective material- it cannot be left to the mere whims and fancies of the acquirer- sale deeds were executed prior to the initiation of the acquisition proceedings and the Court had rightly relied upon them- appeal dismissed. (Para-3 to 31)

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
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
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
Union of India v. Pramod Gupta (Dead) by LRs. & Ors. [(2005) 12 SCC 1
Land Acquisition Officer, Kammarapally village, Nizamabad District, A. P. v. Nookala Rajamallu & Ors. [(2003) 12 SCC 334 (para 9)]
Viluben Jhalejar Contractor (Dead) by Lrs. v. State of Gujarat [(2005) 4 SCC 789]
Suresh Kumar v. Town Improvement Trust, Bhopal [(1989) 2 SCC 329]
Delhi Development Authority v. Bali Ram Sharma & Ors. [(2004) 6 SCC 533]
The General Manager, Oil & Natural Gas Corporation Ltd. v. Rameshbhai Jivanbhai Patel & Anr. [JT 2008 (9) SC 480]
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 vs. Karigowda & others, (2010) 5 SCC 708
Andhra Pradesh Industrial Infrastructure Corporation Ltd. vs. G. Mohan Reddy & others, (2010) 15 SCC 412
Major General Kapil Mehra vs. Union of India & another, (2015) 2 SCC 262

For the appellant	:	Mr. Shrawan Dogra, Advocate General with Mr. R. S. Verma, Addl. Advocate General, Mr. Ram Murti Bisht and Mr. Puneet Rajta, Dy.AGs. for the appellants-State in all the appeals.
For the respondent	:	Mr. Naveen K. Bhardwaj, Advocate, for the respondents in all the appeals.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Common Award dated 17.11.2008, passed by Addl. District Judge, Fast Track Court, Kullu, H.P., in Reference Petition No. 11 of 2007, titled as *S/Sh. Dave Ram & others vs. Land Acquisition Collector (CZ) HPPWD, Mandi, & another*, along with other connected reference petitions, stands assailed in these appeals filed by the State.

2. The challenge is laid on two grounds: (a) There is quantum increase in the value of the market price so determined by the Collector Land Acquisition, HP. PWD, Kullu, Himachal Pradesh; and (b) regardless of the category and classification of the land, amount stands uniformally assessed in favour of the claimants.

3. For public purpose namely Ramshilla – Bhekhali Road, proceedings for acquisition were initiated with the publication of notification dated 17.6.1998 under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act"). With the completion of the procedural formalities, the Collector Land Acquisition passed his Award dated 26.8.2000, determining the market value of the acquired land in the following manner:

"Kind of land	**Area**	**Value per bigha**	**Market value of the acquired land.**
1	**2**	**3**	**4**
Bathal abal	**0-6-1**	**39,300/-**	**11,888/-**
Bagicha Bathal	**1-0-13**	**39,300/-**	**40,577/-**
Bathal Dom	**0-12-15**	**29,082**	**18,540/-**
Bathal Som	**6-9-10**	**24,366**	**1,57,768/-**
Gairmumkin	**0-3-0**	**24,366**	**3,655/-**
	Total		**2,32,428/-**

The total amount of compensation was assessed as below:

1.	**Market value of land**	**Rs. 2,32,428/-**
2.	**30% Solatium u/s 23(2)**	**Rs. 69,728/-**
3.	**12% additional amount under Section 23(1-A)**	**Rs.48,809/-**
4.	**Interest**	**Rs. 41,258/-**
	Total	**3,92,223/-"**

4. Aggrieved thereof, various Land Reference Petitions so filed under the provisions of Section 18 of the Act came to be decided in terms of common impugned award dated 17.11.2008 in the following terms: -

"In view of issue-wise discussion and decision, reference petitions are allowed. Petitioners are entitled for the claim of compensation @ Rs. 3,80,000/- per bigha (Rs. 19,000/- per biswa).

33. Furthermore, petitioners are also entitled:

1. Solatium @ 30% under Section 23(2) of the Act on the compensation assessed under Section 23(1) of the Act;

2. Additional compensation under Section 23(1A) of the Act @ 12% per annum on the market value determined above from the date of publication of the notification under Section 4 of the Act, till date of award of collector;

3. Collector is also directed to pay interest @ 9% per annum on enhanced/excess amount of compensation under Section 23(1), additional compensation under Section 23(1A) and solatium under Section 23(2) of the Act from the date of notification under Section 4 of the Act for one year and thereafter @ 15% per annum till the same is paid/deposited in the Court; and

4. petitioners shall also be entitled to interest under Section 34 of the Act from the date of notification under Section 4 of the Act, if not paid."

5. In support of their claims, as is evident from the record, claimants tendered various exemplar sale deeds. However, only exemplar sale deeds (Ext.P-1, Ext. P-3 and Ext. P-5) were proved in accordance with law, for the vendors/vendees stood examined in Court.

6. While determining the market value of the land, in terms of the impugned Award, the Court below has taken into consideration exemplar sale deeds (Ext. P-1 and Ext. P-5). Exemplar sale deed (Ext. P-1) pertains to sale of 5 biswas of land which took place on 15.12.1997, a date prior to the initiation of the proceedings under the Act. Jindu Ram (PW-1) while stepping into the witness box, has proven contents of the said sale deed and further deposed that the entire consideration of Rs.40,000/- for 5 biawas of land stood paid and with the registration of the sale deed, property mutated in his name. Significantly this exemplar sale deed forms part of the same revenue estate (Phatti Sari). But what is further significant is the unrebutted testimony of this witness to the effect that the land in question was of same nature, potential, utility and comparable with the exemplar sale land. The Public Prosecutor did not dispute such fact as is evident on record.

7. Exemplar sale deed (Ext. P-5) reveals one biswa of land to have been sold for Rs.30,000/-. The sale deed is dated 14.10.1988. Tej Ram (PW-3) has proved the same. He further states that the exemplar sale land situated in Phati Banogi touches the boundary of Phati Sari and is similar in terms of location, quality and potentiality to that of the acquired land.

8. There is yet another exemplar sale deed (Ext. P-3) which pertains to the year 2003 whereby two biswa of land stood sold for a consideration of Rs.3,50,000/- on 7.11.2003. But since it is a subsequent sale, rightly stands not considered by the Court below.

9. Through the testimony of Yashpal (PW-4) it stands proven on record that the land sought to be acquired in terms of the notification in question is more towards the Dhalpur/Kullu Bazar side, having high commercial value, apart from the land being put to agricultural use generating high income. The acquired land is similar to the land situated in Phati Banogi over which National Highway passes through.

10. Thus the claimants have been able to establish the real market value of the acquired land by leading clear, cogent and consistent piece of evidence. Court below has taken the mesne of the exemplar sale deeds (Ext. P1 and Ext. P5) which works out to Rs.3,80,000/- per bigha or Rs.19,000/- per biswa.

