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And

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application is allowed as the proposed amendment is explanatory in nature relating to subsequent events- application allowed subject to the payment of cost of Rs. 3,000/-.
Title: M/s Sainsons Pulp & Papers Ltd. and another Vs. State Bank of India and others (CMP No. 5525 of 2015) Page-912

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff sought the amendment of the plaint for claiming the outstanding charges from the defendants- defendants contended that evidence had been led and the proposed amendment will change the nature of the suit - held, that no new fact was being introduced- the power to allow amendment is wide and can be exercised at any stage- plaintiff had claimed any other relief to which they are entitled, therefore, application allowed and plaintiff permitted to amend the plaint.
Title: The Reserve Bank of India and another Vs. M/s A.B.Tools (P) Ltd., and another (D.B.) Page-1086

Code of Civil Procedure, 1908- Order 9 Rule 13- A decree was passed by the Court exparte- an application was filed for setting aside ex-parte decree – held that ex-parte decree cannot be set aside on the ground that there was some irregularity in the service of the summons- Process Server went to the commercial premises and found it locked - thereafter he went to the residential house of the Managing Director, where he met the Managing Director- process was shown to the managing director but he refused to accept the same- therefore, copy of notice was affixed on the gate of his residence- it is apparent from the report that Managing Director was duly served and there was no reason for setting aside ex-parte decree- application dismissed.
Title: M/s P.A. Times Industries Vs. M/s Apex Marketing Page-890

Code of Civil Procedure, 1908- Order 16 read with Sec.151- Petitioner filed an application for examining the marginal witnesses on the ground that it was reported in the summons that the witness had died about 16 years ago and it was necessary to examine his son- defendant No. 6 was also to be examined regarding the signatures of the marginal witnesses- held that mere delay in filing the application is not sufficient to dismiss the same- Rules of Procedure are handmaid of justice and the purpose of prescribing procedure is to advance the course of justice – marginal witness had died and his son is alive- brother of the plaintiff and other defendants are material witnesses- case relates to a dispute between the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy- application allowed subject to the payment of cost of Rs. 40,000/-.
Title: Neelam Kumari Vs. Yogender Singh and others Page-1145

Code of Civil Procedure, 1908- Order 21 Rule 32- A counter-claim was filed for specific performance of the contract which was decreed- application for execution of the decree was filed- objections were filed pleading that Execution Petition is not maintainable and the decree is not executable in view of the instructions issued by the govt.- held that, decree had attained finality and it cannot be nullified by taking course to administrative instructions.
Title: Rikhikesh son of Shri Narain Dass Vs. Om Parkash Page-918

Code of Civil Procedure, 1908- Order 22 Rule 3- One of the petitioners in an appeal had expired during the pendency of the reference petition- this fact was not brought to the notice of the Court and the award was passed in ignorance of the death- held, that death of the petitioner and non-substitution of his legal representatives in Reference Petition does not affect the same – legal representatives are entitled to receive compensation, therefore, they are ordered to be brought on record.
Title: NTPC Limited Vs. Jitender and others Page- 1064

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff sought a relief of injunction pleading that 'D' was owner to the extent of ½ share- successor of the 'D' got the suit land recorded in his exclusive possession in connivance with the revenue staff- he was threatening to raise construction without getting the suit land partitioned- defendant pleaded that he was exclusive owner of the suit land- he had started construction in the month of February, 2012 and had spent more than Rs.7 lakh- lower Courts had recorded a finding that plaintiff is owner to the extent of ¼ share, whereas defendant is owner to the extent of ½ share- a transfer by the co-owner makes the transferee a co-owner- such transferee is entitled to all the rights and obligation which the other co-owners have- a co-owner has right to enter upon the common property and to take possession of the whole subject to the equal rights of other co-owners- he is not entitled to injunction for restraining other co-owners from exceeding his rights in common property absolutely unless the act of co-owner amounts to ouster- mere making of construction or improvement in the common property does not amount to ouster- if the act of the co-owner amounts to diminution in the value of the property then a co-owner can seek an injunction to prevent the diminution- a co-owner out of possession can seek an injunction to prevent an act which is detrimental to his interest- plaintiff has to establish that the act complained of would cause some injury which would affect his position and enjoyment- defendant in the present case had claimed to raise construction over the suit land and he had claimed that he is in peaceful and uninterrupted possession of the suit land which amounts to ouster- therefore, in these circumstances, injunction was rightly granted.
Title: Ashok Kapoor Vs. Murtu Devi Page-1312

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff claimed an injunction pleading that defendants had started interfering with the path and the kuhal due to which plaintiffs were unable to sow paddy in the suit land- defendant pleaded that they had not consented for the construction of the path- when the objection was raised Panchayat stopped the construction work- major portion of the path has been constructed over the land of the plaintiff- respondents have given no objection for the construction of the jeepable road- plaintiffs could not be deprived of their right of access to the houses- therefore, plaintiff was rightly held entitled for the relief of injunction by Learned Civil Judge.
Title: Puran Chand & anr. Vs. Sanjay & ors. Page-1066

Code of Civil Procedure, 1908- Order XLVII- Review petitioners claimed that the original petitioner was not sponsored by the employment exchange nor was he entitled to the grant of temporary status- he was not entitled to regularization and was a casual worker- the grounds taken in the Review Petition show that petitioners have filed an appeal and not a Review Petition – there was no error on the face of the record- petition dismissed.
Title: Union of India & others Vs. Paras Ram (D.B.) Page-1397

Code of Criminal Procedure, 1973- Section 401- Compromise was entered between the parties- in view of compromise revisionist ordered to pay amount of Rs. 50,000/- as full and final settlement between the parties and the sentence of imprisonment imposed by trial Court and affirmed by appellate Court set aside.
Title: Balwant Singh Vs. Sheela Devi & another Page-1330

Code of Criminal Procedure, 1973- Section 438- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 341, 504, 506 of 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- petitioner had joined investigation- no recovery is to be effected from the petitioner- petitioner being female is entitled to special provision of bail - therefore, bail granted to the petitioner.
Title: Dr. Devkanya wife of Sh. Rahul Lodhta vs. State of H.P. Page-1331

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 of 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- it was duly established prima facie by the police report that a forged certificate was prepared and was used – if anticipatory bail is allowed, interests of the State and general public will not be adversely affected- petitioner had cooperated with the police, therefore, bail application allowed and the petitioner ordered to be released on bail.
Title: Mool Chand son of Shri Tulle Ram Vs. State of H.P. Page-905

Code of Criminal Procedure, 1973- Section 468- An offence punishable under Section 323 of IPC is punishable with imprisonment for a period of one year- FIR was registered on 01.06.2008 and final report was presented on 4.1.2010 beyond the period of limitation- therefore, charge-sheet presented against the petitioner was time barred.
Title: Amar Singh Vs. State of Himachal Pradesh Page-1358

Code of Criminal Procedure, 1973- Section 482- petitioners sought quashing of FIR on the ground that private complaint was filed before Sub Divisional Judicial Magistrate Aanadpur Sahib in which all the accused were acquitted- wife had left matrimonial home in the month of May, 2003 and FIR was lodged after more than 10 years- no specific date and time regarding the demand of dowry were given- record showed that ACJM had given liberty to the complainant to file fresh complaint under provision of law before competent Court having jurisdiction and this judgment has attained finality- hence, fresh complaint filed by the complainant pursuant to the direction of the Court cannot be said to be barred by law.
Title: Sanjeev Kumar son of Shri Jagdish Singh Vs. State of H.P. through Principal Secretary (Home) to the Government of Himachal Pradesh Shimla Page-1292

Code of Criminal Procedure, 1973- Section 482- Cancellation report has been filed before the trial Court, therefore, the petition dismissed as infructuous- however, petitioners will be at liberty to file fresh petition on the same cause of action.
Title: Karan Laroiya & another Vs. State of H.P. & others Page-1363

Code of Criminal Procedure, 1973- Section 482- Reply filed by State showed that cancellation report of FIR stood already filed before the trial Court, hence petitioner withdrew the petition with liberty to file a fresh petition on same cause of action.
Title: Pankaj Sood & another Vs. State of H.P. & others. Page-1348

Constitution of India, 1950- Article 226- A letter was received by the High court highlighting the difficulties being faced by blind and deaf students- reply filed by the State shows that there are shortcomings in the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - University

directed to provide necessary amenities- direction also issued to provide basic facilities required for blind and deaf students in the school and to appoint the requisite number of teachers, to enhance their scholarship, to provide them screen readers, screen magnifiers, speech recognition software, Text-to-speech software, optical character recognition software, large monitors, hand held magnifiers and standalone reading machines.

Title: Court on its own motion Vs. The State of Himachal Pradesh and others (D.B.) (CW PIL No. 30 of 2011) Page-940

Constitution of India, 1950- Article 226- A letter was received stating there are 17 inmates in the Old Age Home at Basantpur- out of them, four inmates are severely handicapped- it was prayed that these inmates be given disability/rehabilitation pension, a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide some vocational training and that inmates suffering from mental illness be shifted to the Hospital of Mental Health and Rehabilitation- held, that it is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded person by providing them necessary assistance- old age pension has been denied to two persons on the ground that they are not citizens of India - the policy enacted by the State Government to deny the pension on the ground of domicile is arbitrary and unreasonable- direction issued to the State to open separate home for adult disabled and mentally retarded and to check whether basic amenities are being provided- further direction issued to provide vocational training, disability allowance and to release old age pension.

Title: Ajai Srivastava Vs. State of Himachal Pradesh and others (D.B.) Page-969

Constitution of India, 1950- Article 226- A letter was written to the High Court stating that there are 30 adult inmates housed in the State Home for Destitute Women at Mashobra- there is no Sweeper available between 5 p.m. to 10 a.m- there is no nurse to look after the mentally sick persons- there is no boundary wall around the Home- old age pension is not being provided to the inmates and their relatives had not been contacted- held, that it is responsibility of the State to provide necessary succor to the inmates- basic rights of the inmates are required to be protected by the State- inmates cannot be segregated on the basis of their domicile or citizenship- direction issued to provide fencing around the building, to pay disabled/old age pension, to appoint Sweeper, nurse and washerman - efforts be made to contact their nearest relatives.

Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) (CW PIL No. 02 of 2015) Page-934

Constitution of India, 1950- Article 226- All India Post Graduate Medical Entrance Examination (AIPGMEE) was conducted from 1.12.2014 to 6.12.2014- admission process was started on the basis of entrance examination - initially it was provided that allotment of the seats will be made in the specified ratio- however, subsequently roster was issued on the basis of method of appointment- petitioner contended that allotment has to be made in accordance with original condition- held, that while filling up the seats for post graduate qualification, the only criterion should be merit – State has created sub groups on the basis of method of appointment – all the medical officers discharge the same duties - once they are permitted to sit in one examination, they are to be treated as the same- the classification within the classification is not permissible and it was also not permissible to change the condition after the publication of the prospectus.

Title: Dr. Vivek Kumar Garg and ors. Vs. State of H.P. & ors. (D.B.) Page-1111

Constitution of India, 1950- Article 226- Appellants were appointed as Panchayat Sahayaks- their appointments were quashed and set aside- an advertisement was issued for filling up 9 posts of Panchayat Sahayaks- a communication was sent to Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur – respondent appeared for interview- a communication was sent by respondent No. 4 to respondent No. 3 requesting him to issue appointment letter- appointments were not given by respondent No. 3- private respondent approached the High Court pleading that suitability of the ex-serviceman was to be adjudged only by Ex-servicemen Cell and thereafter department is to offer appointment letters to the candidates- as per letter dated 17.8.1987 ex-servicemen once interviewed by State Level Selection Committee are not required to be subjected to any future interview for which they have been nominated - once the private respondents are found eligible, they could not have been subjected to further test- they were rightly held entitled for the appointment by the Writ Court.

Title: Ashok Singh and others Vs. Ved Parkash and others (D.B.) Page-929

Constitution of India, 1950- Article 226- Complaints were received in the Court that authorities are not taking action against the person who are violating the directions issued by the Court- trees are being cut on the pretext that permission had been obtained from the authorities to cut the trees- respondent directed to appear before the Court to explain the situation and the respondent commanded to take action strictly as per law.

Title: Court on its own motion Ref:- Ghazala Abdullah Vs. State of H.P. & others (D.B.) Page-1291

Constitution of India, 1950- Article 226- Departmental proceedings were initiated against the petitioner- disciplinary authority asked the petitioner to explain as to why the proposed penalty be not imposed upon her within seven days from the date of receipt of the order- however, an order of compulsory retirement was passed on the same day- held, that purpose of show cause notice is to enable the delinquent to show as to how the report submitted by the Inquiry Officer is factually incorrect - when the order imposing the penalty and to show cause are passed on the same day, show cause notice is an empty formality to show that principle of natural justice had been complied with - order of compulsory retirement could have been passed after adhering to the principle of natural justice and fair play- authority passing an order must act with an open mind while issuing show cause notice-order of compulsory retirement set aside, however, respondent left at liberty to pass a fresh order after complying with the principle of natural justice.

Title: Anu Rana Vs. Central Bank of India & ors. Page-1103

Constitution of India, 1950- Article 226- Government had framed Himachal Pradesh Vidya Upasak Yojna, 1998 to provide teaching man power in Government Primary Schools located in remote/backward/difficult/tribal areas as regular teachers were not willing to serve in those areas- Vidya Upasaks were to be initially recruited for a period of one year and their services could be extended after evaluating their performances- services of those teachers who had passed a written test and had successfully completed one year condensed teacher training course specifically prepared for them were to be regularized after a period of five years subject to the condition that they passed 10+2 examination and had qualified written test and interview conducted by H.P. Subordinate Service Selection Board- appointment letters were issued on the basis of combined merit list- services of the candidates were counted from the date of the regular appointment and not from the date of initial appointment- further, they were also not held entitled for pension- petitioners were appointed in the year 2000 and their appointment continued till 2007- their services were to

be counted from the date of the initial appointment- pension rules were amended in the year 2003 and their appointment was prior to the amendment- hence, they were wrongly deprived of the pension- petition allowed and their services were ordered to be counted from 2000 for the purpose of pension and annual increments etc.
Title: Joga Singh and others Vs. State of Himachal Pradesh and others (D.B.)
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Constitution of India, 1950- Article 226- It was stated in the status report dated 25.4.2015 that first milestone would be achieved by June, 2015, subject to the weather conditions- Status report filed before the Court showed that required progress had not been made till filing of the status report- respondents were taking the plea that delay in the execution of the work was due to bad weather- held, that construction technology had improved to such an extent that construction work is being carried out smoothly even in the areas where temperature remains in minus - a committee of two persons appointed to monitor the progress of the work in question- committee members directed to visit the spot fortnightly and to submit the report about the progress of work and also to give suggestions to take work to logical conclusion.
Title: Court on its own motion Vs. State of H.P. and others (D.B.) (CWPIL 8480 of 2014)
Page-879

Constitution of India, 1950- Article 226- Land was allotted to the father of the petitioner No.1- no objection was raised by the respondent to the allotment of the land- however, a Revision Petition was filed which was allowed without a speaking order- a Writ Petition was filed which was allowed and the petitioners were permitted to approach Divisional Commissioner, Mandi who dismissed the application filed by the petitioners- a Revision was filed after 17 years – such revision was not maintainable- authorities had not adverted to the question of delay- hence, petition allowed and the order set aside.
Title: Bachitar Singh & ors. Vs. Divisional Commissioner Mandi & ors. Page-1220

Constitution of India, 1950- Article 226- Petitioner filed a Civil Writ Petition before the High Court which was allowed and a supernumerary post was created- case of the petitioner was considered by the Departmental Promotion Committee and his name was recommended for promotion on notional basis- petitioner claimed that he has not been paid the actual salary though he was ready to work on the higher post- held, that petitioner has been kept away from discharging the duties of the higher post- he was always ready and willing to work on the higher post- thus, petition allowed and the respondent directed to pay salary from the date of promotion till the date of superannuation.
Title: Balbir Singh Vs. State of Himachal Pradesh and another (D.B.) Page-1225

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking relief that respondent No. 5 be held to be disqualified from holding the office of MLA and he be restrained from acting as MLA- held, that power under Article 226 is in the widest possible terms but this power cannot be used to set aside the election- election can be set aside only by raising election dispute and only Election Tribunal can set aside the election under properly filed election petition under Representation of the People Act- writ petition dismissed as not maintainable.
Title: Ashwani Gupta Vs. State of H.P. and others (D.B.) Page-1210

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to issue NOC to the petitioner on the basis of remarks obtained in the All India Post

Graduation Medical Entrance Examination 2015- Clause No. 1.9 of the notification is illegal and not applicable to the case of the petitioner- petitioner joined PG courses at Chandigarh- she came to know about her critical pregnancy diagnosed as "HYPEREMESIS GRAVIDARUM"- she was not entitled to any maternity leave - she had no option but to submit her resignation- she requested the respondent to relax the P.G. policy so that she could appear in P.G. examination in future as a sponsored candidate- she applied for no objection certificate but the certificate was not issued in her favour- clause No. 1.9 clearly provided that In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years- held, that provisions relating to admission to PG courses were clear and unambiguous- Court cannot pass any direction to accommodate the petitioner- petitioner had not made any attempt to obtain leave or to withdraw the resignation furnished by her- she made a request to consider her posting in the blood bank at IGMC, Shimla which shows that her condition was not critical - rule cannot be declared unreasonable because it operates harshly in a given case- petition dismissed.