11. On the other hand, State has examined Ramesh Chand (RW-1) and Narvinder Singh (RW-2) who have simple proved on record the revenue record which also does not indicate the market value of the land. Ramesh Chand stated that the acquired land is at a distance of 9 km. from the National Highway but then the rates determined in terms of the impugned award are not on the basis of the exemplar sale deeds which are situated on the National Highway.

12. It is a matter of fact that the entire land was put to public purpose. Road 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.

13. 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.

14. 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 the land.

15. 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.

16. 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}.

17. 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).

18. The most reliable way to determine the value is to rely on the instances of sale portions of the same land as has been 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}

19. 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}.

20. 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.

21. In *Land Acquisition Officer, Kammarapally village, Nizamabad District, A. P. v. Nookala Rajamallu & Ors.* [(2003) 12 SCC 334 (para 9)], the Apex Court observed:

> "9. It can be broadly stated that the element of speculation is reduced to a minimum if the underlying principles of fixation of market value with reference to comparable sales are made:
>
> i) when sale is within a reasonable time of the date of notification under Section 4 (1);
>
> ii) it should be a bona fide transaction;
>
> iii) it should be of the land acquired or of the land adjacent to the land acquired; and
>
> iv) it should possess similar advantages."

22. In *Viluben Jhalejar Contractor (Dead) by Lrs. v. State of Gujarat* [(2005) 4 SCC 789], the Apex Court reiterated that for determining the market value of the land under acquisition, suitable adjustment has to be made having regard to various positive and negative factors vis-a-vis the land under acquisition by placing the two in juxtaposition. The positive factors are (i) smallness of size (ii) proximity to a road; (iii) frontage on a road; (iv) nearness to developed area; (v) regular shape, (vi) level vis-a-vis land under acquisition and (vii) special value for an owner of an adjoining property to whom it may have some very special advantage and the negative factors are: (i) largeness of area; (ii) situation in the interior at a distance from the road; (iii) narrow strip of land with very small frontage compared to depth; (iv) lower level requiring the depressed portion to be filled up; (v) remoteness from developed locality and (vi) some special disadvantageous factors which would deter a purchaser.

23. 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.

24. In *Delhi Development Authority v. Bali Ram Sharma & Ors*. [(2004) 6 SCC 533], it is held that in cases where the purpose of acquisition was the same but the notification under Section 4(1) was issued on a subsequent date, obviously there would be escalation of prices in regard to those lands. Hence, it would be just and appropriate to give an annual increase of 10% in the market value in respect of the lands which were acquired by a subsequent notification and further in *The General Manager, Oil & Natural Gas Corporation Ltd. v. Rameshbhai Jivanbhai Patel & Anr.* [JT 2008 (9) SC 480], it has been held that increase in market value in urban/semi-urban areas was about 10% to 15% per annum, the corresponding increase in rural areas would at best be around half of it, that is about 5% to 7.5% per annum, in the absence of evidence of sudden spurts or fall in prices.

25. 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."

26. 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.

27. This judgment was subsequently referred to and relied upon by another Hon'ble Judge of 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.

28. It is a settled position of law that determination of the fair market value of the acquired land has to be on the basis of certain objective material. It cannot be left to the mere whims and fancies of the acquirer. Nothing was proved on record to establish the basis on which Collector determined the market value varying from Rs.24000/- to Rs.39,000/-. But then it is settled position of law that onus to prove the true market value rests with the

claimants. However, the actions of the acquirer also have to be fair, just, reasonable and sustainable in law. The Act itself prescribes sufficient guidelines enabling the authorities as also the Court, for determining the fair market value and one such principle being the price which the willing vendor is expected to obtain in open market from a willing purchaser. Of course, this has to be after complete appraisal of the land, taking into account its peculiar advantages and disadvantages including commercial value. In the instant case the acquired land is close to the main Kullu town an international destination. The exemplar sale deeds are much prior to the initiation of the acquisition proceedings. It is not the case of the State that the sale deeds were executed in anticipation of such acquisition proceedings only to defraud the revenue authorities and have unadvantageous gainful position. Reference can be made to the decision rendered by the apex Court in *Special Land Acquisition Officer vs. Karigowda & others,* (2010) 5 SCC 708.

29. The apex Court in *Andhra Pradesh Industrial Infrastructure Corporation Ltd. vs. G. Mohan Reddy & others,* (2010) 15 SCC 412 has recognized and acknowledged the principle of belting system for the determination of compensation under the Act.

30. The apex Court in *Major General Kapil Mehra vs. Union of India & another,* (2015) 2 SCC 262 has further held as under:-

> "20. Where the lands acquired are of different type and different locations, averaging is not permissible. But where there are several sales of similar lands, more or less, at the same time, whose prices have marginal variation, averaging thereof is permissible. For the purpose of fixation of fair and reasonable market value of any type of land, abnormally high value or abnormally low value sales should be carefully discarded. If the number of sale deeds of the same locality and the same period with short intervals are available, the average price of the available number of sale deeds shall be considered as a fair and reasonable market price. Ultimately, it is in the interest of justice for the land losers to be awarded fair compensation. All attempts should be taken to award fair compensation to the extent possible on the basis of their accessibility to different kinds of roads, locational advantages, etc."... ...

31. Hence, in the given facts and circumstances, no interference is warranted. It cannot be said that the findings returned by the Court below are perverse, illegal or erroneous.

The present appeals, devoid of any merit, are accordingly dismissed. Pending application(s), if any, also stand disposed of accordingly.

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

Vijay Kumar @ Viju S/o late Sh. Rikhi Ram ....Petitioner

Versus

State of H.P. ....Non-Petitioner

Cr.MP(M) No. 270 of 2016
Date of Order 30.3.2016

Code of Criminal Procedure, 1973- Section 439- Petitioner is facing trial for the commission of offences punishable under Sections 302, 212, 120-B of Indian Penal Code,

1860- with the consent of the parties trial Court directed to dispose of the petition within four and half months- trial Court further directed to summon the witnesses by way of special messenger.

For the petitioner: Mr. Manoj Pathak, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Petition is filed under Section 439 Code of Criminal Procedure. Petitioner is facing trial under Sections 302, 212, 120-B of IPC. It is well settled law that accused has a legal right for expeditious trial of the case. With the consent of learned Advocate appearing on behalf of petitioner and learned Additional Advocate General following order passed:-

i) Learned trial Court will dispose of the case within a period of four and half months.

ii) Learned trial Court will summon the witnesses by way of special messenger or by way of other method in order to dispose of the case expeditiously.

iii) Observation will not affect the merits of the case in any manner.

iv) Cr.MP(M) No. 270 of 2016 is disposed of. Pending application if any also disposed of.

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

Dr. Yashwant Singh Parmar University of Horticulture and Forestry ...Appellant.

Versus

Sh. Narender Dhand and others ...Respondents.

LPA No. 19 of 2011
Reserved on: 17.03.2016
Decided on: 31.03.2016

Code of Civil Procedure, 1908- Order 40 Rule 1- Plaintiff filed a civil suit for possession, mandatory injunction and money decree – plaintiff invited several Trusts, Societies and Institutions for upgrading the junior level school- plaintiff selected Chinmaya Trust - 99 years' lease was granted to the Trust and possession of the property was handed over to the Trust- it was pleaded that lease deed was not registered and the possession of the defendants was illegal- application was filed pleading that possession was in breach of H.P. Tenancy and Land Reforms Act- the purpose of the school was to provide social service rather than to be a source of income to the defendants- the receiver is required to be appointed for effective management, preservation, improvement and control of the suit property- defendants are bent upon to alienate the property, which will cause irreparable loss to the plaintiff- application was dismissed by the Court- held, that there is no prima facie proof to show that respondents have damaged the suit property or that they are doing

any activity, which has effect of depriving the plaintiff from his legal right- possession was handed over in the year 1992- no objection was raised till 2008 - in order to seek the appointment of the receiver, plaintiff has to prove strong *prima facie* case, irreparable loss and balance of convenience- no *prima facie* case, irreparable loss and balance of convenience has been shown- on the other hand, appointment of the receiver will cause irreparable loss to the defendants- further, a person in possession should not be dispossessed unless it is necessary to preserve the property- Learned Single Judge had rightly dismissed the application- appeal dismissed. (Para-5 to 49)

Cases referred:

T. Krishnaswamy Chetty versus C. Thangavelu Chetty and others, AIR 1955 Madras 430
Muniammal versus P.M. Ranganatha Nayagar and another, AIR 1955 Madras 571
Madhu Lal versus Ramji Das Chironji Lal and others, AIR 1953 Madhya Bharat 85
Rasi Dei versus Bikal Maharana and others, AIR 1965 Orissa 20
Srinivasa Rao versus Baburao and another, AIR 1970 Mysore 141
Rogunatrao M. Dessai and another versus M/s. Mineira Nacional Ltd. And others, AIR 1974 Goa, Daman and Diu 41
Vijay Kumar and another vs B.K. Thapper and another, AIR 1976 Jammu and Kashmir 30
Prem Prakash Kapoor versus Gobind Ram Kapoor and others, AIR 1976 Jammu and Kashmir 37
Chandrashekhar Sidramappa Chinchansure versus Bhaurao Sidramappa Chinchansure and others, AIR 1983 Bombay 475.
Rajeshwar Nath Gupta versus Administrator General and others, AIR 1989 Delhi 179
Ravi Kumar versus Misha Vadhera and others, AIR 1995 Delhi 175
Sanatan Barik and another versus Purna Chandra Barik, AIR 2003 Orissa 127
Industrial Credit & Investment Corporation of India Ltd. And others versus Karnataka Ball Bearings Corpn. Ltd. and others, (1999) 7 Supreme Court Cases 488
Kalpana Kothari (Smt) versus Sudha Yadav (Smt) and others with Parasnath Builders Pvt. Ltd. Versus Sudha Yadav (Smt) and others, (2002) 1 Supreme Court Cases 203
Firm Ashok Traders and another versus Gurumukh Das Saluja and others, (2004) 3 Supreme Court Cases 155

For the appellant:	Ms. Ranjana Parmar, Senior Advocate, with Mr. Karan Singh Parmar, Advocate.
For the respondents:	Mr. J.S. Bhogal, Senior Advocate, with Mr. Pramod Negi, Advocate, for respondents No. 1 to 4. 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. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

This Letters Patent Appeal is directed against the order, dated 23rd July, 2010, passed by the learned Single Judge in Civil Suit No. 72 of 2008, titled as Dr. Yashwant Singh Parmar University of Horticulture and Forestry, Nauni versus Narender Dhand and other, whereby and whereunder miscellaneous application, being OMP No. 403 of 2008, for appointment of Receiver in terms of mandate of Order 40 Rule 1 of the Code of Civil Procedure (for short "CPC") came to be dismissed (for short "the impugned order").

2. Appellant/plaintiff/applicant has assailed the impugned order on the grounds taken in the memo of appeal which are almost the same grounds as taken in the plaint and OMP No. 403 of 2008.

3. The question is – whether the impugned order is legal or otherwise, is to be decided while taking note of the pleadings of the parties and the mandate of the provisions of Section 94 and Order 40 CPC.

4. Before we deal with the facts of the case, one has to understand what is the object of Order 40 CPC.

5. The aim and object of Order 40 CPC is to protect, preserve and manage the suit property during pendency of a suit. The said power is subject to the controlling provision of Section 94 CPC and is to be exercised for preventing the ends of justice from being defeated.

6. It would be profitable to reproduce Section 94 CPC herein:

> *"**94. Supplemental proceedings.** - In order to prevent the ends of justice from being defeated the Court may, if it is so prescribed, -*
>
> *(a) issue a warrant to arrest the defendant and bring him before the Court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to the civil prison;*
>
> *(b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the Court or order the attachment of any property;*
>
> *(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to the civil prison and order that his property be attached and sold;*
>
> *(d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;*
>
> *(e) make such other interlocutory orders as may appear to the Court to be just and convenient."*

7. The said provision of law mandates that the Court may pass order(s) to prevent the ends of justice from being defeated, if it is so prescribed.

8. What does the word 'prescribed' mean? Section 2 (16) CPC defines the word 'prescribed', in terms of which, 'prescribed' means prescribed by Rules.

9. In view of the above, Section 94 CPC can be pressed into service and orders can be passed if it is provided by the Rules.

10. In the case in hand, we are dealing with Section 94 (d) and (e) read with Order 40 CPC.

11. It is profitable to reproduce Order 40 CPC herein:

> ***"ORDER XL***
>
> ***APPOINTMENT OF RECEIVERS***
>
> ***1. Appointment of receivers.** - (1) Where it appears to the Court to be just and convenient, the Court may by order -*

(a) appoint a receiver of any property, whether before or after decree;

(b) remove any person from the possession or custody of the property;

(c) commit the same to the possession, custody or management of the receiver, and

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove."

12. The mandate of Order 40 CPC is that the Court may appoint a Receiver of suit property, whether before or after the decree, if it appears to the Court to be just and convenient.

13. The crux of the matter is – whether it is 'just and convenient' to appoint the Receiver?

14. 'Just and convenient', to us, mean that order(s) is/are not to be made arbitrarily, whimsically or illegally. It cannot be made on any ground which has effect of defeating the equity. The mandate is what is right and just according to the judicial notion.