Title: Dr. Lalita Bansal Vs. State of H.P. & ors Page-953

Constitution of India, 1950- Article 226- Petitioner sought quashing of the letter stating that notification issued under Section 4 of Land Acquisition Act, 1984 stood lapsed and direction be issued to Land Acquisition Collector to initiate the proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- the record showed that there was unreasonable delay on the part of the respondents in finalizing the proceedings under Land Acquisition Act- therefore, respondents cannot take advantage of the wrong to claim that they will proceed under the new Act- provision of Section 6 will not come in to operation till the requirement laid down in part-VII of the Act are fulfilled – respondents had delayed the proceedings instead of promptly paying compensation- petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents- Writ Petition allowed and the letter issued by respondents quashed.

Title: Seli Hydro Electric Power Company Ltd. Vs. State of H.P. and others (D.B.) Page-1069

Constitution of India, 1950- Article 226- Petitioner was appointed as Lower Division Clerk on contract basis- Department invited application for three posts of Lower Division Clerk for which the petitioner also applied- his case was rejected on the ground that he was over age- when his contract was not renewed, he filed an application before Central Administrative Trinunal which was also dismissed - selected candidates were not arrayed as party- this application was not filed before the High court, therefore, it could not be said as to what plea was taken by the petitioner before the Court.

Title: Mohinder Kumar Vs. Union of India and others Page-967

Constitution of India, 1950- Article 226- Petitioner was transferred from Corporate Office Shimla to STPL, Patna- the persons who were working for more period than the petitioner were not transferred- wife of the petitioner had undergone renal (kidney) transplant in the year 2000- daughter of the petitioner is studying in 10+2 at Shimla- petitioner has worked only for three years at Shimla and has been transferred while the people working for more than 9-10 years have not been transferred- therefore, petition allowed and the transfer order of the petitioner quashed, liberty granted to the respondent to transfer the person on the basis of length of services at a particular place.

Title: Abhay Shankar Shukla Vs. SJVN Ltd. & ors. (D.B.) Page-1208

Constitution of India, 1950- Article 226- Petitioners are beldars who were placed beyond the parent cadre by way of secondment- it was contended that consent of the petitioners was not obtained prior to their transfer- respondent contended that Statute did not provide for obtaining consent for placement on deputation/secondment/foreign service- Statute did not provide that the consent of the employee need to be taken - willingness of posting beyond the cadre need not be expressly sought and can be implied – where the employees had joined without any reservation they are not entitled for any relief but where employees had approached the Court immediately after the passing of the order, they are entitled to the relief.

Title: Desh Raj Vs. Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya (D.B.) Page-944

Constitution of India, 1950- Article 226- Petitioners are pursuing their studies in the St. Bedes College, Shimla- petitioners had obtained 8 marks whereas they were required to obtain 10 marks for obtaining admission in higher classes- a representation was made which was allowed by respondent No. 3 and the internal marks were changed- respondent No. 1 did not accept the recommendation of respondent No. 3- it was contended that there is a specific bar regarding the revision of internal assessment- held, that there is no provision in the statute for the revision/review of internal assessment- therefore, respondent No. 1 had rightly refused to accede to the request of respondent No. 3- petition dismissed.

Title: Tanuja Bhatia Vs. H.P.University and others Page-924

Constitution of India, 1950- Article 226- Respondent was working on daily wages basis as Beldar- his services were retrenched- he filed a petition before the Labour Court which was allowed- held, that while retrenching the employee, the principle of last come first go has to be applied- while giving re-employment preference has to be given to the retrenched employee- petitioner was not re-employed but his juniors were re-employed- thus, seniority was rightly granted to the respondent- reference can be made at any time and there is no limitation for making the reference.

Title: State of H.P. through Secretary (IPH) to Govt. of H.P. and another Vs. Raj Kumar son of Shri Jaisi Ram Page-1349

Constitution of India, 1950- Article 226- **Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002** (SARFAESI Act) – Section 13(4)- Petitioner filed a Writ Petition against an action taken against it in terms of Section 13(4) of SARFAESI Act- petitioner has a remedy of appeal under Section 17 of the Act- held that when an alternative remedy is available, writ petition is not maintainable.

Title: SPS Steels Rolling Mills Ltd.Vs. State of Himachal Pradesh & others (D.B.) Page-1387

Constitution of India, 1950- Article 226- Show cause notice was issued to the petitioner asking them to show cause as to why action be not taken for not paying proper VAT on mobile chargers- petitioners have efficacious and alternative remedy under Section 48 of the Act- petitioners have to appear before the authority and to file reply- it would be open for the petitioners to take all the grounds which have been taken before the High Court – a show cause notice cannot be quashed by the Writ Court- hence, Writ Petition dismissed as not maintainable.

Title: Micromax Informatics Ltd. Vs. State of HP and others (D.B.) Page-1334

Constitution of India, 1950- Article 226- **Sick Industrial Companies (Special Provisions) Act 1985**- Section 22- Petitioners sought a direction to the bank to take steps to prevent the petitioner from becoming sick- petitioners had stated that an order was passed by BIFR

H.P. Land Revenue Act, 1954- Section 134- A person can apply for delivery of possession within three years from the date of preparation of instrument of partition – if the possession is not delivered within three years, aggrieved person can seek possession on the basis of title before the Civil Court.

Title: Satya Devi widow of late Shri Udho Ram Vs. Hari Chand son of Udho Ram Page-1380

H.P. Land Revenue Act, 1954- Section 135- Plaintiff applied for partition of the land before Assistant Collector 1st Grade- respondent stated that suit land had already been partitioned- this objection was rejected and the land was partitioned- appeal was preferred against the order which was allowed and the case was remanded- meanwhile, settlement operation started in the revenue estate, Una- application was allowed by Tehsildar Settlement Una – appeal was preferred before Settlement Officer, Kangra who allowed the same and directed the parties to approach the Civil Court having jurisdiction in the matter-a civil suit was preferred pleading that land was joint- held, that where the parties had partitioned the land privately without intervention of the revenue officer, any party can apply to a revenue official to record the same- a report was made in rapat roznamcha regarding the partition – this entry was also reflected in the jamabandi- parties were shown in separate possession- this probablises the plea of private partition - it is permissible for the parties to partition a particular piece of land leaving other land joint- merely because the award was accepted by the defendants and the plaintiffs cannot be considered to be a circumstance to belie the plea of private partition- appeal dismissed.

Title: Amrik Singh and others Vs. Abnash Chand and others Page-881

Himachal Pradesh Nautor Land Rules, 1968- Rules 13 and 14- Petitioner was a government employee at the time of allotment of nautor land- land was granted to him for the construction of cow-shed - he had mentioned his annual income as Rs. 4,800/- from all sources- he had spent a sum of Rs. 80,000/- on the construction of the shops- he was not even resident of estate for which he had applied for the grant of nautor land- he had violated the Rule 7 as he had used the land for the purpose other than for which the land was sanctioned by constructing a shop- his income was Rs. 48,000/- but he had given his income as Rs. 4,800/- p.a. which was more than Rs. 2,000/- prescribed under the Rules- the object of nautor land rules was to help the persons who were landless or were in dire need of land for cultivation- petitioner cannot be called to be a landless or needy person- nautor land was allotted in 5,769 cases in the State- Financial Commissioner directed to call for the records in all the cases and to pass the order of resumption/cancellation if the allotment had been made contrary to the provision of Rules – a further direction issued to refund the amount with interest if the land has been acquired.

Title: Narinder Lal Negi Vs. State of Himachal Pradesh and others (D.B.) Page-1364

Himachal Pradesh Value Added Tax Act, 2005- Section 16(xiii)- Petitioner was paying tax @ 5% on the sale of cell phone chargers and other accessories instead of 13.75%- a show cause notice was issued to it to revise the assessment order- petitioner filed a Writ Petition challenging the show cause notice- held that petitioner has an alternate remedy of filing an appeal under the H.P. VAT Act 2005 -mere illegal or irregular exercise of powers will not make the order without jurisdiction - when an effective remedy is available Court should not entertain the Writ Petition- Writ Petition dismissed for the lack of maintainability.

Title: M/s Samsung India Electronics Pvt. Ltd. Vs. State of H.P. & ors. (D.B.) Page-1226

Hindu Succession Act, 1956- Sections 2(2) and 4- Plaintiff filed a Civil Suit pleading that his father was Gaddi and was governed by custom according to which daughters do not inherit the property of their father and the attestation of mutation in favour of the plaintiff and defendants was wrong- held, that any text, rule or interpretation of Hindu Law or any custom or usage immediately before the commencement of the Act shall cease to have effect with respect to which provision is made in the Act- custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized- further, such custom will be in violation of Article 15 of the Constitution of India.

Title: Bahadur Vs. Bratiya and others Page-1259

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Indian Contract Act, 1872- Section 70- Plaintiff No.1 had sold 8 flats in the Valley Side Estate to the defendants together with lease- it was specifically agreed that the seller will not be bound to carry out any repair after one year and alternate arrangement will be made by Flat Owner Association- plaintiff spent Rs. 26,000,00/- towards the maintenance of common area- held, that no Flat Owners Association was formed in area and services were rendered by the plaintiff- once the defendants had taken the advantage of the services, they were bound to pay for the same- Article 113 of Limitation Act will be applicable in such a situation - cause of action arose on 20.9.2004 and the suit was filed on 18.1.2006 within limitation- hence, suit decreed.

Title: The Reserve Bank of India and another Vs. M/s A.B.Tools (P) Ltd., and another (D.B.) Page-1086

Indian Penal Code, 1860- Section 302- Accused resided with his wife, mother and sister-in-law in a temporary shed- PW-16, father-in-law of the accused, was asked by PW-7 to call mother of the accused to milk the cattle- temporary shed occupied by the accused was bolted from inside and his daughter refused to open the same -on the second day same reply was received – matter was reported to police and the door was got opened- dead bodies of the parents of the accused were found- accused made a disclosure statement and got darat and scissor recovered- there was contradiction regarding the person who had asked the father-in-law of the accused to leave- further, he had not informed his employer that the door was found locked from the inside – it is difficult to believe that accused, his children, his wife and sister-in-law would have remained inside the room for 48 hours after the commission of crime and would not have run away from the scene of crime- in normal course, the occupants of the house would have come out of the room and would have raised hue and cry- wife of the accused who was present in the room was also not examined- clothes of the accused were recovered but no blood stains were found - blood stains were bound to be on the clothes if the accused had committed the crime- there was contradiction as to who had informed the police- the motive for killing the parents was not established- held, that these circumstances made prosecution case doubtful- accused acquitted.

Title: State of Himachal Pradesh Vs. Om Parkash @ Pappu (D.B.) Page-1390

Indian Penal Code, 1860- Section 376(2)(g)- Prosecutrix had stayed with her boyfriend in a hotel- accused 'N' who was manager in the hotel entered into the room where prosecutrix was staying and gagged her mouth- he called co-accused 'V' who took the prosecutrix to adjoining room No. 27 where she was raped – prosecutrix had immediately given an affidavit before the Executive Magistrate stating that she was pressurized by the police officials to file complaint- she was examined forcibly and no rape was committed upon her- her boyfriend had specifically stated that no rape was committed by accused person- he had also filed an

affidavit to this effect- no injuries were detected on her person- case was filed earlier against the prosecutrix under Section 41(2) and 109 Cr.PC- all these circumstances create doubt regarding the prosecution version- held, that in these circumstances, accused were wrongly convicted by the Court.
Title: Vijay Kumar @ Tantu son of Sh.Nater Singh vs. State of H.P. (D.B.)
Page-1296

Indian Penal Code, 1860- Sections 109, 147, 148, 149 and 323- A charge was framed against the petitioner for the commission of offences punishable under Sections 109, 147, 148, 149 and 323 of IPC- only petitioner was arrayed as accused and other persons were arrayed as suspects- held, that offence can be committed by an unlawful assembly of 5 or more than five persons - when only one accused has been arrayed before the Court, he cannot be charged for the commission of offence punishable under Section 149.
Title: Amar Singh Vs. State of Himachal Pradesh Page-1358

Indian Penal code, 1860- Sections 302 and 323 read with Section 34- Complainant was thrashing the paddy in his courtyard- houses of the deceased and accused are adjoining to each other- there was a passage between the houses- accused had stacked Bajri on the passage due to which the walls of the house of the complainant were damaged as a result of dampness- complainant asked the accused to remove Bajri but the accused started quarreling with the complainant- accused also assaulted the deceased and 'B'- matter was reported to the police, when the complainant party returned home from the police they found that deceased had died- record showed that complainant was asking the accused to remove Bajri immediately at 10:00 P.M, which led to a sudden fight- therefore, case would fall under Exception (4) of Section 300 of IPC- prosecution had also not explained the injury received by the accused- role of accused 'K' and 'N' was not established- appeal partly allowed.
Title: Kashmir Singh and others Vs. State of Himachal Pradesh Page-961

Indian Penal Code, 1860- Sections 302, 323, 324, 427 and 201- Accused and the deceased went to attend the marriage where accused and deceased had a scuffle – injuries were caused to the deceased with sharp edged weapon- accused pelted stone on the car and damaged window panes- injured was brought to the Civil Hospital where he was declared brought dead- PW-1 specifically stated that when they had placed injured in the car and were taking him to the Hospital, accused did not allow him to take the deceased to the Hospital and they pelted stones on the car- this was corroborated by other witnesses- mere fact that accused had been acquitted for the commission of other offences is no ground to acquit them- related witnesses cannot be called to be interested witnesses- minor contradictions in the testimonies are not sufficient to discredit, the testimonies of the prosecution witnesses when they are examined after considerable lapse of time.
Title: Dharam Pal and another Vs. State of H.P. (D.B.) Page-1240

Indian Penal Code, 1860- Sections 302, 364 and 201- PW-1 and PW-4 were staying at Mehatpur- they had two daughters and one son- accused claimed to be putative father of the son- he took away the girls on 3.8.2009- PW-1 brought the matter to the notice of the police- investigation revealed that accused had thrown his daughters in a water canal- dead bodies were recovered- parents had duly identified the girls- accused made a disclosure statement and identified the place from where the girls were thrown in the canal- chappals were recovered which were identified by the parents- it was duly proved that accused had taken away the girls without the consent of the parents- Medical Officer specifically stated

that girls had died due to drowning- recovery of chappals pursuant to the disclosure statement was duly proved- all the circumstances led to the guilt of the accused- held, that accused was rightly convicted.
Title: Birbal Vs. State of H.P. (D.B.) Page-1411