15. It has to be kept in mind that appointment of a Receiver deprives a person from enjoyment of suit property during the tenure of receivership, that is why it is known to be a harshest remedy.

16. In terms of the English law and the law developed in the Indian Courts, the applicant, who seeks appointment of Receiver, has to carve out a strong *prima facie* case, balance of convenience and irreparable loss.

17. Before we discuss all these issues, law and judgments occupying the field, it is necessary to understand what are the pleadings of the parties.

18. Appellant/plaintiff/applicant invoked the original jurisdiction of this Court by the medium of Civil Suit No. 72 of 2008 for decree of possession, mandatory injunction and money decree for an amount of ₹ 2,16,00,000/- with 12% interest in respect of the immovable property situated in Mauza Nanganji, Pargana Kiutan, Tehsil and District Solan, H.P. (for short "the suit property"), the description of which has been given in the plaint.

19. It has been admitted in para 3 of the plaint that the appellant/plaintiff/applicant invited several Trusts, Societies and Institutions, which were dealing and engaged in providing education and establishing educational institutions at school level – grass root level, for upgrading the junior level school, the details of which have been given in para 2 of the plaint, and one of the Trusts, known as Delhi Chinmaya Seva Trust, New Delhi (for short "the Trust") came forward and offered to provide such services to the appellant/ plaintiff/applicant. It granted 99 years' lease to the said Trust and the arrangement/memorandum of understanding was reduced into writing on 4th March, 1992,

and possession of the suit property was handed over to the said Trust, as has been mentioned in paras 4 and 5 of the plaint.

20. It has been averred that the lease deed was not registered and the possession to the Trust as well as defendants/respondents/non-applicants No. 1 to 3 was illegal, as pleaded in paras 6 to 8 of the plaint.

21. The defendants/respondents/non-applicants No. 1 to 4 have filed the written statement and have specifically admitted that the Trust is in possession and they have made the school functional, running the same and have not caused any damage to the property or the building. Further averred that the defendants/respondents/non-applicants are manning the same, but, it is the property of the Trust.

22. It is admission on the part of the appellant/ plaintiff/applicant that the possession of the Trust was permissive, not illegal one and it was at the request, rather, on the persuasion and initiation of the appellant/plaintiff/ applicant that the Trust came forward and entered into the possession of the suit property and made the Chinmaya Educational Society, Nauni, Tehsil and District Solan, H.P., functional. The said Society was registered on 22nd July, 1992.

23. In OMP No. 403 of 2008, the foundation of the application is that the defendants/respondents/non-applicants are in illegal possession of the suit property in breach of the mandate of H.P. Tenancy and Land Reforms Act, 1972 (for short "the Act") and the suit property is in danger of being wasted. The purpose of the school was to do and provide social service rather than to be a source of income to the defendants/respondents/non-applicants and the Receiver is required to be appointed for effective management, preservation, improvement and control of the suit property. Further that the defendants/respondents/non-applicants are bent upon to alienate the suit property, which will cause irreparable loss to the appellant/plaintiff/ applicant and the appointment of the Receiver is just for preservation of the entire property.

24. The defendants/respondents/non-applicants No. 1 to 4 resisted the same by the medium of objections. Virtually, the grounds taken in the objections to the application are the same grounds, which have been taken by them in the reply.

25. There is no *prima facie* proof on the file to the effect that the defendants/respondents/non-applicants have damaged the suit property or they have done or are doing such an activity, which has effect of depriving of the appellant/plaintiff/applicant from its legal right, rather, it has been pleaded that these proceedings are aimed at to dispossess the defendants/respondents/non-applicants and defeat their vested interests and rights.

26. Admittedly, the appellant/plaintiff/applicant has handed over the possession of the suit property to the Trust in the year 1992. It has not raised any finger about the possession, raising of construction, constitution of Society in order to establish the school and running of the school till the year 2008. It is not an illegal possession, but, the possession with consent, rather, permissive possession.

27. Can a Receiver be appointed to dislodge the defendants/respondents/non-applicants and take over the possession, that too, from an institutional society, which is running a school imparting education to so many students? The answer is in the negative for the following reasons:

28. The Madras High Court in the case titled as **T. Krishnaswamy Chetty versus C. Thangavelu Chetty and others,** reported in **AIR 1955 Madras 430,** has laid

down five tests and requirements, known as *'panch sadachar'*, for appointment of Receiver, while interpreting what is 'just and convenient'. It is apt to reproduce paras 13 and 14 of the judgment herein:

> *"13. The five principles which can he described as the "panch sadachar' of our Courts exercising equity jurisdiction in appointing receivers are as follows :*
>
> *(1) The appointment of a receiver pending a suit is a matter resting in the discretion of the Court. The discretion is not arbitrary or absolute: it is a sound and judicial discretion, taking into account all the circumstances of the case, exercised-for the purpose of permitting the ends of justice, and protecting the rights of all parties interested in the controversy and the subject-matter and based upon the fact that there is no other adequate remedy or means of accomplishing the desired objects of the judicial proceeding : - 'Mathusri v. Mathusri, 19 Mad 120 (PC) (Z5); - 'Sivagnanathammal v. Arunachallam Pillai', 21 Mad LJ 821 (Z6); - 'Habibullah v. Abtiakallah', AIR 1918 Cal 882 (27); - 'Tirath Singh v. Shromani Gurudwara Prabandhak Committee', AIR 1931 Lah 688 (28); - 'Ghanasham v. Moraba', 18 Bom 474 (7.9); - 'Jagat Tarini Dasi v. Nabagopal Chaki', 34 Cal 305 (Z10); - 'Sivaji Raja Sahib v. Aiswariyanandaji', AIR 1915 Mad 926 (Z11); - 'Prasanno Moyi Devi v. Beni Madbab Rai', 5 All 556 (Z12); - 'Sidheswari Dabi v. Abhayeswari Dahi', 15 Cal 818 (213); - 'Shromani Gurudwara Prabandhak Committee, Amritsar v. Dharam Das', AIR 1925 Lah 349 (Z14); - 'Bhupendra Nath v. Manohar Mukerjee', AIR 1024 Cal 456 (Z15).*
>
> *(2) The Court should not appoint a receiver except upon proof by the plaintiff that prima facie he has very excellent chance of succeeding in the suit. - 'Dhumi v. Nawab Sajjad All Khan', AIR 192.3 Uh 623 (Z16); - 'Firm of Raghubir Singh' Jaswant v. Narinjan Singh', AIR 1923 Lah 48 (217); - 'Siaram Das v. Mohabir Das', 27 Cal 279 (Z18); - 'Mahammad Kasim v. Nagaraja Moopanar', AIR 1928-Mad 813 (Z19); - 'Banwarilal Chowdhury v. Motilal', AIR 1922 Pat 493 (220).*
>
> *(3) Not only must the plaintiff show a case of adverse and conflicting claims to property, but, he must show some emergency or danger or loss demanding immediate action and of his own right, he must be reasonably clear and free from doubt. The element of danger is an important consideration. A Court will not act on possible danger only; the danger must be great and imminent demanding immediate relief. It has been truly said that a Court will never appoint a receiver merely on the ground that it will do no harm. - "Manghanmal Tarachand v. .Mikanbai', AIR 1933 Sind 231 (221); - 'Bidurramji v. Keshoramji', AIR 1939 Oudh 31 (Z22); - 'Sheoambar Ban v. Mohan Ban', AIR 1941 Oudh 328 (223).*
>
> *(4) An order appointing a receiver will not be. made where it has the effect of depriving a defendant of a 'de facto' possession since that might cause irreparable wrong. If the dispute is as to title only, the Court very reluctantly disturbs possession by receiver, but if the property is exposed to danger and loss and the person in possession has obtained it through, fraud or force the Court will interpose by receiver for the security of the property. It would be different where*