Indian Penal Code, 1860- Sections 364, 302, 201 read with Section 34- Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- PW-1 informed the police that accused had kidnapped her husband after beating him- search was made to locate her husband but he could not found- the slippers of her husband were found on the next day near the house of the accused- accused had enmity with the deceased as deceased had purchased the land which accused intended to purchase – accused had beaten the complainant and her son- accused 'A' was arrested and he made a disclosure statement on which body parts of the deceased and darat were recovered- PW-1, PW-2 and PW-3 had not made any efforts to search the deceased, even though they were accompanied by many persons- PW-33 admitted the overwriting on the disclosure statement- motive for the commission of crime was not established and no material was brought by the prosecution on record to show that deceased was killed simply because he happened to be member of scheduled caste category- Medical Officer stated that cause of death could not ascertained due to advance decomposition of the body- witnesses were closely related to each other and their statements did not inspire confidence- held, that in these circumstances, prosecution version was not proved- accused acquitted.
Title: Ruchi Kant and others Vs. State of Himachal Pradesh (D.B.) Page-1039

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was found to be pregnant- she disclosed that her pregnancy was due to forcible sexual intercourse by accused within a period of 1 ½ years- a panchayat was conveyed in which compromise was effected, however, mother of the prosecutrix filed a complaint against the accused before Panchayat which was forwarded to the police where FIR was registered- prosecutrix made improvement in her statement while appearing in the Court- there are variations in her statement recorded on 11.7.2012 and 12.7.2012 under Section 161 of Cr.P.C and the statement made in the Court- it was admitted that prosecutrix and her family members went to the Clinic in the vehicle of the accused after the incident was disclosed by the prosecutrix - family would have never boarded the vehicle if the incident was narrated by the prosecutrix- witness of the compromise turned hostile- prosecutrix stated that she was raped in the house- it was not believable that accused would have raped the prosecutrix in the house in the presence of all the members of the family- version of the prosecutrix did not inspire confidence- held, that in these circumstances, accused acquitted.
Title: Mast Ram Vs. State of Himachal Pradesh (D.B.) Page-1027

Indian Succession Act, 1925- Section 63- Plaintiff claimed to be a successor on the basis of registered will- administrator had wrongly resumed the property in favour of State without affording any opportunity of hearing to the plaintiff- defendant claimed that bidder had not raised construction within two years- thus, he had violated the condition of the auction- general notice was published in the weekly gazette requiring all the bidders to complete the construction after getting the plans approved from the respondent- order was passed in exercise of power under H.P. New Mandi Townships (Development and Regulation) Act, 1973- a plot was purchased in the year 1940 and the provisions of the act were not in operation, therefore, plot could not be resumed under provision of the Act.
Title: Pradeep Kumar Vs. State of H.P. & others Page-1124

'M'

Motor Vehicle Act, 1988- Section 147- The cover note recorded the date of issue as 21.1.2005 but the effective date of commencement of insurance was recorded as 22.1.2005- accident had taken place on 21.1.2005 at about 3:45 P.M- Insurance Company had never questioned the cover note till the date of accident – held that the date of commencement mentioned in the cover note is the date from which insurer is liable- policy document is to be construed strictly- since insurer was liable only from 22.1.2005, therefore, he is not liable for the accident which had taken place on 21.1.2005.

Title: Partap Singh Bhagnal Vs. Ramkali & others Page-995

Motor Vehicle Act, 1988- Section 147- Tractor was insured with trolley and additional premium was paid- tractor of the trolley was being used for agriculture purposes- therefore, insurer was wrongly discharged by MACT.

Title: Rattan Singh and others Vs. Dodi Devi and others Page-1179

Motor Vehicle Act, 1988- Section 149- 24 persons died and 40 persons were injured in a motor vehicle accident- 25 claim petitions were filed- seating capacity of vehicle was 42+2- Insurer has to satisfy the award to the extent of risk cover- if the claim petitions are more than the risk covered, then it is for the insured to satisfy the same.

Title: Oriental Insurance Company Vs. Indiro & others Page-1149

Motor Vehicle Act, 1988- Section 149- Accident had taken place on 12.7.2004- licence expired in the month of February, 2002 and it was renewed w.e.f. 24.11.2004-driver did not have a valid driving licence w.e.f. 1.2.2002 till 24.11.2004 – owner had committed willful breach of the terms and conditions of the policy by employing a driver having no valid driving licence- therefore, insured was rightly held liable to pay compensation.

Title: Sucha Singh Vs. Ritesh Kumar & another Page-1182

Motor Vehicle Act, 1988- Section 149- Claimants had specifically pleaded that driver of the vehicle had given lift to the deceased- owner stated in the reply that deceased was travelling in the vehicle in the capacity of a labourer – driver stated that deceased was travelling in the vehicle as owner of goods- held that in these circumstances, plea of insurance company that the deceased was a gratuitous passenger has to be accepted as correct - owner had committed willful breach of the terms and conditions of the policy and he was rightly saddled with liability.

Title: Gumti Devi Vs. Pushpa Devi and others Page-1141

Motor Vehicle Act, 1988- Section 149- Driver possessed a valid driving licence to drive the vehicle at the time of accident – insurer was not able to show as to how driver did not have a valid and effective licence at the time of accident- insurer had also failed to prove any breach of the terms and conditions of the policy- therefore, insurer was rightly held liable to pay compensation.

Title: National Insurance Company Ltd. Vs. Satish Kumar & others Page-1143

Motor Vehicle Act, 1988- Section 149- Driving Licence of the driver had expired on 13.6.2004 – it was renewed w.e.f. 24.8.2004- accident had taken place on 12.8.2004- held, that licence is valid from the date of renewal – driver did not possess any valid driving licence on the date of accident and the owner had committed breach of the terms and

conditions of the licence by employing a driver having no valid driving licence- therefore, insurance company was rightly held liable to pay compensation with a right to recovery.
Title: Partap Chand and another Vs. Harinder Kumar and another Page-992

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not possess valid driving licence at the time of accident- unladen weight of the vehicle was 1670 kg. and laden weight of the vehicle was 2820 kg. – vehicle falls within the definition of light motor vehicle- driver possessed a driving licence to drive light motor vehicle- held, that Insurance Company was rightly held liable to pay compensation.
Title: The New India Assurance Co. Ltd. Vs. Roshan Lal & others Page-1011

Motor Vehicle Act, 1988- Section 149- Owner specifically stated that he had engaged the driver after examining his driving licence and after knowing that he was driver of tractor in the same village- held, that owner had performed his duty which he was supposed to do- insurance policy covered 1+1 which means that risk of driver and passenger was covered- only the claimant had filed the claim, therefore, insurance company is liable to satisfy the award and it was rightly saddled with liability.
Title: United India Insurance Company Vs. Lalli alias Laloo and another
Page-1199

Motor Vehicle Act, 1988- Section 166- A bridge was constructed by Union of India across Jankar Nallah- bridge was meant for crossing by one vehicle at a time- caution boards were put on both side of the bridge to this effect- respondent/driver took the vehicle to the bridge when another vehicle was present on it- bridge could not bear the weight of two vehicles and collapsed- Union of India filed a petition seeking compensation of Rs. 8,11,536/-- Insurer had admitted in the reply that accident had taken place due to the negligence of the driver who took the vehicle to the bridge when another vehicle was crossing- therefore, MACT had rightly held that Insurance Company liable to pay compensation.
Title: United India Insurance Company Limited Vs. Union of India and others
Page-1016

Motor Vehicle Act, 1988- Section 166- A bus hit a group of persons standing near the vehicle bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to them - Tribunal held that accident was outcome of the contributory negligence of the drivers of the bus and jeep- accordingly, 50% liability was fastened upon the insurer of the jeep as well as HRTC - it was contended that awards were excessive- On scrutiny, some of the awards were found to be excessive which were ordered to be modified and the excess amount was ordered to be refunded to HRTC.
Title: Himachal Road Transport Corporation Vs. Naresh Kumar & others Page-980

Motor Vehicle Act, 1988- Section 166- Claimants had specifically pleaded that deceased was a house wife and was earning Rs.5,000 to 7,000/- p.m. by agriculturist and horticulturist vocations- they further pleaded that they have to engage a servant for looking after the affairs of the house and orchard by paying Rs. 3,000/- p.m. - it can be held by guess work that income of the deceased was not less than Rs. 4,5000/- p.m.- 1/3rd of the amount is to be deducted towards personal expenses - loss of dependency would be Rs. 3,000/- p.m. and applying multiplier of '8', claimants will be entitled to Rs. 3,000x12x8=2,88,000/- as compensation for loss of dependency.
Title: Ramesh Kumar and another Vs. Himachal Pradesh Road Transport Corporation and another Page-1177

Motor Vehicle Act, 1988- Section 166- Claimants pleaded that deceased was travelling in the vehicle along with apple plants but it was not pleaded that she had hired the vehicle – fare paid was also not specified- insurer had specifically pleaded that deceased was travelling in the vehicle as a gratuitous passenger – no plants were found at the place of the accident- therefore, plea of the Insurance Company that deceased was a gratuitous passenger has to be accepted as correct – held that the Insurance Company was rightly held liable to make the payment with right to recovery.

Title: Savitra Devi & another Vs. Jaiwanti Devi & others Page-1007

Motor Vehicle Act, 1988- Section 166- Compensation of Rs. 40,000/- and Rs.1,09,000/- were awarded with interest to the claimants – appeals were preferred against the award - held, that even under no fault liability compensation of Rs.25,000/- has to be awarded, hence amount of Rs. 40,000/- awarded as compensation is reasonable- claimant had suffered injury which had shattered her physical frame and, therefore, compensation of Rs.1,09,000/- awarded to her cannot be said to be excessive, rather, same was not just, however, it was not questioned by victim and it was upheld reluctantly.

Title: Oriental Insurance Company Vs. Dinesh Kumar & others Page-990

Motor Vehicle Act, 1988- Section 166- Deceased was aged 19 years at the time of accident – annual income of the deceased was taken as Rs. 15,000/- by the Tribunal- deceased was young person aged 19 years- he was pursuing three years diploma Course in Electrical Engineering and had almost put in two years - by guess work his income can be taken as Rs. 6,000/- p.m.- 50% of the amount is to be deducted towards personal expenses and parents had lost Rs. 3,000/- p.m. as source of dependency - they are entitled to Rs. 3000x12x14= 5,04,000/-, as compensation for loss of dependency and Rs. 30,000/- as funeral charges and compensation for love and affection.

Title: Kehar Singh and another Vs. Ashwani Kumar and others Page-986

Motor Vehicle Act, 1988- Section 166- Deceased was aged 38 years at the time of accident- he was a government servant drawing salary of Rs. 9,610/- p.m before the accident - 1/4th of the amount was to be deducted towards personal expenses- loss of dependency would be Rs. 6,400/- applying multiplier of '14', claimants will be entitled for compensation of Rs. 6,400 x 12 x 14=10,75,200/-- in addition to this they will be entitled for compensation of Rs. 28,000/- under other heads- petitioners are entitled to total compensation of Rs. 11,03,200/-.

Title: Master Sachin & others Vs. Urmila Chauhan & others Page-988

Motor Vehicle Act, 1988- Section 166- Deceased was aged 42 years- multiplier of '14' will be applicable- he was earning Rs. 1,06,483/ as salary- Tribunal had deducted 1/3rd towards deduction and further deducted 1/4th towards his personal expenses- held, that further deductions are not permissible from the salary - only 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th i.e. Rs.26,500/- -loss of dependency would be Rs. 79,500/- and claimant would be entitled for Rs.11,13,000/- as compensation for loss of income.

Title: Anubha Sood and others Vs. Krishan Chand and others Page-1127

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs.7,103/- p.m.- 1/4th of the amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 5,300/- p.m.- multiplier has to be applied considering the age of the

deceased - applying multiplier of '13', claimants are entitled to Rs. 5300x12 =Rs.63,600 x 13 = 8,26,800/-.
Title: Tara Devi & others Vs. HRTC and others Page-1184

Motor Vehicle Act, 1988- Section 166- Deceased was working as a trained Electrician- therefore, his income can be taken as Rs. 6,000/- p.m. - 50% of the amount was to be deducted towards personal expenses of the deceased- age of the deceased is to be taken into consideration while determining the multiplier- deceased was aged 28 years and multiplier of '13' is applicable- hence, compensation of Rs.4,68,000/- awarded under the head loss of dependency.
Title: Sanjokta Devi and others Vs. Himachal Road Transport Corporation and another Page-1005

Motor Vehicle Act, 1988- Section 166- Deceased was working in the police department- last salary drawn by him was Rs.7,500/--Rs.8,000/-- 1/4th of the amount was to be deducted towards personal expenses- deceased was aged 34 years and multiplier of '16' was applicable- thus, claimants are entitled for Rs. 9 lakh under the head 'loss of dependency'.
Title: Secretary (Home) & others Vs. Shanti Devi & others Page-1009

Motor Vehicle Act, 1988- Section 166- Income from the agriculture- deceased was managing orchard- claimants will have to engage a person to manage and supervise the orchard- at least Rs. 5,000/- per month would be payable as salary to him- therefore, claimants are entitled to Rs. 5,000x12x14 = Rs. 8,40,000/- as compensation on this account.
Title: Anubha Sood and others Vs. Krishan Chand and others Page-1127

Motor Vehicle Act, 1988- Section 166- MACT had deducted 1/3rd of amount towards the personal expenses- deceased was bachelor, therefore, 50% of the amount was to be deducted towards personal expenses- income of the deceased was Rs.4,000/- p.m.- loss of dependency would be Rs.2,000/- p.m.- deceased was 22 years of age at the time of accident- multiplier of '15' has to be applied and the compensation of Rs. 3,60,000/- (Rs.2,000/- x 12 x 15) has to be awarded towards loss of dependency.
Title: Oriental Insurance Company Ltd. Vs. Ambi Chand and others Page-1175

Motor Vehicle Act, 1988- Section 166- Tribunal had assessed the income of the deceased as Rs.3,000/- per month and loss of dependency as Rs.1,000/-- deceased was agriculturist and horticulturist by profession and it can be safely held that he would have earning Rs.6,000/- p.m.- loss of dependency has to be taken as 50%- deceased was 21 years old at the time of accident - applying multiplier of '14', claimant will be entitled to Rs. 3000x12x14=Rs.5,04,000/-+ Rs. 1000/-costs=Rs. 5,05,000/-.
Title: Vidya Devi Vs. Naresh Kumar and another Page-1205

Motor Vehicle Act, 1988- Section 169- Petitioner filed an application for releasing the awarded amount but MACT only released 25% of the arrear- held, that compensation awarded in favour of minors, illiterate claimants or widows is to be invested- petitioner does not fall in the category of claimants specified above- no reason was assigned as to why the entire amount was not released to the claimant- petition allowed and the entire amount ordered to be released in favour of petitioner.
Title: Dixit Chauhan Vs. Jagdish Thakur and others Page-1405

Motor Vehicle Act, 1988- Section 171- Interest is to be awarded from the date of the award and not from the date of Claim Petition.
Title: Partap Chand and another Vs. Harinder Kumar and another Page-992

Motor Vehicle Act, 1988- Section 171- Interest was awarded by MACT @ 12% P.A. in all the petitions except 7 in which interest was awarded @ 7.5 % p.a.- held, that interest has to be awarded as per the prevailing rate- interest awarded @ 9% p.a. in all the claim petitions.
Title: Oriental Insurance Company Vs. Indiro & others Page-1149

'N'

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1120 grams of charas- prosecution witnesses deposed in tandem and harmony- sample was taken on 14.5.2006 and was deposed on 19.5.2006- sample of 25 grams was taken at the spot but its weight was found to be 19.3711 grams in the laboratory- hence, variation in the weight of the sample leads to an inference that sample analysed was not connected to the sample taken at the spot.
Title: State of H.P. Vs. Om Parkash (D.B.) Page-921

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.3 k.g of charas in a bag held in right hand- PW-1 stated that Investigating Officer had stopped the ongoing vehicles and had asked the occupants of the vehicles to become witness- it is not believable that occupants would not have become independent witnesses to support the arrest, search and seizure- place of apprehension is a busy Highway and police could have easily associated independent witness- no entry was made in the malkhana register regarding the taking out of the property for production in the Court and re-deposit of the property in malkhana- entries required to be made in malkhana register at the time of taking out of the property and depositing the same in malkhana- these circumstances created doubt regarding the prosecution version- accused acquitted.
Title: Kansara Mayur Vs. State of Himachal Pradesh (D.B.) Page-958

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 8 k.g of charas- police did not have any prior information- it was a case of chance recovery- accused was unable to satisfactorily answer the queries of the police party, on which he was searched- non-association of the independent witnesses in such circumstances is not material- police officials had corroborated testimonies of each other- their version is clear, cogent and consistent – testimonies are free from exaggerations, embellishments and major contradictions- once possession has been proved, burden is upon the accused to prove that possession was not conscious- held, that prosecution version was proved beyond reasonable doubt and the accused was rightly convicted.
Title: Sesh Ram Vs. State of H.P. (D.B.) Page-1416

N.D.P.S. Act, 1985- Section 20- The person who produced the case property in the Court was not examined- no evidence was led to prove as to when the case property was taken out from the Malkhana for production before the court- Malkhana register was not produced to verify this fact- entry was required to be made when the case property was taken out from the Malkhana for its production in the court and when it was returned to be deposited in the Malkhana after its production in the court- failure to do so would make it doubtful that the case property which was seized from the accused was sent to FSL, Junga and was produced before the court, or it was the case property of some other case- link evidence has not been

established from the seizure of the case property till its production in the Court- accused acquitted.
Title: Roshan Lal Vs. State of Himachal Pradesh (D.B.) Page-1036

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 5.6 k.g of charas- consent memo did not mention that accused had a legal right to be searched before a Magistrate or a Gazetted Officer- consent memo further inquired from the accused whether the accused wanted to be searched before Magistrate or a Gazetted Officer or police officer- only two options namely to be searched before Magistrate or a Gazetted Officer can be given as per law - consent was collective and should have been given individually – option was given prior to the search of the vehicle and no option to be searched was given prior to the search of the person- held, that requirements of Section 50 of the Act were not complied with.
Title: Tarsem Lal Vs. State of Himachal Pradesh (D.B.) Page-1187

'P'

Protection of Women from Domestic Violence Act, 2005- Section 12- Wife was maltreated by the petitioner- her petition was allowed and the husband was prohibited from committing any act of domestic violence -he was ordered to pay maintenance @ Rs. 5,000/- along with compensation of Rs. 10,000/-- husband contended that wife is TGT Maths and was drawing salary of Rs. 9,000/-- he was compelled to tender resignation from his job and was not doing anything- held, that husband is under an obligation to maintain his wife- statute commands that there has to be some acceptable arrangement so that wife can sustain herself- if husband is an able-bodied person capable of earning sufficient money, he cannot deny his obligation to maintain his wife - carry home salary of the husband was Rs. 45,000/-- income of the wife was taken into consideration by the Court, while awarding maintenance – wife is entitled to the status which she was enjoying in the house of her husband –hence, maintenance of Rs. 5,000/- cannot be said to be excessive.
Title: Vipul Lakhanpal Vs. Pooja Sharma Page-896

'S'

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he had rented out one shop consisting of two rooms to the defendant- tenancy was terminated by serving a legal notice- correct address was mentioned in the notice and there is presumption that addressee had received the same- mere acceptance of the rent subsequent to the delivery of notice which will not have affected extending the tenancy.
Title: Bansi Lal Thakur Vs. Ram Saran Thakur Page-1108

Specific Relief Act, 1963- Section 5- Plaintiff filed a Civil suit for recovery of possession pleading that plaintiff and defendant were co-sharers of the suit land- plaintiff applied for partition and the possession was delivered to him- defendant occupied the suit land forcibly- defendant pleaded that he was never dispossessed from the suit land- a wrong report was made in the rapat roznamcha- held, that joint status of co-owner is extinguished after preparation of instrument of partition- allottee becomes exclusive owner of the allotted land- defendant had not pleaded adverse possession- plaintiff is entitled to the relief of possession on the basis of his title.
Title: Satya Devi widow of late Shri Udho Ram Vs. Hari Chand son of Udho Ram Page-1380

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract- it was specifically mentioned in condition No. 4 of the agreement that case No. 38/2004 is pending before High Court of H.P and sale deed will be executed only if the said case is decided in favour of seller - no evidence was led to prove that case was decided in favour of the seller- since, decision of case is the pre-condition for the execution of the sale deed, therefore, plaintiff cannot be held entitled for the relief of specific performance – however, plaintiff held entitled for the refund of the amount paid by him along with interest.
Title: Sumit Kumar son of Shri Yogendra Singh Vs. Sudesh Dogra wife of late Sh. Suresh Chander Dogra and another Page-1352

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he is owner in possession of the suit land - defendants were stacking construction material and laying pipeline without his permission- defendants had not laid any claim over the suit land and the suit was decreed by the trial Court- High Court should not interfere with the concurrent findings of the fact recorded by the Court- no substantial question of law arose – appeal dismissed.
Title: Jai Singh Vs. State of H.P. and others (D.B.) Page-

Specific Relief Act,1963- Section 38- **Torts-** Defendant started raising construction of the house and in the process stacked the construction material on the retaining wall- wall fell down along with stones and excavated material on the house of the building and causing damage of Rs.94,000/-- defendant denied the allegation made in the plaint- trial Court dismissed the suit- the decree was upheld in the appeal- held, that injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property at the hands of the defendant- injunction can also be granted when defendant was trustee of the property and invades the rights of enjoyment of such property where the damage caused or to be caused by such invasion cannot be measured in terms of money- collapse of retaining wall cannot be attributed to any omission or negligence on the part of the defendant, rather, plaintiff had dug pits for erection of pillars without raising any retaining wall –merely, because defendant had not obtained approved from the Town and Country Planning Department to raise construction is not sufficient- moreover, plaintiff had also not obtained the permission from Town and Country Planning Department- in these circumstances, suit was rightly dismissed.
Title: Mangat Ram Vs. Dila Ram Verma page-1422

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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.8480 of 2014
Date of order: May 02, 2015.

Constitution of India, 1950- Article 226- It was stated in the status report dated 25.4.2015 that first milestone would be achieved by June, 2015, subject to the weather conditions- Status report filed before the Court showed that required progress had not been made till filing of the status report- respondents were taking the plea that delay in the execution of the work was due to bad weather- held, that construction technology had improved to such an extent that construction work is being carried out smoothly even in the areas where temperature remains in minus - a committee of two persons appointed to monitor the progress of the work in question- committee members directed to visit the spot fortnightly and to submit the report about the progress of work and also to give suggestions to take work to logical conclusion.

For the Petitioner(s): Ms.Jyotsna Rewal Dua, Advocate, as Amicus Curiae.
Mr.R.K. Sharma, Senior Advocate, with Mr.Rajender Singh Dogra, Mr.Devinder Chauhan Jaita and Ms.Anita Parmar, Advocates.

For the respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma, Additional Advocate General and Mr.J.K. Verma, Deputy Advocate General, for respondents No.1 and 2.
Mr.Satyen Vaidya, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Mr.Shrawan Dogra, learned Advocate General, stated that the respondents have filed two status reports, dated 6th April, 2015 and 25th April, 2015.

2. In the status report, dated 25th April, 2015, it is stated that the first milestone would be achieved by June, 2015, subject to the weather conditions. It is apt to reproduce the relevant portion of the affidavit hereunder:

> *".....All of them assured that they will work to their full capacity to achieve first milestone by June 2015 subject weather conditions remain favourable."*

3. The learned Amicus Curiae argued that the progress of the work is not reasonably good and the way the things are shaping are also not satisfactory.

4. Mr.Rajinder Dogra, Advocate, has filed CMP No.4428 of 2015 for interim directions to the respondents to start metaling of the road at least 3 meters in width from Theog to Rohru and also to depute some expert from the Horticulture and Agriculture

Departments to educate the farmers and fruit growers to save their plants and vegetables from the diseases caused due to dust and environmental pollution.

5. Newspaper cutting containing the speech of the Chief Minister, delivered on the floor of the Assembly, has also been annexed as Annexure A-1, wherein the Chief Minister has also expressed his concern about the execution of the work.

6. Mr.Rajender Dogra has also filed response to the status reports, by the medium of CMP No.4429 of 2015, and refuted the averments contained in the status reports.

7. We have passed the interim orders right from the institution of this petition till 23rd March, 2015 and commanded all the respondents to do the needful and achieve the milestone, without any delay, so that the public, in general, who is the sufferer and is suffering badly, is in a position to reap the benefits.

8. We have gone through the status reports, which are suggestive of the fact that required progress has not been made till the filing of the status reports. It is also apparent from the record that the respondents are repeatedly taking the stand that the delay in the execution of the work, in question, is due to the bad weather conditions.

9. The construction technology has undergone a sea change and the advancement in the field of construction has transformed the entire world. It has been experienced that with the help of technology, even in the zones where temperature remains in minus, the construction work is being carried out smoothly.

10. Mr.Satyen Vaidya, learned counsel for respondent No.3, argued that the contractor has to execute the work strictly in terms of the advice and the direction of the Consultant.

11. The learned Amicus Curiae stated that the World Bank report also discloses that the Consultant is not performing the job satisfactorily. Therefore, we deem it proper to array the Consultant, i.e. M/s LOIUS BERGER GROUP, Construction Supervision Consultant, B-7, Lane-I, Sector-I, New Shimla, through its team leader Mr.Andrew Boghle, as party respondent, who shall figure as respondent No.4 in the writ petition.

12. Issue notice to the newly added respondent No.4 for causing appearance before this Court on the next date of hearing and also to file reply/status report by or before the next date of hearing.

13. Keeping in view the facts and circumstances and the discussion made hereinabove, we are of the view that the subject matter of the lis is to be declared *custodia legis*, but we refrain to do so for the time being and deem it proper to constitute a Committee of two members, namely – i) Shri B.L. Soni, District & Sessions Judge (Retd.) and; ii) Shri Arun Sharma, Chief Engineer (Retd.), to monitor the progress of the work in question. The Committee Members shall visit the spot fortnightly and submit their report about the progress of the work and also give suggestions, in order to take the work to its logical end.

14. The Chief Secretary is held personally responsible for providing all facilities to the Committee Members, so that they are in a position to visit the spot and prepare the reports etc. The remuneration of each Member, per visit, is fixed at Rs.20,000/-, which shall be borne out by the State Government.

15. List on **18th May, 2015**. In the meantime, all the respondents are also directed to file the status reports in terms of the orders passed by this Court from time to time. Copy dasti.

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

Sh. Amrik Singh and others .....Appellants.
Versus
Sh. Abnash Chand and others. .....Respondents.

RSA No. 85 of 2001
Reserved on 15th May, 2015
Decided on: 28th May, 2015

H.P. Land Revenue Act, 1954- Section 135- Plaintiff applied for partition of the land before Assistant Collector 1st Grade- respondent stated that suit land had already been partitioned- this objection was rejected and the land was partitioned- appeal was preferred against the order which was allowed and the case was remanded- meanwhile, settlement operation started in the revenue estate, Una- application was allowed by Tehsildar Settlement Una – appeal was preferred before Settlement Officer, Kangra who allowed the same and directed the parties to approach the Civil Court having jurisdiction in the matter-a civil suit was preferred pleading that land was joint- held, that where the parties had partitioned the land privately without intervention of the revenue officer, any party can apply to a revenue official to record the same- a report was made in rapat roznamcha regarding the partition – this entry was also reflected in the jamabandi- parties were shown in separate possession- this probablises the plea of private partition - it is permissible for the parties to partition a particular piece of land leaving other land joint- merely because the award was accepted by the defendants and the plaintiffs cannot be considered to be a circumstance to belie the plea of private partition- appeal dismissed. (Para-12 to 20)

Cases referred:

Dhan Kaur (Died) through LRs versus Shamsher Singh and others, 2005(3) Civil Court Cases 673 (P&H)
Lila Wati and others versus Paras Ram and others, AIR 1977 Himachal Pradesh 1
Surat Singh versus F.C. (Appeals) and another, 2008(1) Shim,LC 3
Md. Mohammad Ali (Dead) by LRs versus Jagadish Kalita and others, (2004)1 Supreme Court Cases, 271
Bhartu versus Ram Sarup 1981 Punjab Law Journal, 204
Suba Singh versus Mohinder Singh and others, 1983 Revenue Law Reporter 384
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Mangat Ram versus Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(H.P.) 274
Sunder and others versus Hukmi Devi and another 1999(1) CLJ (H.P) 314
Janku and others versus Nagnoo and others AIR 1986 Himachal Pradesh 10,
Khem Dutt and others versus Palkia and another 1983 Shim.L.C 77
Kale versus Deputy Director of Consolidation, AIR 1976 SC 807,

For the appellants: Mr. Bhupender Gupta, Senior Advocate with Mr. Ajit Jaswal, Advocate.

For the respondent: Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma and Rohit Bharoll, Advocates for respondents No. 1 and 2.

None for the remaining respondents.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge.

Plaintiffs are in second appeal before this Court. They are aggrieved by the judgment and decree dated 10.01.2001 passed by learned District Judge, Una in Civil Appeal No. 25 of 1993, whereby the appeal has been dismissed and the judgment and decree passed by learned Senior Sub Judge, Una in case No. 330 of 1983 dated 30.01.1993 affirmed.

2. The facts giving rise for filing of the present appeal, in a nut-shell, are that :

(i) land measuring 9 Kanals 6 Marlas, Khewat No. 260, Khatoni Nos. 544, 545, 546, Khasra Nos. 4689/3923/1052min, 4689/3923/1052-1053min, 4689/3923/1052min-1053 min;

(ii) land measuring 12 Kanals 1 Marla, Khewat No. 258, Khatoni No. 541, Khasra Nos. 1282, 1361 and 1362 ; and

(iii) land measuring 4 Kanals 7 Marlas, Khewat No. 259, Khatoni No. 542, 543, Khasra No. 46min;

total 25 Kanals 14 Marlas situated in Revenue Estate, Una, as per entries in the Jamabandi for the year 1976-77 is claimed to have been in joint ownership and possession of the parties to the suit. The plaintiffs though applied for partition thereof by filing an application under the Land Revenue Act before the Assistant Collector 1st Grade, Una during the year 1972, however, respondents No. 1 and 2 (hereinafter referred to as 'defendants No. 1 and 2') have raised the question of title, as according to them the suit land was already partitioned. The Assistant Collector, however, rejected the said objections and allowed the partition of the suit land. Defendants No. 1 and 2 preferred an appeal before S.D.O (Civil), Una, who remanded the case for deciding the objections afresh. During the currency of the partition proceedings, settlement operation started in the Revenue Estate, Una. The case file was taken over by Tehsildar (Settlement), Una. The application was allowed vide order dated 29.06.1982 and the mode of partition also drawn. Defendants No. 1 and 2 have assailed the order so passed before the Settlement Officer, Kangra. The Settlement Officer accepted the appeal and order to relegate the parties to Civil Court for getting the question of title decided from the Civil Court having jurisdiction over the matter. The partition proceedings initiated on the application filed by the plaintiffs were kept in abeyance till the question of title is decided.

3. The plaintiffs claim that the suit land is joint of the parties. The same has not yet been partitioned privately or through intervention of the Court. The suit land measuring 9 Kanals 6 Marlas abuts Una-Hamirpur road adjoining to new bus stand, Una, hence valuable. Defendants No. 1 and 2 allegedly influential persons want to occupy the best portion of the land in dispute abutting the road to the exclusion of the plaintiffs-appellants forcibly. The plaintiffs, therefore, seek the declaration to the effect that the suit land is joint of the parties with permanent prohibitory injunction, restraining the defendants

from raising any construction thereon by occupying best and valuable portion abutting the road.