the property is shown to be 'in medio', that is to say, in the enjoyment of no one, as the Court can hardly do wrong in taking possession: it will then be the common interest of all the parties that the Court should prevent a scramble as no one seems to be in actual lawful enjoyment of the property and no harm can be done to anyone by taking it and preserving it for the benefit of the legitimate who may prove successful. Therefore, even if there is no allegation of waste and mismanagement the fact that the property is more or less 'in medio' is sufficient to vest a Court with jurisdiction to appoint a receiver. - 'Nilambar Das v. Mabal Behari', AIR 1927 Pat 220 (Z24); - 'Alkama Bibi v. Syed Istak Hussain', AIR 1925 Cal 970 (Z25~.); - 'Mathuria Debya v. Shibdayal Singh', 14 Cal WN 252 (Z26); - 'Bhubaneswar Prasad v. Rajeshwar Prasad', AIR 1948 Pat 195 (Z27). Otherwise a receiver should not be appointed in supersession of a bone fide possessor of property in controversy and bona fides have to be presumed until the contrary is established or can be indubitably inferred.

(5) The Court, on the application of a receiver, looks to the conduct of the party who makes the application and will usually refuse to interfere unless his conduct has been free from blame. He must come to Court with clean hands and should not have disentitled himself to the equitable relief by laches, delay, acquiescence etc.

14. To sum up as stated in - 'Crawford V. Ross', 39 Ga 44 (Z28),

> *"The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending."*

In 'Dozier v. Logan', 101 ga 173 (Z29) Atkinson J. said

> *"The appointment of a receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the creditors is exposed to manifest peril,"*

Therefore, this exceedingly delicate and responsible duty will be discharged with the utmost caution and only when the 'panch sadachar' or five requirements embodied in the words just and convenient (Order 40, Rule 1) are fulfilled by the facts of the case under consideration -- ('Ramachandrayya v. Nethi Iswarayya', AIR 1952 Hyd 139 (Z30)).”

29. The same principles have been laid down by the Madras High Court in the case titled as **Muniammal versus P.M. Ranganatha Nayagar and another,** reported in **AIR 1955 Madras 571.** It is profitable to reproduce para 19 of the judgment herein:

“19. The principles which should guide Indian Courts in the appointment of a Receiver are three in number. First of all, a plaintiff applying for the appointment of a Receiver must show 'prima facie' that he has a strong case and good tide to the property or a special equity in his favour and that the property in the hands of the defendant is in danger of being wasted; --'Muhammad Qasim Ravather v. Nagaraja Moopanar', AIR 1928 Mad 813 at p. 814 (Z13). It is not enough for the plaintiff to show that he has a fair question to raise as to the extent of the right alleged as in the case of a temporary

injunction, but he must go further and make out that he has a good 'prima facie' title requiring Court's protection and safeguarding pending litigation and which must be made out on the facts of that particular case. 'Guruswami Pandiyan v. S. K. P. Chinnathambirar', AIR 1919 Mad 157 at p. 158 (Z14).

Secondly, where the property is in media that is to say, in the possession of no one, a Receiver can readily be appointed. But where any one is in possession under a legal claim strong & compelling reasons are necessary for interfering with such possession : -- 'Sivaji Raja Sahib v. Aiswariyanaudaji Sahib', AIR 1915 Mad 926 at p. 929 (Z15); AIR 1924 Mad 482 at p. 483 (Z12). Thus the 'bona fide' purchaser of the property -- 'bona fides have to be presumed unless and until the contrary can be inferred -- in dispute should not be disturbed by the appointment of a Receiver unless there is some substantial and compelling ground for such interference.

Where there is no apprehension of waste or danger a Receiver will not be appointed merely on the ground that the applicant apprehends difficulty in obtaining possession 'of properly in the event of success or in realising mesne profits or the opposite party is poor or a woman. Specific acts capable of being tested should be alleged 21 Mad IJ 821 (Z11); AIR 1915 Mad 926 (Z15). Voilently stated vague allegations constitute no substitute for vacuum of facts.

Thirdly, an application for the appointment of a Receiver should always be made promptly and delay in making it is a circumstance unfavourable to such an appointment. But of course the matter should he considered judicially in all its aspects before being disposed of as there may be legitimate reasons for preferring an application after delay: -- Pattiuharakettu v. Mauavedan', AIR 1936 Mad 966 (Z1G). If all these conditions are satisfied, and it is found just and convenient to appoint a Receiver, the Court can exercise its discretion in favour of the applicant."

30. Applying the tests to the instant case, the defendants/respondents/non-applicants are not in illegal possession and their possession is admitted. There is also nothing on record to show that the defendants/respondents/ non-applicants have acted in such a way in order to cause damage or loss to the suit property or have/are tried/trying to alienate the suit property or are acting in such a way that there is a great and eminent danger to the suit property.

31. Appointment of Receiver is one of the harshest remedies in the eyes of law. It is obligatory, rather, duty of the appellant/plaintiff/applicant to carve out all the three ingredients which are *sine quo non* for grant of relief, i.e. (i) strong *prima facie* case, (ii) irreparable loss and (iii) balance of convenience.

32. The appellant/plaintiff/applicant has not been able to show a *prima facie* case, not to speak of carving out a strong *prima facie* case.

33. The appellant/plaintiff/applicant has to show that irreparable loss will be caused to it if the Receiver is not appointed. Applying the test, it can be, *prima facie,* said/held that in case Receiver is appointed, it will cause irreparable loss to the defendants/respondents/non-applicants because they are in possession coupled with the

fact that they have established the Society, are running the school and for sixteen years, the appellant/plaintiff/ applicant has not raised any finger.

34. In view of the pleadings of the parties read with the other attending factors, balance of convenience also leans in favour of the defendants/respondents/non-applicants and not in favour of the appellant/plaintiff/ applicant.

35. The Gwalior Bench of the Madhya Bharat Court in the case titled as **Madhu Lal versus Ramji Das Chironji Lal and others,** reported in **AIR 1953 Madhya Bharat 85,** has also laid down the same principle.

36. Various High Courts have almost laid down the same tests and in addition to the said tests, have also held that a person in possession should not be dispossessed unless it is shown that the property is in *medio* or it is necessary to preserve the property. Further, it has been held that even if Receiver is to be appointed, a person, who is in possession, should be appointed as Receiver, not a third party.

37. It would be profitable to reproduce para 5 of the judgment rendered by the Orissa High Court in the case titled as **Rasi Dei versus Bikal Maharana and others,** reported in **AIR 1965 Orissa 20,** herein:

> *"5. The appointment of receiver is recognised as one of the harshest remedies which the law provides for the enforcement of rights and is allowable only in extreme cases and in circumstances where the interest of the person seeking the appointment of a receiver is exposed to manifest peril. Therefore, this exceedingly delicate and responsible duty has to be discharged by the Court with the utmost caution. The principles to be followed for appointment of receiver as laid down are these; Not only must the plaintiff show a case of adverse and conflicting claim to property, but he must show some emergency or danger or loss demanding immediate action and of his own right he must be reasonably clear and free from doubt. The element of danger is an important consideration. An order appointing a receiver will not be made where it has the effect of depriving a defendant of a de facto possession since that might cause irreparable wrong. The high prerogative act of taking property out of the hands of one and putting it in pound under the order of the Judge ought not to be taken except to prevent manifest wrong imminently impending.*
>
> *Hence the Court should not appoint a receiver of property in the possession of the defendant who claim it by legal title, unless the plaintiff can show prima facie that he has a strong case and good title to the property. The Court must consider whether special interference with the possession of defendant is required, there being well founded fear that the property in question will be disputed or other irreparable mischief may be done unless the court gives protection. The mere circumstance that the appointment of a receiver will do no harm to anyone is no ground for appointing a receiver."*

38. The Mysore High Court in the case titled as **Srinivasa Rao versus Baburao and another,** reported in **AIR 1970 Mysore 141,** while placing reliance upon the 'panch sadachar' enunciated in **T. Krishnaswamy's case (supra)**, held that an order appointing a Receiver shall not be made if it has the effect of depriving a defendant of *de facto* possession. It is apt to reproduce para 23 of the judgment herein:

> *"23. The next contention urged on behalf of the petitioner was that the appellate Court exceeded its jurisdiction in interfering with the order of the trial Court for the appointment of a receiver. Reliance in this behalf is placed on a decision in Bipan Lal v. I. T. Commr. The argument is that the appointment of a receiver is a matter, which falls within the discretionary powers of a Court and as such is not ordinarily reviewable on appeal except to correct a clear and manifest abuse of justice. Sri K. Jagannatha Shetty, the learned counsel appearing on behalf of the respondents, did not dispute this proposition. But, what he submitted was that a trial Court in the exercise of its discretionary power relating to the appointment of a receiver, had clearly overlooked the several relevant circumstances or at any rate, assumed certain facts in favour of such an appointment of receiver. His contention was that the two elements to be considered in all cases where an appointment of a receiver was sought were that the existence of reasonable probability that the plaintiff asking for the appointment of a receiver would ultimately succeed in obtaining the general relief sought for in his suit and that the property in controversy would be wasted or destroyed unless a receiver was appointed.*
>
> *He also submitted that it would not be enough to make mere general averments relating to the acts of waste or damage to the property. It must be established by affidavits setting out the grounds upon which such petition was based. In addition to the above circumstances, the conduct of the parties would also become relevant. In support of this proposition, which, was not disputed by Sri Muralidhar Rao, reliance has been placed on the decisions in Iswara Shastry v. Ramakrishna Shastry, 1965-1 Mys LJ 342, Bore Gowda v. K. Channegowda, 1965-2 Mys LJ 548, Saraswathi Bai v. Kamala Bai, 1964-1 Mys LJ 551 and Krishnaswamy v. Thangavelu, AIR 1935 Mad 430. In the last of the above decisions, after a detailed examination of the several cases bearing on the subject, Ramaswamy, J. has enunciated five principles, which have been described by him as the 'panch sadaachar', which should be borne in mind by the Courts while exercising equity jurisdiction in appointing receivers. The principles are; that the question of appointing a receiver is a matter resting in the discretion of the Court; that a receiver should not be appointed unless the party has an excellent chance of succeeding in the suit; that plaintiff himself shall show that there was some emergency or danger or loss that may be caused to the right involved in the suit; that an order appointing a receiver shall not be made if it has the effect of depriving a defendant of do facto possession; that, however, the position would be different if the property is shown to be 'in medio' that is to say, in the enjoyment of no one, and that the Court should always look into the conduct of the parties who seek for the appointment of a receiver."*

39. The Goa, Daman and Diu Judicial Commissioner's Court in the case titled as **Rogunatrao M. Dessai and another versus M/s. Mineira Nacional Ltd. And others,** reported in **AIR 1974 Goa, Daman and Diu 41,** held that the Receiver cannot be appointed when the effect of the appointment is to deprive a person from his possession.

40. The Jammu and Kashmir High Court in the case titled as **Vijay Kumar and another versus B.K. Thapper and another,** reported in **AIR 1976 Jammu and Kashmir 30,** held that the court has a wide discretion in the matter of appointment of Receiver but the discretion must be sound and reasonable and the Court should not appoint a receiver save in exceptional circumstances, such as, when the property is in danger of being wasted, destroyed or lost. It is apt to reproduce paras 5 and 6 of the judgment herein:

> *"5. Order 40 Rule 1 of the Civil P.C. empowers a court to appoint receiver of any property where it appears to the court to be just and convenient that such appointment should be made. The exercise of this power is however limited by the proviso that the appointment of receiver will not authorise the court -*
>
> *"To remove from the possession or the custody of property any person whom any party to the suit has not a present right so to remove."*
>
> *The proviso clearly refers to a case where a person in possession is a third person and the parties to the suit have no present right to disturb his possession. This was the view taken by Ramesam and Cornish, JJ. In Vythulinga Pandarasannadhi v. Board of Control, Thiagarajaswami Devasthanam, (AIR 1932 Mad 193). I fully agree with this view. I make these observations because it was argued by Mr. Inder Dass that the provision was an impediment in the way of the appointment of a receiver in the present case having regard to the fact, as he said, that the plaintiffs had yet to establish their right to eject the defendants and that way they had no present right to disturb their possession.*
>
> *6. In the ordinary sense, the words 'Just and convenient', would denote what is practicable and what the interests of justice require. Now what is practicable and in the interests of justice in one case may not be so in the other case. Different considerations arise in different cases depending on the facts and circumstances of each case. The Court has, therefore, a wide discretion in the matter of appointment of Receiver but the discretion must be sought and reasonable. The court may be influenced mainly by the particular facts of each case, it must also be guided by road and well established principles which have covered the previous practice and which, though unexpressed, may be said to be lying dormant in the provisions of the Code."*