4. Defendants No. 1 and 2 when put to notice have contested the suit. According to them, they have nothing to do with the suit land except for a portion of land measuring 9 Kanals 6 Marlas entered in Khewat No. 260, Khatoni Nos. 544, 545 and 546. This land, according to them, stands partitioned between their predecessor-in-interest Smt. Durgi and predecessor-in-interest of the plaintiff Sh. Bhagat Ram, co-sharers in the year 1952. The said private partition was given effect in the revenue record by lodging rapat in rojnamcha vakayati on 24.10.1952. As per private partition, land in eastern side bearing Khasra Nos. 3923, 1052 and 1053 measuring 4 Kanals 14 Marlas fell in the share of their predecessor-in-interest Smt. Durgi Devi and remaining 4 Kanals 14 Marlas bearing Khasra No. 3932, 1023, 1052/2 in western side abutting old Una-Arnayala road to that of Sh. Bhagat Ram, co-sharer. Tatimas of the partition of the land so having taken place were carved out by the Patwari, therefore, Smt. Durgi Devi their predecessor-in-interest had no connection with the land of Bhagat Ram and Bhagat Ram with that of her separate parcel. Although, no mutation of such private partition was entered in the revenue record. It has also been pointed that Bhagat Ram, predecessor-in-interest of the plaintiff had retained best portion of the land at that time and the inferior portion thereof that too, under the tenancy on the eastern side was given to Smt. Durgi Devi.

5. One Ajit Singh had acquired the portion of the land measuring 1 Kanal 11 Marlas out of 4-14 Kanals in the share of said Smt. Durgi Devi vide sale deed dated 28th July, 1962. Said Ajit Singh further sold his entire land i.e. 1 Kanal 11 Marlas to defendants No. 1 and 2 through registered sale deed dated 12.07.1966. The defendants are, therefore, now in possession of 1 Kanal 11 Marlas of land. They have raised construction thereon and also installed a water tap. The vacant land is being used by them for storing coal, fuel wood and other materials. The plaintiffs allegedly were using 4 Kanals 14 Marlas land exclusively without interference of said Smt. Durgi Devi or her successor-in-interest. They even sold the earth also from that portion of the land exclusively with them. It is further pointed out that defendants are not concerned with the suit land except for 1 Kanals 11 Marlas, they purchased from Ajit Singh.

6. Defendants No. 3, 7 to 9 in separate written statement filed on their behalf have not contested the suit and rather admitted the claim of the plaintiffs to be true and correct.

7. Defendants No. 4 to 6 have also admitted the claim of the plaintiffs to be true and correct.

8. On such pleadings of the parties, learned trial Court has framed the following issues:

1. Whether the land had been privately partitioned as alleged ? OPD 1 and 2.
2. Whether the plaintiffs are estopped by their act and conduct form filing the suit as alleged? OPD 1&2.
2-A. Whether the suit is barred by principle of res judicata? OPD 1&2.
2-B. Whether the suit is barred under Order 2 ru7le 2 CPC? OPD.
2-C. If issue No. 1 is not proved, whether possession of defendants No. 1 and 2 has ripened into ownership by adverse possession as alleged? OPD, 1 and 2.

2-D. Whether the suit is collusive between the plaintiffs and defendants No. 3 to 5, if so, its effect? OPD.

3. Relief.

9. The parties were put to trial. On appreciation of the evidence comprising oral as well as documentary, learned trial Court has decreed the suit. Learned lower appellate Court has affirmed the judgment and decree so passed and dismissed the appeal vide judgment and decree under challenge in this appeal before this Court.

10. The challenge to the judgment and decree is on the grounds inter-alia that the plea of private partition raised by defendants No. 1 and 2 has erroneously been accepted by both Courts below. The revenue record does not support the plea of private partition so raised. The factum of the defendants did not assert any claim for award of separate compensation during the course of acquisition proceedings of a portion of the suit land and rather received the compensation jointly, is stated to be not taken into consideration. Over-whelming evidence available on record showing that the land in suit being most valuable and adjoining the main highway and as such, could have not fallen in the share of defendants in private partition is erroneously ignored. The case law cited on behalf of plaintiffs has not been applied and to the contrary, the judgment of the Apex Court relied upon by learned lower appellate Court has wrongly been applied. Neither there was any order of private partition passed by a competent Revenue Officer nor the property ever privately partitioned, but such facts have erroneously been ignored. The evidence available on record is stated to be misread, mis-appreciated and mis-construed.

11. The appeal has been admitted on the following substantial questions of law:

1. Whether the presumption of private partition could be raised merely on the ground that in the revenue record the parties have been recorded in separate possession? In the absence of any instrument of partition and delivery of possession as envisaged under the Land Revenue Act, could the presumption of partition be raised merely on the basis of report Rojnamcha which was inadmissible in evidence?

2. Whether both the courts below have erroneously ignored from consideration that the admission of defendants-respondents exhibit the status of the parties as co-owners by accepting the Award of Land Acquisition and not assailing the same in any proceedings?

12. As per description already given at the very out, the suit land though is 25 Kanals 14 Marlas, however, for the purpose of the present controversy, it is the land measuring 9 Kanals 6 Marlas entered in Khewat No. 260, is the subject matter of dispute. Rather real controversy is qua 1 Kanal 11 Marlas, out of the same purchased by defendants No. 1 and 2, S/Sh. Surinder Lal and Abnash Chand. It is they who alone contested the suit that too, qua the suit land to the extent of 1 Kanal 11 Marlas, they purchased and qua remaining, it is their case that they have nothing to do therewith. Since the plaintiffs claim that the entire suit land including 9 Kanals 6 Marlas aforesaid is joint of the parties, whereas, defendants No. 1 and 2 have raised the plea of private partition and also that the same stands duly acted upon by giving effect in the revenue record, therefore, the legal question need adjudication is that the evidence available on record substantiates the plea of private partition and the same having given due effect in the revenue record or not?

13. Sh. Bhupender Gupta, learned Senior Advocate has argued that mere separate possession for convenience of cultivation without any instrument as required to be drawn under Section 133 followed by delivery of possession as required under Section 134 of the H.P. Land Revenue Act cannot at all be taken as partition of the suit land having taken place in accordance with law. This Court, however, find no substance in the argument so addressed for the reason that instrument of partition is required to be prepared in those cases where partition has taken place with the intervention of a Revenue Officer. Therefore, Sections 133 and 134 of the H.P. Land Revenue Act has no application in the case in hand. True it is that in a case where partition has taken place without the intervention of a Revenue Officer, any party thereto may apply to a Revenue Officer for affirmation thereof under Section 135 of the Act. In the case in hand, the partition of the suit land entered in Khewat No. 260 measuring 9 Kanals 6 Marlas had taken place in October, 1952. Reference in this behalf can be made to Ext. DW-5/A rapat rojnamcha Vakayati, Hindi version whereof is Annexure A-3 to the application, CMP No. 3936 of 2015. In this document, out of the suit land measuring 9 Kanals 6 Marlas bearing Khasra Nos. 3923, 1052 and 1053, 4 Kanals 14 Marlas in western side was taken by Bhagat Ram, predecessor-in-interest of the plaintiffs for himself and 4 Kanals 14 Marlas in eastern side was given to Smt. Durgi Devi, predecessor-in-interest of defendants No. 1 and 2. In this document, word "Garv" stands for west and word "Shak" for east. There is no dispute qua it. The partition had taken place with mutual consent between the co-sharers, namely, Bhagat Ram and Durgi Devi and a rapat Ext. DW-5/A was entered in Rojnamcha Vakayati of the concerned Patwar Circle. The rapat rojnamacha ultimately was given effect in the Jamabandi for the year 1956-57, Ext. P-13, in which defendants No. 1 and 2 have been shown owners and in separate possession of 1/6 shares of the suit land denoted by Khasra Nos. 3923, 1052, 1053/2/2. The other owners have been shown in separate possession of the land to the extent of their respective shares i.e. 1/3 of Gurdass Ram etc., and half share that of the plaintiffs. If coming to the Jamabandi for the year 1976-77, while Khewat number of the land is 260, the same has been bifurcated in different Khatonis i.e. 544, 545 and 546. Land purchased by defendants No. 1 and 2 has been denoted by Khatoni No. 545 measuring 1 Kanal 11 Marlas, Khasra Nos. 4689/3923/1052min, 1053min. The Khatoni of the land with the plaintiffs is 544, Khasra Nos. 4689/3923.1052, 1053min measuring 4 Kanals 14 Malras. The remaining 3 Kanals 1 Marla has been denoted by separate Khatoni No. 546 and denoted by Khasra Nos. 4689/3923/1052min, 1053. As a matter of fact, as per this document, land measuring 4 Kanals 14 Marlas is that of the plaintiffs and it has been gifted to them by their predecessor-in-interest Sh. Bhagat Ram, whereas, 1 Kanal 11 Marals with defendants No. 1 and 2 and 3 Kanal 1 Marla, total 4 Kanal 14 Marlas with Gurdass Ram etc., was in the share of their predecessor-in-interest of Smt. Durgi Devi. Smt. Durgi Devi had sold 1 Kanal 11 Marlas to one Ajit Singh vide sale deed Ext. DW-9/A. It is from said Sh. Ajit Singh, defendants No. 1 and 2 have purchased the same further. In the sale deed Ext. DW-9/A location of the land sold to Sh. Ajeet Singh by Durgi Devi find mentioned. The same tallies with the entries in the rapat rojnamcha Ext. DW-5/A. If coming to Khasra Girdawari Ext. DW-7/A for the year 1952-53, Hindi version whereof is at page No. 547 of the trial Court record, tatima has been drawn and as per the same, out of the suit land, 4 Kanals 14 Marlas was given to Smt. Durgi Devi, predecessor-in-interest of defendants No. 1 and 2 in eastern side. The location of the land sold to Ajit Singh and thereafter by Ajit Singh to defendants No. 1 and 2, if compared with tatima drawn and Khasra Girdawari Ext. DW-7/A, the same tallies with each other. In Khasra Girdawari for the year 1957-58, Ext. D-7 also land with Durgi Devi is in the direction "Shak" i.e. east, whereas, that of Sh. Bhagat Ram aforesaid in direction "Garv" i.e. west. In Khasra Girdawari Ext. D-8 map has also been drawn. As a matter of fact, this document clinched the point in issue because name of Smt. Durgi Devi in the map so drawn is on the top, whereas, that of defendants No. 1 and 2 below her name. Meaning thereby

that 1 Kanal 11 Marlas of the suit land in the ownership and possession of defendants No. 1 and 2 was adjoining to the remaining land 3 Kanal 13 Marlas. In Khasra Girdawari for the year 1969-70, 1971-72 and 1972-73, Ext. D-9 also, out of 4 Kanal 14 Marlas land belonging to Smt. Durgi Devi 1-11 Kanals in eastern side though has been shown in the ownership and possession of said Smt. Durgi Devi, however, through defendants No. 1 and 2 and the remaining 3-3 Kanals in her share again in her ownership but through Gurdass Ram etc., whereas, the land in the ownership and possession of the plaintiffs in western side. Therefore, from this document also, it is crystal clear that in the eastern side the land fell in the share of Smt. Durgi Devi, whereas, in the western side in that of Bhagat Ram, the predecessor-in-interest of the plaintiffs. One Smt. Sandla, as per Ext. P-22 was the Special Power of Attorney of the plaintiffs. If coming to Ext. DW-9/B, Hindi version whereof is at page No. 461, she claimed the plaintiffs to be exclusive owners in possession of 4 Kanals 14 Marlas i.e. half share out of suit land measuring 9 Kanals 6 Marlas. As a matter of fact, in this document, the land in question was given to a brick kiln owner for extraction of earth on payment of charges. The entries in the Jamabandi for the year 1952-53, Ext. D-12, makes it crystal clear that 4 Kanal 14 Marlas of land given to predecessor-in-interest of the defendants was in the possession of the tenants. The remaining 4 Kanal 14 Marlas taken by Sh. Bhagat Ram, the predecessor-in-interest of the plaintiffs, however, was not under the tenancy of anyone. Therefore, at the time of partition, said Sh. Bhagat Ram had taken best piece of land.

14. The documentary evidence discussed supra, make it crystal clear that the suit land measuring 9 Kanal 6 Marlas stands partitioned between Bhagat Ram and Smt. Durgi Devi, predecessor-in-interest of the parties to the suit. It is for this reason different Khatonis i.e. 544, 545 and 546 in respect of the same have been prepared. While land entered in Khewat No. 260, Khatoni No. 545, Khasra Nos. 4689/3923/1052, 1053min measuring 1-11 Marlas has been purchased by defendants No. 1 and 2, the remaining 3-1 Marlas in the share of Smt. Durgi Devi entered in Khewat No. 260, Khatoni No. 546, Khasra Nos. 4689/3923/1052min, 1053min measuring 3-1 has been recorded in the ownership and possession of Gurdass Ram etc. Similarly, the land measuring 4-14 Marlas of plaintiffs in this very Khewat has been denoted by separate Khatoni i.e. 544. It is, therefore, satisfactorily proved that suit land measuring 9 Kanals 6 Marlas stand duly partitioned with mutual consent amongst the co-shares i.e. Sh. Bhagat Ram and Smt. Durgi Devi long back in the year 1952. The partition so taken place was given effect by making entries in the Rojnamcha Vakayati vide rapat Ext. DW-5/A. Thus, the partition so taken place has been given effect in the revenue record also, because the entries in the jamabandi for the year 1956-57, Ext. P-13 and Jamabandi for the year 1976-77, Ext. P-10 show that the land is in separate possession of the plaintiff, defendants No. 1 and 2 and other co-sharers. The contentions to the contrary that for want of instrument of partition and delivery of possession, the legal and valid partition of the suit land cannot be inferred, are without any substance for the reason, already stated in para supra. Instrument of partition is required to be prepared in a case where the partition is effected through a Revenue Officer. Here, it is private partition having taken place with mutual consent. The Punjab and Haryana High Court in **Dhan Kaur (Died) through LRs** versus **Shamsher Singh and others, 2005(3) Civil Court Cases 673 (P&H)** has held as follows:

> "17. It is also well settled that there is no prohibition by law about oral partition and that a memorandum of past oral partition is not required to be registered. In this regard, reliance may also be placed on various other judgments of the Supreme Court in the cases of Bakhtawar Singh v. Gurdev Singh, 1969(9) S.C.C.370, Hans Raj Agarwal v. CIT,

2003(2) S.C.C. 295 and Digambar Adhar Patil v. Devram Girdhar Patil, 1995 Supp.(2) S.C.C.428.

The facts of the present case are required to be examined in the light of the principles laid down by the Supreme Court in the above mentioned judgments. The learned lower appellate Court has fallen in a grave error by discarding documents Mark 'A' and 'B'which are mere memorandum of family partition. There is no necessity for everyone of the co-sharer to thumb-mark, sign and acknowledge such a memorandum. I am further inclined to hold that a family settlement once given effect to by the parties then the Courts should be very slow in interfering with the same.....

.....The evidence on record supports only one view that partition in fact has taken place and parties were in possession even earlier to the oral partition. Therefore, the findings on the issue as returned by the lower appellate Court are not sustainable because there are categorical admissions made by defendants, document Mark 'A' and 'B'-memorandum of partition and the recitals in Ex. P-1, P-3 and P-3. There is no evidence to the contrary. Revenue record cannot be considered in isolation. It was to be reckoned according to factual position. It is also pertinent to mention that possession of the parties in respect of their lands is long and settled. Therefore, the findings of the lower appellate Court are liable to be set aside and that of the trial Court deserve to be restored."

15. The point in issue in the present lis is squarely covered by the ratio of the judgment supra. The parties herein are also in separate possession, as is apparent from the over-whelming documentary evidence in the form of Jamabandis, Khasra Girdawaris as well as Rapat Rojnamcha etc. discussed hereinabove.

16. Otherwise also, in the present lis the Court is concerned with the suit land measuring 9-6 Marlas. Out of 4-14 Marlas in the share of Smt. Durgi Devi, defendants No. 1 and 2 had purchased 1-11 Marlas because the remaining defendants have not contested the claim of the plaintiffs. In view of the ratio of the judgment of a Division Bench of this Court in **Smt. Lila Wati and others** versus **Paras Ram and others, AIR 1977 Himachal Pradesh 1**, partition of a particular property leaving the remaining joint is legally permissible.