41. The same principle has been laid down in the cases titled as **Prem Prakash Kapoor versus Gobind Ram Kapoor and others,** reported in **AIR 1976 Jammu and Kashmir 37; Chandrashekhar Sidramappa Chinchansure versus Bhaurao Sidramappa Chinchansure and others,** reported in **AIR 1983 Bombay 475.**

42. The Delhi High Court in the case titled as **Rajeshwar Nath Gupta versus Administrator General and others,** reported in **AIR 1989 Delhi 179,** following the *'panch sadachar'* described in **T. Krishnaswamy's case (supra)**, held that Court should not appoint a Receiver to take possession of immovable property from the defendants unless and until the Court is of the opinion that there is a well founded reason to believe that the property in question will be dissipated or that other irreparable mischief may be committed and calls for the interference and protection of the Court.

43. In the cases titled as **Ravi Kumar versus Misha Vadhera and others,** reported in **AIR 1995 Delhi 175,** and **Sanatan Barik and another versus Purna Chandra Barik,** reported in **AIR 2003 Orissa 127,** it has been held that the application for appointment of Receiver should not be disposed of summarily, but is to be considered cautiously and judicially.

44. The Apex Court in the case titled as **Industrial Credit & Investment Corporation of India Ltd. And others versus Karnataka Ball Bearings Corpn. Ltd. and others,** reported in **(1999) 7 Supreme Court Cases 488,** held that the law Courts are entrusted with the power under Order 40 Rule 1 CPC to protect the rights of the parties, preserve the subject matter of a lis and to do complete justice between the parties. Further held that the Court may appoint a Receiver not as a matter of course but as a matter of prudence and just according to judicial notion. It is profitable to reproduce para 6 of the judgment herein:

> *"6. Order 40, Rule 1 of the Code of Civil Procedure expressly provides for the appointment of a Receiver over a property whether before or after the decree and the Court may by an order confer on the Receiver all powers of realisation, management, protection, preservation and improvement of the property. Order 40, Rule 1(d) specifically provides for realisation and the words "or such of those powers as the Court thinks fit" appearing in Order 40, Rule 1(d) ought to be interpreted in a manner so as to give full effect to the legislative intent in the matter of conferment of powers by the Court to preserve and maintain the property through the appointment of a Receiver. Needless to record here that there is existing a power which is totally unfettered in terms of the provisions of the statute. Law courts, however, in the matter of appointment of a Receiver through a long catena of cases, imposed a self-imposed restriction on the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation "unfettered" does not and cannot mean unbridled or unrestricted powers and though exercise of discretion is of widest possible amplitude, but the same has to exercised in a manner with care, caution and restraint so as to subserve the ends of justice. The law courts are entrusted with this power under Order 40, Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties."*

45. The Apex Court in the cases titled as **Kalpana Kothari (Smt) versus Sudha Yadav (Smt) and others with Parasnath Builders Pvt. Ltd. Versus Sudha Yadav (Smt) and others,** reported in **(2002) 1 Supreme Court Cases 203; and Firm Ashok Traders and another versus Gurumukh Das Saluja and others,** reported in **(2004) 3 Supreme Court Cases 155,** held that the basic principle governing the discretion of the Court in appointing a Receiver is whether it is 'just and convenient' to do so and the interests of both the parties are to be balanced while deciding whether it is desirable to appoint a Receiver.

46. Keeping in view the ratio of English law, law made by the Apex Court and the other High Courts, as discussed hereinabove, one comes to an inescapable conclusion that the appellant/plaintiff/applicant has failed to carve out a *prima facie* case, not to speak of strong *prima facie* case. It has also failed to, *prima facie,* carve out that the suit property is in danger of being wasted. The appellant/plaintiff/applicant has failed to satisfy the tests laid down by the Madras High Court in **T. Krishnaswamy's case (supra).**

47. Having said so, the learned Single Judge has rightly made the discussions, need no interference.

48. Viewed thus, the impugned order merits to be upheld and the appeal is to be dismissed.

49. Having glance of the above discussions, the impugned order is upheld and the appeal is dismissed alongwith the pending applications, if any.

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

Himachal Pradesh State Electricity Board Limited ...Appellant.
Versus
Krishan Chand Malhotra and others ...Respondents.

LPA No. 238 of 2010
Decided on: 31.03.2016

Constitution of India, 1950- Article 226- Writ Court had issued direction to the respondents-appellants to allow the petitioners time bound benefit of promotional scales/devised promotional scale on completion of 9/16 years of service with all consequential benefits- held, that an employee has a right of consideration for promotion only and not a right of promotion- Court could have directed the respondent to consider the case of the petitioners for grant of time bound benefit of promotional scales/devised promotional scale. (Para- 3 to 6)

For the appellant: Mr. Satyen Vaidya, Senior Advocate, with Mr. Vivek Sharma, Advocate.
For the respondents: Mr. Dilip Sharma, Senior Advocate, with Mr. Manish Sharma, Advocate.

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 17th August, 2010, made by the Writ Court/learned Single Judge in CWP (T) No. 5413 of 2008, titled as Krishan Chand Malhotra and others versus Himachal Pradesh State Electricity Board, whereby the writ petition filed by the writ petitioners-respondents herein came to be allowed with a direction to the writ respondents-appellants to allow the petitioners time bound benefit of promotional scales/devised promotional scale on completion of 9/16 years of service with all consequential benefits (for short "the impugned judgment").

2. It is apt to reproduce para 12 of the impugned judgment herein:

> *"12. Accordingly, in view of the observations made hereinabove, the petition is allowed. Respondent is directed to allow the petitioners time bound benefit of promotional scales/devised promotional scale*

on completion of 9/16 years of service with all the consequential benefits in terms of scheme contained in Annexure A-5 dated 31.1.1991. Needful be done within a period of two months from the date of production of certified copy of the judgment by the petitioners. No costs."

3. The moot question is – whether the Court can direct the respondents to grant promotional scales/devised promotional scales? The answer is in the negative for the following reasons:

4. An employee has a right of consideration only and not a right of promotion. So, at the best, the Court can direct the respondents to consider the case of the employees-writ petitioners for grant of time bound benefit of promotional scales/devised promotional scale.

5. Having said so, we deem it proper to modify the impugned judgment by providing that the writ respondents are directed to consider the case of the writ petitioners for grant of time bound benefit of promotional scales/devised promotional scale as per the scheme occupying the field, within six weeks.