17. Interestingly enough, the plaintiffs have withdrawn the previous suit bearing No. 183 of 1979, filed for decree of declaration to the effect that suit land measuring 9-6 Marlas, which is subject matter of dispute in the present *lis* is unpartitioned and that till the partition thereof, the defendants be restrained from raising any construction on the best and specific portion thereof, unconditionally and without reserving liberty to file fresh suit, as is apparent from the perusal of order Ext. P-15 passed by learned Sub Judge, 1st Class, on 28.04.1981 in the said suit. Therefore, even the maintainability of the present suit is doubtful, as no fresh suit could have been filed. True it is that in the joint statement Ext. P-3 of learned counsel representing the defendants including defendants No. 1 and 2 herein, it was stated that till the partition of the suit land is effected, they will not raise construction thereon and will maintain status quo qua the same as on that day. It is on the statement

Ext. P-3, learned counsel representing the plaintiffs in that suit vide statement Ext. P-4 has not pressed the suit and sought the dismissal thereof. The liberty to file fresh suit, however, was not sought to be reserved by learned counsel for the plaintiff. Mr. Gupta, learned Senior Advocate has laid emphasis on the statement Ext. P-3 and has urged that the defendants had themselves agreed not to raise any construction over the suit land till the same is partitioned. However, the submissions so made are without any substance for the reason that statement Ext. P-3 cannot be taken to arrive at a conclusion that the defendants, particularly defendants No. 1 and 2 had admitted the suit land being unpartitioned. The issue that the same stands partitioned or not was not yet decided at the time of making statement Ext. P-3. If on the basis of statement Ext. P-3, it is to be inferred that the defendants had admitted the suit land unpartitioned, why the plaintiffs have filed the present suit. It appears that on construction of bus stand Una adjoining to the suit land and the suit land in the ownership and possession of defendants No. 1 and 2 is abutting to Una-Hamirpur highway, became more valuable and the plaintiffs with a motive to grab the same have instituted the suit to unsettle the position settled long back in the year 1952, when the partition thereof had taken place with mutual consent. The arguments addressed on behalf of the appellants-plaintiffs that on the construction of Una-Hamirpur highway, this piece of land has become valuable and as such they are entitled to seek partition thereof are without any substance, because position qua suit land settled long back in the year 1952 cannot be allowed to be unsettled at this stage, that too, when the predecessor-in-interest of the plaintiffs at that time had taken the best portion of the suit land for himself and portion thereof under the tenancy was given to Smt. Durgi Devi by putting her in an advantageous position. Now, with the passage of time if the Una-Hamirpur road has been constructed adjoining to the portion of the suit land in the possession of defendants No. 1 and 2, the possession of the said defendants cannot be unsettled, particularly when they as per entries in the jamabandis Ex. P-10 and Ext. P-13 have raised construction of their house and using the remaining vacant land as go-down to store the coal, fuel wood etc.. The law laid down in **Surat Singh** versus **F.C. (Appeals) and another, 2008(1) Shim,LC 3** is not applicable in the case in hand for the reason that here it is not only Khasra Girdawaris which substantiates the plea of private partition but also the entries in the jamabandis and Rapat Rojnamcha Vakayati discussed hereinabove. As regards law laid down by the Apex Court in **Md. Mohammad Ali (Dead) by LRs** versus **Jagadish Kalita and others, (2004)1 Supreme Court Cases, 271** and by Punjab and Haryana High Court in **Bhartu** versus **Ram Sarup 1981 Punjab Law Journal, 204** there cannot be any quarrel qua the same, however, here the suit land measuring 9-6 Marlas has lost its characteristics of joint property after its private partition having taken place in the year 1952. If coming to the law laid down by Punjab and Haryana High Court in **Suba Singh** versus **Mohinder Singh and others, 1983 Revenue Law Reporter 384** and in **Dhoom Singh and another** versus **Ram Kumar and another 1988 Punjab Law Journal 72**. the same is also not attracted as in the case in hand the private partition arrived at between the parties with mutual consent was reported to the Revenue Authorities and consequently Rapat Ext. DW-5/A was entered in Rojnamcha Vakayati. Not only this but the partition so taken place has also been given due effect in the revenue record, such as jamabandis and Khasra Girdawaris. The law laid down by this Court in **Mangat Ram** versus **Gulat Ram (since deceased) through his LRs Jagdeep Kumar and others Latest HLJ 2011(H.P.) 274** is also distinguishable on facts, because here not only the private partition has taken place but the co-owners have given effect to the same in the revenue record and separate Khatonis have also been prepared with respect to the separate piece of land in possession of plaintiffs, defendants No. 1 and 2 and remaining defendants. As regards, the law laid down by this Court in **Sunder and others** versus **Hukmi Devi and another 1999(1) CLJ (H.P) 314**, the same has also no application in the case in hand, because in that case the private partition was set aside, whereas, in the case

in hand the private partition having been duly proved cannot be set aside. Similarly, in **Janku and others** versus **Nagnoo and others AIR 1986 Himachal Pradesh 10**, there was no oral or documentary evidence showing the partition of the property having taken place. However, in the case in hand, there is over whelming oral as well as documentary evidence to arrive at a conclusion that suit land measuring 9-6 Marlas stands already partitioned. The judgment of this Court in **Khem Dutt and others** versus **Palkia and another 1983 Shim.L.C 77** deals with the case pertaining to the partition of the land by a Revenue Officer under the H.P Land Revenue Act, hence not applicable in the case in hand. Learned lower appellate Court has rightly placed reliance on the judgment of the Hon'ble Apex Court in **Kale** versus **Deputy Director of Consolidation, AIR 1976 SC 807**, as the parties to the present suit should honour the private partition having taken place long back in the year 1952 by mutual consent. I am not persuaded to take a view of the matter that the family settlement is only to be honoured and the same does not prohibit a party to seek partition in accordance with law for the reason that in the case in hand it is not merely a family settlement but the plea of private partition set up by defendants No. 1 and 2 is proved on record satisfactorily.

18. In view of what has been said hereinabove, present is not a case of mere separate possession of the suit land but a case where partition thereof has taken place with mutual consent. In a case of this nature, no instrument of partition is required to be prepared and an information to the Revenue Officer is sufficient. Such information in the form of Rapat Rojnamcha Ext. DW-5/A was duly received by the Revenue Officer and entered in Rojnamcha Vakayati. On and after entry of the rapat, the partition so arrived at was given effect in the revenue record because as per entries in the jamabandis and Khasra Girdawaris not only the parties to the suit have been shown owner in possession of the suit land to the extent of their respective shares but separate Khatonis pertaining to the land in their respective shares also stand prepared.

19. If coming to 2nd substantial question of law, the acceptance of award by defendants No. 1 and 2 along with plaintiffs and defendants No. 3 to 9 in respect of acquired land cannot be taken to be a circumstance to belie the plea of private partition because it is not the case of the plaintiffs that out of the land in the ownership and possession of Sh. Ajit Singh, predecessor-in-interest of defendants No. 1 and 2, no portion thereof was acquired. The presumption, therefore, would be that out of the land Sh. Ajit Singh aforesaid had purchased and in their ownership and possession, some portion was acquired and they have been paid compensation in respect of such acquired land. The acceptance of the compensation, therefore, cannot be treated as an admission qua the suit land unpartitioned on the part of defendants No. 1 and 2 by any stretch of imagination.

20. In view of reappraisal of the given facts and circumstances and also evidence available on record, no legal question much less substantial question of law as formulated arise for determination in the present appeal. On the other hand, the concurrent findings recorded by both Courts below on appreciation of the evidence available on record in its right perspective need no interference in the present appeal. The judgment and decree under challenge being legally and factually sustainable is hereby affirmed.

21. This appeal, therefore, fails and the same is accordingly dismissed. No orders so as to costs.

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

M/s P.A. Times Industries .....Non-applicant/Plaintiff.
Versus
M/s Apex Marketing .....Applicant/defendant.

OMP (M) No. 4 of 2014 and OMP
No. 49 of 2014 in C.S. No. 43 of 2011.
Reserved on: 20.5.2015
Decided on: 28th May, 2015.

Code of Civil Procedure, 1908- Order 9 Rule 13- A decree was passed by the Court exparte- an application was filed for setting aside ex-parte decree – held that ex-parte decree cannot be set aside on the ground that there was some irregularity in the service of the summons- Process Server went to the commercial premises and found it locked - thereafter he went to the residential house of the Managing Director, where he met the Managing Director- process was shown to the managing director but he refused to accept the same- therefore, copy of notice was affixed on the gate of his residence- it is apparent from the report that Managing Director was duly served and there was no reason for setting aside ex-parte decree- application dismissed. (Para-11 to 30)

Case referred:
Sushil Kumar Sabharwal Versus Gurpreet Singh & Others, (2002) 5 SCC 377

For the Plaintiff/ Non-applicant: Mr. I.S. Narwal, Advocate.
For the defendant/ applicant : Mr. B.S. Chauhan & Mr. Manish Thakur, Advocates.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

This order shall dispose of both the applications filed with a prayer to set aside the exparte judgment and decree dated 1.7.2013 on condonation of delay.

2. Suit for recovery of Rs.15,49,770/- came to be filed by M/s P.A. Times Industries, Kasauli Road, Dharampur, the non-applicant/plaintiff, against the applicant/defendant. The defendant-Company, as per order dated 9.4.2012, in 'B' part of the file was served with Dasti notice by way of affixation for 13.3.2012 as its Managing Director though present, however, refused to accept the notice. The defendant, therefore, was ordered to be proceeded against exparte as per the order passed on 1.6.2012 read with order dated 9.4.2012, passed in 'B' part of the file.

3. A co-ordinate Bench of this Court after recording exparte evidence has decreed the suit vide judgment and decree dated 1.7.2013. The judgment and decree so passed has been sought to be set aside on condonation of delay.

4. The delay as occurred in filing the application, OMP No.49 of 2014, aforesaid for setting aside the exparte judgment and decree has been sought to be condoned on the ground that the applicant-defendant came to know about the exparte judgment and decree dated 1.7.2013 passed in this suit on 14.1.2014 from one Rajesh Kumar Janak, Kishore Road, Kadam Kuan, Patna Bihar, who, in turn, was informed by one Vinay Dalamia. Mr. Dalamia was informed about the exparte decree passed in the suit by one Shri J.K. Mishra,

an employee of the non-applicant/Company. The delay as occurred, therefore, is stated to be neither intentional nor deliberate and allegedly occurred owing to the circumstances beyond the control of the applicant-defendant.

5. On merits, the case pleaded in the application OMP No.49 of 14 is that the applicant-defendant was never served legally and validly in the suit. He never refused to accept the service of notice. The report to this effect submitted by the Process-server is stated to be false and manipulated one. Otherwise also, the notice allegedly was affixed on the residence of the managing Director of the applicant-defendant and not in its business premises. There is no legal and valid service in terms of Order 5 Rule 2 CPC.

6. In reply filed on behalf of the non-applicant/ plaintiff, the question of maintainability of the application for setting aside the abatement has been raised. On merits, it is denied that the Managing Director of applicant-defendant has refused to accept the service. The reports Annexure P-1 and P-2 to the reply have been pressed into service in this regard. Therefore, it is submitted that no option was left except for affixation of the notice on the residential premises of the Managing Director of applicant-defendant. It is denied that the Managing Director of the applicant-defendant came to know about the decree passed in the suit on 14.1.2014. It is pointed out that the official of defendant-Company had been asking for the status of the proceedings in the suit from the employees of plaintiff-Company. Since defendant-Company was not willing to clear the dues of the non-applicant/plaintiff, it is for this reason the reports qua vacation of the rented accommodation and disconnection of electricity meter have been fabricated and falsely procured. Since the applicant-defendant refused to accept the notice, therefore, the refusal itself is to be treated as legal and valid service. The service upon the applicant is stated to be effected, in terms of the provisions contained under Order 5 Rule 2 CPC. Both applications have, therefore, been sought to be dismissed.

7. In rejoinder, the contentions to the contrary have been denied being wrong and on merits the case as set out in these applications reiterated. It is pointed out that as per reports Annexures P-1 and P-2, the service has been effected on the address of Managing Director of applicant-defendant i.e. near Sanichra Masjid, Thana Sultan Ganj, Bihar, however, as per Aadhar Card Annexure A-1, he is resident of Dargah Road, New Azimabad Colony, Sanichra, P.S. Bahadhurpur, Patna, Bihar. It is, therefore, reiterated that the Managing Director of the applicant-defendant has never been served with the notice legally and validly.

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

"1. Whether there are sufficient grounds for condonation of delay as occurred in filing the application for setting aside exparte decree passed on 1st July, 2013? OPA.

2. If issue No.1 held in affirmative, does the application disclose sufficient grounds for setting aside the ex-parte decree or not? OPA

3. Relief.

9. The applicant-defendant in turn has produced in evidence the affidavit of its Managing Director Najmul Haque Hashmi and that of Shri Rajesh Kumar S/o late Shri Om Prakash.

10. On hearing learned counsel on both sides and also going though the records my findings on the issues so framed are as under:

Issue No.1 : Yes.

Issue No.2	:	No.
Relief	:	OMP(M) No.2014 allowed, however, OMP No.49 of 2014 dismissed per operative part of the judgment.

Issue No. 1.

11. The application, OMP No.49 of 2014, filed with a prayer to set aside the exparte decree, is time barred. An application of this nature under Article 123 of the Limitation Act could have been filed within thirty days from the date of decree. Here the decree has been passed on 1.7.2013. The application has been filed on 10.2.2014. The delay actually occurred has neither been calculated and mentioned in the application by the applicant-defendant nor by the Registry at the time of scrutiny of the application. Any how, the delay as occurred in filing the application is more than six months, after deduction of the statutory period of thirty days prescribed for filing of an application of this nature. The explanation as forth coming is that the applicant-defendant was not aware of the passing of the judgment and decree on 1.7.2013 nor the pendency of the suit. It is on 14.1.2014, he was informed about the exparte decree passed by this Court in the suit on 1.7.2013 by Rajesh Kumar Janak, Kishore Road, Kadam Kuan, Patna, Bihar. Said Rajesh Kumar was informed by one Vinay Dalamia. Said Shri Dalamia had received the information from one J.K. Mishra, an employee of the non-applicant/plaintiff.

12. The response to such pleadings in the application OMP (M) No.4 of 2014 under Section 5 of the Limitation Act, however, is that the plaintiff had due knowledge and notice of the pendency of the suit and also the exparte judgment and decree passed by this Court. In support of such contentions, it has been submitted that the applicant-defendant remained in constant touch of the employee of the non-applicant/ plaintiff throughout during the course of proceedings in the suit and obtaining information qua the progress therein at each and every stage.

13. If coming to the evidence, the same has been produced by way of affidavit. Mr. Najmul Haque Hashmi, Managing Director of the applicant-defendant in his own affidavit has said all whatever averred in the application. Also that he was never served in the suit at his residential address as find mentioned in the Aadhar Card annexed to the rejoinder and on that address the Process-Server never served him with the notice of the suit. Shri Rajesh Kumar, in the affidavit sworn in by him, has supported the applicant's version qua his having come to know about exparte judgment and decree on 14.1.2014 because according to Mr. Rajesh Kumar, it is he, who informed the applicant-defendant in this regard. He came to know about the exparte judgment and decree from one Vinay Dalmia, who was informed by one J.K. Mishra, an employee of non-applicant/plaintiff.

14. In rebuttal of the evidence so produced by the applicant-defendant, the non-applicant/plaintiff has produced affidavit of one Mr. Vinod Rana, its Senior Manager (Accounts). Mr. Rana has stated that the pendency of the suit was well within the notice of the applicant-defendant because he always remained in touch with non-applicant and its officials during the pendency of the suit. According to him, the applicant-defendant has cooked up a false story just to get the exparte decree set aside. He allegedly has blown hot and cold in the same breath i.e. in the affidavit filed in support of the application under Order 9 Rule 13 and Section 5 of the Limitation Act the address given is;

> "R/o Sandalpur Behind Sanichra Mandir, near Mobile Tower Mahendru, Patna, Bihar";

whereas in the affidavit filed in support of the rejoinder, the address given by its Managing Director is;

"R/o Dargah Road, New Azimabad Colony, Sanichra, Police Post Bahadhurpur, Patna, Sampatchak, Patna, Bihar-800006";

altogether different.

15. Mr. B.S. Chauhan, learned counsel has urged that sufficient grounds are made out from the perusal of the application justifying the condonation of delay.

16. Mr. I.S. Narwal, learned counsel representing the non-applicant/plaintiff has, however, repelled the submissions so made and has come forward with the version that what to speak of sufficient cause, the application, according to him, does not disclose any ground warranting condonation of the inordinate delay as occurred in filing the application for setting aside the exparte judgment and decree.

17. As noticed supra, there is delay of over six months having occurred in filing the application for setting aside the exparte decree. Section 3 of the Limitation Act provides that no Court shall have the jurisdiction to entertain the suit and application if the same has been filed after the expiry of period of limitation. The period of limitation for filing an application for setting aside the exparte Order is thirty days from the date of knowledge of the decree. Here a separate application OMP (M) NO. 4 of 2014 has been filed with a prayer to condone the delay. It is well settled that the delay howsomuch long can be condoned, if sufficient cause is found to have been shown from the perusal of the pleadings and also the evidence available on record.

18. It is well settled at this stage that a party seeking the condonation of delay has to show "sufficient cause" warranting condonation of delay. The expression 'sufficient cause' should be interpreted liberally and in a meaningful manner to sub-serve the ends of justice. Also that the expression 'every day's delay must be explained' should be applied in a rational common sense by taking pragmatic approach to do substantial justice. The Courts have wide discretion in the matter of condonation of delay; however, the same should be exercised judiciously and only in a case where sufficient cause is found to be shown.

19. In the case in hand although it cannot be believed that the Managing Director of the applicant-defendant had no knowledge about the pendency of the suit, however, to my mind he had no knowledge of passing of the decree on 1.7.2013. Had he been in the notice and knowledge of passing of the decree dated 1.7.2013, would have not remained sit over the matter for a period over seven months because he was not going to be benefited in any manner whatsoever by delaying the institution of the application for setting aside the exparte decree. The explanation as set forth in the application for condonation of delay finds support from his own affidavit and also that of Rajesh Kumar produced in evidence. It seems that after having come to know about the exparte judgment and decree passed against the applicant-defendant, its Managing Director, rushed to Shimla and applied for certified copy of the judgment on 17.1.2014, through Mr. Manish Thakur, Advocate. It is apparent so from the perusal of the certified copy of the judgment filed along with the application for setting aside the exparte decree. The application having been filed on 10.2.2014 in the Registry is, therefore, within the period of 30 days from the date of knowledge. The delay as occurred in filing the application for setting aside the exparte judgment and decree, therefore, stands satisfactorily explained and as such is hereby ordered to be condoned. This issue is answered in affirmative i.e. in favour of the applicant-defendant.

Issue No. 2.

20. Now coming to the application filed for setting aside the exparte decree, the only ground raised is that the applicant-defendant was not aware of the pendency of the suit

in this Court as he was never served with the notice, in accordance with law. The response to such averments in the application OMP No. 49 of 2014, however, is denial, as according to non-applicant/ plaintiff, the Managing Director of applicant-defendant remained throughout in touch with its employees, hence the pendency of the suit was well within the notice of its Managing Director. It has also been pleaded in reply to the application that the Managing Director of the applicant-defendant has refused to accept the notice issued Dasti when Process-Server visited him at his residence and as a result thereof the notice was affixed in the house.

21. If coming to the evidence, Shri Najmul Haque Hashmi, the Managing Director of the applicant-defendant has only stated in his affidavit that he was never served with the notice at his business premises nor at residential address. According to him, the report made by the Process-Server is false and manipulated. The service by way of affixation is also stated to be carried out on wrong address. This is the only evidence, the applicant-defendant produced to substantiate this aspect of the matter. Now coming to the evidence produced by the non-applicant/plaintiff, its Senior Manager, Mr. Vinod Rana has stated that on the face of the report made by the Process-Server, the Managing Director of the applicant-defendant has refused to accept the service of notice. As a result thereof, copy of the notice had to be affixed on his house. The applicant-defendant, therefore, had due knowledge and notice of the pendency of the suit and also the date fixed and as such has rightly been proceeded against exparte.

22. It is also averred that the applicant-defendant remained in touch with non-applicant and its officials throughout during the pendency of the suit. The applicant's version that he has not been served on correct address is stated to be false for the reason that he has blown hot and cold in the same breath as in the affidavit filed in support of the applications, he has given some different address whereas in the affidavit filed in support of the rejoinder some other address. Mr. Rana has therefore, further stated that the applicant-defendant has not only played hide and seek with the plaintiff but with this Court also.

23. Now coming to the arguments addressed, according to Mr. Chauhan, on account of invalid service, the applicant-defendant could have not been treated to be served. Otherwise also, the fixation of notice not accompanied by plaint cannot be treated to be a valid service.

24. Mr. Narwal, however, has emphasized that no ground is made out for setting aside the exparte decree and the application deserves dismissal.

25. Order 9 Rule 13 CPC makes it crystal clear that the Court, if satisfied that the summons was not duly served or that the defendant was prevented by sufficient cause from putting appearance on the date fixed, the Court may order to set aside the exparte decree.

26. It is well settled at this stage that an exparte decree could only be set aside, if sufficient grounds are found to be made out. The summons were not accompanying the copy of the plaint may be an irregular service of summons, however, does not constitute a ground to set aside the exparte decree. The apex Court in ***Sushil Kumar Sabharwal*** versus ***Gurpreet Singh & Others, (2002) 5 SCC 377,*** has held that exparte decree cannot be set aside merely on the ground that there has been an irregularity in the service of the summons, if the Court is satisfied that the defendant had due notice of the date of hearing and had sufficient time to appear. Relevant portion of this judgment reads as follows:-

> "11. The High Court has overlooked the second proviso to rule 13 of order 9 Code of Civil Procedure, 1908, added by the 1976

> amendment which provides that no court shall set aside a decree passed exparte merely on the ground that there has been an irregularity in the service of summons if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim. It is the knowledge of the 'date of hearing' and not the knowledge of 'pendency of suit' which is relevant for the purpose of the proviso abovesaid. Then the present one is not a case of mere irregularity in service of summons; on the facts it is a case of non-service of summons. The appellant has appeared in the witness box and we have carefully perused his statement. There is no cross examination directed towards discrediting the testimony on oath of the appellant, that is, to draw an inference that the appellant had in any manner a notice of the date of hearing and had sufficient time to appear and answer the plaintiffs claim which he did not avail and utilise."

27. Now coming to the evidence discussed hereinabove, the report of Process-Server Annexure P-2 to the reply filed by non-applicant/plaintiff, makes it crystal clear that the Process Server firstly went to the commercial address of applicant-defendant i.e. A.H. Complex, Exhibition Road Patna, Bihar. He found the premises locked. The proprietor of "Vatika Slash Enterprises" in western side of the business premises of the applicant-defendant had informed the Process-Server that the defendant had closed the business at that place and had vacated that premises also. He has also given the residential address of the Managing Director of the defendant-Company i.e. Near Sanishchra Maszid, Police Station Sultanganj, Patna. The Process Server went to the residential house of the Managing Director on the address so disclosed. As per the report, it was a cream-white coloured house. Shri R.S. Hashmi, father of the Managing Director of the defendant-Company met the Process-Server there. The Managing Director of the applicant-Company, Mr. Najmul Haque Hashmi, was called. He came to the Process-Server. He was shown the notice. The Process-Server requested him to receive the copy of the notice and issued the receipt under his signature. The Managing Director, however, refused to accept the copy of the notice and also issuance of the receipt. According to the Process-Server, he, therefore, was compelled to affix the copy of the notice on the grill of the door of the house of the Managing Director. The report further reveals that the Process-Server had to witness the report himself because Amit Kumar and Ashok Kumar present there refused to witness the service of the notice upon the Managing Director of the applicant-defendant.

28. The report Annexure P-2 so submitted by Process-Server has also been verified by the Registrar of the Civil Court, Patna, as per the endorsement made by the Registrar under his signature. The report alone is sufficient to come to the conclusion that the defendant had due knowledge and notice of the pendency of the suit and also that the same was fixed in the Court on 13th March, 2012. He, however, opted for not accepting the copy of the notice and to put in appearance in this Court on the date fixed and may be with a motive to play hide and seek with the Court. The notice was issued dasti because initially the notices issued, through ordinary mode and registered AD post, were received back undelivered with the report that the premises were found locked.

29. True it is that the applicant-defendant had vacated the place of its business as per address given in the plaint because Process-Server has also stated so in the report Annexure P-2. The fact, however, remains that the Process-Server when visited the residential place of the Managing Director of the applicant-defendant, he refused to accept the notice. The plea that he has not been served on the correct address is palpably false

because had the residential address of Najmul Haque Hashmi aforesaid was "Dargah Road, New Azimabad Colony, Sanichra, Police Post Bahadhurpur, Patna", why in the affidavit filed in support of the application he has given his address as "Sandalpur Behind Shanichra Mandir, Near Mobile Tower Mahendru, Patna". It is crystal clear that in order to wriggle out from the exparte judgment and decree, he has manipulated his address as given in the affidavit filed in support of the rejoinder. Though in Adhar Card Annexure A-1 filed with the rejoinder, this address finds mentioned therein, however, it is not known as to when the Aadhar Card was prepared. There is also nothing to show that after issuance of Aadhar Card, he had not changed his place of residence.

30. On the other hand, the report submitted by the Process-Server, who not only mentioned the colour of the house of the Managing Director of the applicant-defendant, but also the name of his father present there, cannot be disbelieved. Otherwise also, the Process-Server being a public servant cannot be said to have any enmity or any grudge with the applicant-defendant leading to manipulate the report. Rather he, being a public servant, every correctness and sanctity is attached to the report Annexure P-2, he submitted. As generally is now the trend of avoiding the processes issued by the Courts of law, the Managing Director of the applicant-defendant also seems to have avoided the service of the notice intentionally and deliberately and may be with a motive to hamper the proceedings in the suit. Therefore, no ground for setting aside the exparte decree is made out from the record. The application OMP No.49 of 2014, therefore, deserves dismissal. This issue is accordingly decided in negative i.e. against the applicant-defendant.

Relief.

31. In view of my findings on both issues hereinabove, application OMP (M) No. 4 of 2014 succeeds and the same is accordingly allowed. Consequently, the delay as occurred in filing the application, OMP No. 49 of 2014, for setting aside the exparte order is hereby ordered to be condoned, whereas application, OMP No. 49 of 2014, fails and the same is accordingly dismissed as no ground for setting aside the exparte decree is made out. Both the applications stand disposed of accordingly.

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

Cr.MMO No.26 of 2015 and
Cr. Revision No. 369 of 2014.
Judgement reserved on: 28.5.2015.
Date of decision: 1.6.2015.

1.	**Cr.MMO No. 26 of 2015.**	
	Vipul Lakhanpal	..... Petitioner.
	Vs.	
	Smt. Pooja Sharma	..... Respondent
2.	**Cr. Revision No. 369 of 2014.**	
	Smt. Pooja Sharma	..... Petitioner.
	Vs.	
	Vipul Lakhanpal	..... Respondent

Protection of Women from Domestic Violence Act, 2005- Section 12- Wife was maltreated by the petitioner- her petition was allowed and the husband was prohibited from committing any act of domestic violence -he was ordered to pay maintenance @ Rs. 5,000/- along with compensation of Rs. 10,000/-- husband contended that wife is TGT Maths and was drawing salary of Rs. 9,000/-- he was compelled to tender resignation from his job and

was not doing anything- held, that husband is under an obligation to maintain his wife- statute commands that there has to be some acceptable arrangement so that wife can sustain herself- if husband is an able-bodied person capable of earning sufficient money, he cannot deny his obligation to maintain his wife - carry home salary of the husband was Rs. 45,000/-- income of the wife was taken into consideration by the Court, while awarding maintenance – wife is entitled to the status which she was enjoying in the house of her husband –hence, maintenance of Rs. 5,000/- cannot be said to be excessive. (Para-12 to 27)

Cases referred:
Kota Varaprasada Rao and another vs. Kota China Venkaiah and others AIR 1992 AP 1
Shamima Farooqui vs. Shahid Khan JT 2015 (3) SC 576

For the petitioner : Mr. G.D.Sharma, Advocate, for the petitioner in Cr.MMO No. 26 of 2015 and for respondent in Cr.Revision No. 369 of 2014.

For the respondents : Mr. Anirudh Sharma, Advocate, for the respondent in Cr.MMO No. 26 of 2015 and for petitioner in Cr. Revision No. 369 of 2014.

The following judgment of the Court was delivered

Tarlok Singh Chauhan, Judge.

Since both the petitions arise out of the same judgement, they are being taken up together for disposal. The parties shall hereinafter referred to as wife and husband.

2. The wife filed a petition through Protection Officer, under section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, the Act) against her husband. It transpires that wife had made a written complaint before the Protection Officer, in which it had been averred that her marriage was solemnized with the husband on 30.10.2009 in accordance with the Hindu Rites. After the marriage, she went to the house of husband at Longwood, Shimla where on the first night the husband threatened her and told her that had he been in possession of a knife he could have killed her and in case she opened her mouth her entire family will be killed by him.

3. The wife thereafter was taken to the native village at Hamirpur by her husband and his family members for POOJA purpose, where the husband and his family members also maltreated her. The husband also told the wife that in fact he wanted to marry with the niece of Karuna Vaid and he does not like her.

4. The husband could not consummate the marriage with the wife as he is not physically fit. The wife also joined the company of her husband at Mumbai where he could also not consummate the marriage with her, rather he had beaten her and her mother at Mumbai. Two meetings were called by the relatives of the wife, where father of the husband admitted that his son is not physically fit.

5. Thereafter, the husband attacked his wife in her parental house and in this manner, made her life hell by making telephonic calls and SMS and, therefore, action be taken against him. The Protection Officer filed incident report. The complaint was forwarded by him through incident report in the Court.

6. The respondents contested the petition by filing their separate replies. In his reply the husband took preliminary objection regarding maintainability. On merits, he

denied that he or his family members ever maltreated or had beaten the wife. The wife remained with him and his family members even at his native place in District Hamirpur and also stayed with him at Mumbai. The wife joined his company at Mumbai when she was brought by his father to Mumbai. The meeting was convened by the relatives of the husband but the wife refused to join the company of her husband without sufficient cause. In fact, in the meeting father and relatives of the wife asked the father of husband to pay Rs.15-20 lacs and get divorce from the wife and the husband and his family members never maltreated the petitioner. The wife also lodged FIR against the respondents under Sections 498-A and 506 IPC at Solan just to harass the respondents. The petition filed by the wife is false and frivolous, same be dismissed with costs.

7. The other respondents also filed the reply in which they denied the allegations as had been made by the wife.

8. The learned Magistrate after recording evidence and hearing the parties vide his order dated 1.9.2012 partly allowed the petition of the wife against the respondent-husband, whereby he was prohibited from committing any act of domestic violence and further ordered to pay a maintenance to the tune of Rs.5,000/- per month alongwith compensation of Rs.10,000/-.

9. The husband assailed this order before the learned appellate authority, who affirmed and upheld the order passed by the learned Magistrate.

10. Aggrieved by the orders passed by the learned courts below, the husband has invoked the jurisdiction of this court under Section 482 of the Code of Criminal Procedure with a prayer to quash and set-aside the aforesaid orders.

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

12. It has been alleged that the learned courts below have failed to appreciate the fact that the wife who is TGT in Maths and was drawing a handsome salary of Rs.9,000/- per month and was therefore, not entitled to maintenance. It was further alleged that due to the act and conduct of the wife, the husband was compelled to tender resignation from his job as Manager on 25.4.2010 and ever since then not only that he is doing any job, rather he is under mental distress and undergoing treatment at IGMC Shimla. It has been lastly contended that the courts below have miserably failed to appreciate that the husband has no source of income and therefore, cannot be directed to pay maintenance.

13. The learned counsel for the husband has vehemently argued that since the wife is earning an amount of Rs.9,000/- per month whereas the husband is not at all earning, therefore, she is not entitled to maintenance.