6. Accordingly, the appeal is disposed of and the impugned judgment is modified, as indicated hereinabove. Pending applications, if any, are also disposed of.

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

M/s U.G. Hotels & Resorts Ltd. ...Applicant.

Versus

M/s Business Associates (Delhi) Pvt. Ltd. and others ...Respondents

Co. Application No. 14 of 2016 In
Company Appeal No. 1 of 2016.
Order reserved on : 30.3.2016.
Date of decision : 31 March, 2016.

Companies Act, 1956- Section 483- Company petition was filed for non-payment of Rs. 6.90 lacs - stakeholders and creditors of the company agreed to the sale of the resort and assets of the company before the Company Law Board- however, prior to this Company Judge had passed an order of status quo which was claimed to be impeding the process of implementation of order of Company Law Board- application was filed by Administrator for vacation of the order which was declined by the Company Judge- held, that Administrator was appointed with the consent of the parties- Administrator was required to take steps to clear the clouds, if any, over the title to the assets of the Company and the application filed by Administrator deserves some consideration- 46 former employees were appointed without notice to the company- hence, further proceedings pending before Company Judge are stayed. (Para-7 to 13)

For the Applicant : Mr. Aman Sood, Advocate.
For the respondents : Mr. B.C.Negi, Senior Advocate, with Mr. Raj Negi, Advocate, for respondnt No.1.

Mr. Satyen Vaidya, Senior Advocate, with Mr. Rohan Chauhan, Advocate, for respondent No.2.
Mr. Sanjay Prashar,Advocate, vice Mr. Y.P. Sood, Advocate, for respondent No.3.
Mr. Dheeraj K. Verma, Advocate, for respondent No.4.
Ms. Shikha Chauhan, Advocate, for respondent No.5.
Mr. Ashok Sood, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Company Application No. 14 of 2016.

By medium of this application, the applicant/appellant has sought condonation of 35 days delay that has crept-in in filing of the instant appeal.

2. We have gone through the contents of the application, more particularly paras 2 to 6 thereof, duly supported by the affidavit of the Administrator of the applicant/appellant, which reveal that the applicant/appellant has shown sufficient cause which prevented it from filing the appeal within the prescribed period of limitation. Accordingly, the application is allowed and the delay of 35 days in filing of the appeal is condoned. Application stands disposed of.

Company Appeal No. 1 of 2016.

Be registered.

3. This appeal under Section 483 of the Companies Act, 1956 (for short 'Act') is directed against the orders passed by learned Company Judge on 22.12.2015 and 7.1.2016 in Company Applications No. 44 and 49 of 2015 and Company Application No. 4 of 2016 in Company Petition No. 9 of 2012.

4. Since the Company Petition itself is listed for final hearing before the learned Company Judge on 31.3.2016, therefore, we at this stage are only required to find out as to whether the appellant has made out a prima-facie case for staying further proceedings before the learned Company Judge.

5. The challenge in this appeal by the Administrator of the appellant is *inter alia* to the non-vacation of the order of status quo in respect of the property of the appellant Company which was passed on 11.10.2012 in Company Application No. 28 of 2012. The appellant is aggrieved since it alongwith its promoters/ directors including Sh. H.S. Ghai, owes to the respondent No.2 Company over 17 crores.

6. The Company Petition was filed by respondent No.1 M/s Business Associate Pvt. Ltd. for alleged non-payment of ` 6.90 lacs and is claimed to be a collusive petition filed at the behest of Sh. H.S. Ghai through the instrumentality of the Company belonging to him and his family members.

7. Indisputably, all the stakeholders and creditors of the appellant-company in pursuance to the settlement agreed to the sale of the resort and assets of the company before the Company Law Board (for short 'CLB'). However, earlier to this, the learned Company Judge passed an order of status quo on 11.10.2012 which according to the appellant is impeding the process of implementation of the mandate of the CLB given with the consent of the parties.

8. It is averred that the Administrator on receiving offers and after getting the valuation done approached the CLB for permission for sale and/or inviting public bids.

However, the CLB before processing the permissions/permitting bids desired the Administrator to move the Company Judge for vacation of the aforesaid order. The Administrator accordingly filed Company Application No. 49 of 2015 seeking vacation of the aforesaid order which was declined on 22.12.2015 vide impugned order which reads thus:

> "***Co.Application No. 49 of 2015 in Co. Pet. 9 of 2012***
>
> *No ground has been made out for alteration of order dated 11.10.2012. However, in the interest of justice, the company petition itself is ordered to be listed for final hearing on 31.3.2016. The application stands disposed of."*

On the same date, an application moved by 46 former employees of the appellant for impleading them as parties in the winding petition also came to be allowed in the following terms:

> "***Co. Application No. 44 of 2014 in Co. Pet. No.9 of 2012.***
>
> *The applicants are permitted to be impleaded as creditors/ petitioners. The Registry is directed to carry out necessary correction in the memo of parties. The application stands disposed of."*

9. The appellant thereafter again moved an application for variation, clarification and further directions in respect of the order dated 22.12.2015 (supra) reiterating the grounds taken in the earlier application i.e. C.A. No. 49 of 2015 and the same is stated to be pending adjudication before the learned Company Judge.

10. The grievance of the appellant at this stage is two fold. Firstly, the order of the status quo is impeding the process of implementation of the mandate of the CLB and secondly, the impleadment of 46 former employees of the appellant is not only against the statutory requirement of the Act, but would ultimately interfere with the decision making of the winding up petition itself.

We have heard the learned counsel for the parties and have gone through the material placed on records of the case.

11. It is not in dispute that it was pursuant to the consent of all parties that Administrator of the appellant came to be appointed on 31.1.2014 and this fact is duly recorded in the order passed by the CLB on 2.12.2013. It is further not in dispute that the Administrator in terms of the aforesaid order apart from carrying out the other functions was required to take steps to clear the clouds, if any, over the title to the assets of the Company in the revenue records so as to make it marketable by ensuring that all or any permissions required under the law to sell the property are obtained. Once, this is the admitted position, then the application filed by the Administrator did deserve some consideration especially when as many as eleven grounds had been set out therein and even otherwise the order of status quo dated 11.10.2012 had been passed earlier to the appointment of the Administrator.

12. In addition, we also find that 46 former employees have been ordered to be impleaded as parties, that too, without notice to the appellant. That apart, there is nothing on the record to suggest that these employees prior to seeking their impleadment had even served a notice under Sections 433 and 434 of the Act, and therefore, in such circumstances their impleadment prima-facie appears to be contrary to law.

13. Having said so, we are of the considered view that the appellant has carved out a prima-facie case calling for interference by this Court. Accordingly, further proceedings in Company Petition No. 9 of 2012 pending before the learned Company Judge, fixed for 31.3.2016 are ordered to be stayed. Call for the records. List on 09.05.2016.

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