14. In support of his contention, strong reliance has been placed by him on the judgement of learned single Judge of Delhi High Court in **Crl. M.C. No. 491 of 2009** titled **Sanjay Bhardwaj & ors.** vs. **The State & anr., decided on 27.8.2010**, particularly on the following observations:-

> "4. A perusal of Domestic Violence Act shows that Domestic Violence Act does not create any additional right in favour of wife regarding maintenance. It only enables the Magistrate to pass a maintenance order as per the rights available under existing laws. While, the Act specifies the duties and functions of protection officer, police officer, service providers, magistrate, medical facility providers and duties of Government, the Act is silent about

the duties of husband or the duties of wife. Thus, maintenance can be fixed by the Court under Domestic Violence Act only as per prevalent law regarding providing of maintenance by husband to the wife. Under prevalent laws i.e. Hindu Adoption & Maintenance Act, Hindu Marriage Act, Section 125 Cr.P.C - a husband is supposed to maintain his un-earning spouse out of the income which he earns. No law provides that a husband has to maintain a wife, living separately from him, irrespective of the fact whether he earns or not. Court cannot tell the husband that he should beg, borrow or steal but give maintenance to the wife, more so when the husband and wife are almost equally qualified and almost equally capable of earning and both of them claimed to be gainfully employed before marriage. If the husband was BSc. and Masters in Marketing Management from Pondicherry University, the wife was MA (English) & MBA. If the husband was working as a Manager abroad, the wife with MBA degree was also working in an MNC in India. Under these circumstances, fixing of maintenance by the Court without there being even a prima facie proof of the husband being employed in India and with clear proof of the fact that the passport of the husband was seized, he was not permitted to leave country, (the bail was given with a condition that he shall keep visiting Investigating Officer as and when called) is contrary to law and not warranted under provisions of Domestic Violence Act.

5. We are living in an era of equality of sexes. The Constitution provides equal treatment to be given irrespective of sex, caste and creed. An unemployed husband, who is holding an MBA degree, cannot be treated differently to an unemployed wife, who is also holding an MBA degree. Since both are on equal footing one cannot be asked to maintain other unless one is employed and other is not employed. As far as dependency on parents is concerned, I consider that once a person is grown up, educated he cannot be asked to beg and borrow from the parents and maintain wife. The parents had done their duty of educating them and now they cannot be burdened to maintain husband and wife as both are grown up and must take care of themselves.

6. It must be remembered that there is no legal presumption that behind every failed marriage there is either dowry demand or domestic violence. Marriages do fail for various other reasons. The difficulty is that real causes of failure of marriage are rarely admitted in Courts. Truth and honesty is becoming a rare commodity, in marriages and in averments made before the Courts. "

15. I have gone through the aforesaid judgement and find myself unable to agree with the same.

16. Indisputably the factum of marriage has not been denied by the husband. If that be so, it is not only his moral obligation but legal duty to maintain his wife by providing food, clothing and shelter, if not anything more.

17. The law on the subject has been elaborately dealt in **Kota Varaprasada Rao and another** vs. **Kota China Venkaiah and others AIR 1992 AP 1**, wherein it has been held as follows:-

"8. The oldest case decided on the subject is one in Khetramani Dasi v. Kashinath Das, (1868) 2 Bengal LR 15. There, the father-in-law was sued by a

Hindu widow for maintenance. Deciding the right of the widow for maintenance, the Calcutta High Court referred to the Shastric law as under:

"The duty of maintaining one's family is, however, clearly laid down in the Dayabhaga, Chapter II, Section XXIII, in these words:

'The maintenance of the family is an indispensable obligation, as Manu positively declares.' Sir Thomas Strange in his work on Hindu Law Vol. I page 67, says:

'Maintenance by a man of his dependants is, with the Hindus, a primary duty. They hold that he must be just, before he is generous, his charity beginning at home; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with the family whatever be its composition, as consisting of other relations and connexions, including (it may be) illegitimate offspring. It extends according to Manu and Yajnavalkya to the outcast, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment."

At page 21, the learned Judges have also referred to a situation where there is nothing absolutely for the Hindu widow to maintain herself from the parents-in-law's branch by referring to the following texts from NARADA:

"In Book IV, Chapter I Section I, Art. XIII of Celebrooke's Digest, are the following texts from NARADA:

'After the death of her husband, the nearest kinsman on his side has authority over a woman who has no son; in regard to the expenditurte of wealth, the government of herself, and her maintenance, he has full dominion. If the husband's family be extinct, or the kinsman be unmanly, or destitute of means to support her, or if there is no Sapindas, a kinsman on the father's side shall have authority over the woman; and the comment on this passage is : "'Kinsman on the husband's side; of his father's or mother's race in the order of proximity. 'Maintenance' means subsistence. Thus, without his consent, she may not give away anything to any person, nor indulge herself in matters of shape, taste, small, or the like, and if the means of subsistence be wanting he must provide her maintenance. But if the kinsman be unmanly (defecient in manly capacity to discriminate right from wrong) or destitute of means to support her, if there be no such person able to provide the means of subsistence, or if there be no SAPINDAS, then any how, determining from her own judgment on the means of preserving life and duty, let her announce her affinity in this mode : 'I am the wife of such a man's uncle; 'and if that be ineffectual, let her revert to her father's kindred; or in failure of this, recourse may be had even to her mother's kindered" (Emphasis supplied.)

In Book III, Chapter II, Section II, Art. CXXII, of Colebrooke's Digest, we have the following texts and comments:

"She who is deprived of her husband should not reside apart from her father, mother, son, or brother, from her husband's father or mother, or from her maternal uncle; else she becomes infamous."

As per the above texts and comments, a Hindu widow if the parents-in-law's branch is unmanly or destitute of means to support her is entitled to be with the father or the kinsman on the father's side.

9. In Janki v. Nand Ram, (1889) ILR 11 All 194 (FB), a Hindu widow after the death of her father-in-law sued her brother-in-law and her father-in-law's widow. The Full Bench of the Allahabad High Court held that the father-in-law was under a moral, though not legal, obligation not only to maintain his widowed daughter-in-law during his life time, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by a suit against the son and against the property in question. While so deciding, the learned Judges at page 210 made a reference to a passage from Dr. Gurudas Banerjee's Tagore Law Lectures, thus:

"We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the dependant members of his family. The following are a few of the many texts on the subject:--

MANU: 'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.'

NARADA: 'Even they who are born, or yet unborn and they who exist in the womb, require funds for subsistence; deprivation of the means of subsistence is reprehended.'

BRIHASPATI: 'A man may give what remains after the food and clothing of his family, the giver of more who leaves his family naked and unfed, may taste honey at first, but still afterwards find it poison.' "

The text of MANU as added reads:

"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit: even what he does for the sake of his future spiritual body, to the injury of those whom he is found to maintain, shall bring him ultimate misery both in this life and in the next."

Having so quoted the texts, the Full Bench based its judgment on the proposition:

> *".....under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property."*

10. In Kamini Dassee v. Chandra Pode Handle, (1890) ILR 17 Cal 373, it is held by the Calcutta High Court that the principle that an heir succeeding to the property takes it for the spiritual benefit of the late proprietor, and is, therefore, under a legal obligation to maintain persons whom the late proprietor was morally bound to support, has ample basis in the Hindu law of the Bengal School and accordingly decreed the suit for maintenance laid by a widowed brother against her husband's brothers.

11. In Devi Prasad v. Gunvati Koer, (1894) ILR 22 Cal 410, deciding an action brought for maintenance by a Hindu widow against the brothers and nephew of her deceased husband after the death of her father-in-law, the Calcutta High Court held that the plaintiff's husband had a vested interest in the ancestral property, and could have, even during his father's life time, enforced partition of that property, and as the Hindu law provides that the surviving coparceners should maintain the widow of a deceased coparcener, the plaintiff was entitled to maintenance.

12. In Bai Mangal v. Bai Rukmini, (1899) ILR 23 Bom 291, the statement of law of MAYNE that

> *"After marriage, her (meaning the daughter's) maintenance is a charge upon her husband's family, but if they are unable to support her, she must be provided for by the., family of her father."*

was understood to have been one of monetary character than laying down any general legal obligation. The learned Judge, Ranede, J., after examining all the authorities has broadly laid down the law, as he understood, thus:

> *"In fact, all the text writers appear to be in agreement on this point, namely, that it is only the unmarried daughters who have a legal claim for maintenance from the husband's family. If this provision fails, and the widowed daughter returns to live with her father or brother, there is a moral and social obligation, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heirs." (page 295).*

13. However, the same learned Judge, Ranede, J., in a later case in Yamuna Bai v. Manubai, (1899) ILR 23 Bom 608, expressed his absolute concurrence with the law laid down by the Allahabad High Court in Janaki's case, (1889 ILR 11 All 194) (supra), as regards the right of the widow of a predeceased son to maintenance against the estate of the deceased father-in-law in the hands of his heirs.

14. The view of Ranede, J., in Bai Man-gal's case, (1899 ILR 23 Bom 291) (supra), was further conditioned by Ammer Ali, J., in Mokhoda Dassee v. Nundo Lall Haldar, (1900) ILR 27 Cal 555, by holding that the right of maintenance is again subject to the satisfaction of the fact that the widowed sonless daughter must have been at the time of her father's death maintained by him as a dependant member of the family.

15. But, both the views of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra), and Ameer Ali, J., in Mokhode Dassee's case, (1900 ILR 27 Cal 555) (supra), did not find acceptance of A. K. Sinha, J., of the Calcutta High Court in Khanta Moni v. Shyam Chand, . The learned Judge held that a widowed daughter to sustain her claim for maintenance need not be a destitute nor need be actually maintained by the father during his life time... All that she is required to prove to get such maintenance, the learned Judge held, is that at the material time she is a destitute and she could not get any maintenance from her husband's family."

"19. In Appavu Udayan v. Nallamrnal, AIR 1949 Madras 24, the Madras High Court has to deal with the rights of daughter-in-law against her father-in-law and his estate in the hands of his heirs. There it is held that the father-in-law is under a moral obligation to maintain his widowed daughter-in-law out of his self-acquired property and that on his death if his self-acquired property

descends by inheritance to his heirs, the moral liability of the father-in-law ripens into a legal one against his heirs.

20. A Full Bench of this High Court in T. A. Lakshmi Narasamba v. T. Sundaramma, AIR 1981 Andh Pra 88 held:

"The moral obligation of a father-in-law possessed of separate or self-acquired property to maintain the widowed daughter-in-law ripens into a legal obligation in the hands of persons to whom he has either bequeathed or made a gift of his property.

Under the Hindu law there is a moral obligation on the father-in-law to maintain the daughter-in-law and the heirs who inherit the property are liable to maintain the dependants. It is the duty of the Hindu heirs to provide for the bodily and mental or spiritual needs of their immediate and nearer ancestors to relieve them from bodily and mental discomfort and to protect their souls from the consequences of sin. They should maintain the dependants pf the persons of property they succeeded. Merely because the property is transferred by gift or by will in favour of the heirs the obligation is not extinct. When there is property in the hands of the heirs belonging to the deceased who had a moral duty to provide maintenance, it becomes a legal duty on the heirs. It makes no difference whether the property is received either by way of succession or by way of gift or will, the principle being common in either case."

21. It is rather pertinent to notice here that the view of Ranede, J., in Bai Mangal's case, (1899 ILR 23 Bom 291) (supra) has been dissented from specifically by the Full Bench of this High Court."

18. The next question, which arises for consideration is as to whether employed wife can be refused maintenance only on the ground that the husband is unemployed.

19. It can never be forgotten that inherent and fundamental principle behind section 12 of the Act is for amelioration of the financial state of affairs as well as mental agony and anguish that woman suffers when she is compelled to leave her matrimonial home. The statute commands that there has to be some acceptable arrangements so that she can sustain herself. Sustenance does not mean and can never allow to mean a mere survival.

20. A woman, who is constrained to leave the matrimonial home, should not be allowed to feel that she has fallen from grace and move hither and thither arranging for sustenance. As per law, she is entitled to lead a life in the similar manner as she would have lived in the house of her husband. She cannot be compelled to become a destitute or a beggar.

21. Now, I deal with the plea advanced by the husband that he does not have the job and his survival is on the little pension that his father is getting. Similar question came up before the Hon'ble Supreme Court in **Shamima Farooqui** vs. **Shahid Khan JT 2015 (3) SC 576,** wherein it has been held as follows:-

"15. .....Sometimes, a plea is advanced by the husband that he does not have the means to pay, for he does not have a job or his business is not doing well. These are only bald excuses and, in fact, they have no acceptability in law. If the husband is healthy, able bodied and is in a position to support himself, he is under the legal obligation to support his wife, for wife's right to receive maintenance under Section 125 CrPC, unless disqualified, is an absolute right. While determining the quantum of

maintenance, this Court in Jabsir Kaur Sehgal v. District Judge Dehradun & Ors. [JT 1997 (7) SC 531: 1997 (7) SCC 7] has held as follows:-

> "The court has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate."

16. Grant of maintenance to wife has been perceived as a measure of social justice by this Court. In Chaturbhuj v. Sita Bai [JT 2008 (1) SC 78 : 2008 (2) SCC 316], it has been ruled that:-

> "Section 125 CrPC is a measure of social justice and is specially enacted to protect women and children and as noted by this Court in Captain Ramesh Chander Kaushal v. Veena Kaushal [1978 (4) SCC 70] falls within constitutional sweep of Article 15(3) reinforced by Article 39 of the Constitution of India. It is meant to achieve a social purpose. The object is to prevent vagrancy and destitution. It provides a speedy remedy for the supply of food, clothing and shelter to the deserted wife. It gives effect to fundamental rights and natural duties of a man to maintain his wife, children and parents when they are unable to maintain themselves. The aforesaid position was highlighted in Savitaben Somabhai Bhatiya v. State of Gujarat [JT 2005 (3) SC 164]".

16.1. This being the position in law, it is the obligation of the husband to maintain his wife. He cannot be permitted to plead that he is unable to maintain the wife due to financial constraints as long as he is capable of earning.

17. In this context, we may profitably quote a passage from the judgment rendered by the High Court of Delhi in Chander Prakash Bodhraj v. Shila Rani Chander Prakash [AIR 1968 Delhi 174] wherein it has been opined thus:-

> "An able-bodied young man has to be presumed to be capable of earning sufficient money so as to be able reasonably to maintain his wife and child and he cannot be heard to say that he is not in a position to earn enough to be able to maintain them according to the family standard. It is for such able-bodies person to show to the Court cogent grounds for holding that he is unable to reasons beyond his control, to earn enough to discharge his legal obligation of maintaining his wife and child. When the husband does not disclose to the Court the exact amount of his income, the presumption will be easily permissible against him."

22. From the aforesaid enunciation of law, it is absolutely clear that once the husband is an able-bodied young man capable of earning sufficient money, he cannot simply deny his legal obligation of maintaining his wife.

23. It has to be remembered that when the woman leaves the matrimonial home, the situation is quite different. She is deprived of many a comfort. Sometimes the faith in life reduces. Sometimes, she feels she has lost the tenderest friend. There may be a feeling that her fearless courage has brought her misfortune. At this stage, the only comfort that the law can impose is that the husband is bound to give monetary comfort. That is the only soothing legal balm for which she cannot be allowed to resign to destiny. Therefore, the lawful imposition for grant of maintenance allowance. [Ref: **Shamima Farooqui** vs. **Shahid Khan** (supra)].

24. The learned counsel for the husband has vehemently argued that the learned courts below have ignored the fact that the wife is earning Rs.9,000/- by taking her income only to be Rs.5000/-. I am afraid that such contention is belied from the records as the learned appellate court has duly taken into consideration the fact that the wife was getting a salary of Rs.9,000/-.

25. The learned counsel for the wife has further vehemently argued that since the husband is already getting a salary of Rs.9,000/-, therefore, the amount of maintenance can in no manner be said to be justified. I am afraid that this contention is without force. It has to be remembered that it was probably because of the fact that husband was getting Rs.60,000/- when he was at Mumbai and his carry home salary was Rs.45,000/- that too in the year 2010 that this matrimonial relationship came into existence. It was after taking into consideration the status and the earning capacity of the husband that the marriage proposal was accepted and thereafter solemnized. Therefore, taking into consideration all the aforesaid facts, coupled with the price index and the high cost of living, the maintenance of Rs.5,000/- in no manner can be held to be excessive.

26. That apart after having rendered the wife a total destitute, the husband cannot be heard to complain that because now she is earning, therefore, she is not entitled to any maintenance. After-all, it was the circumstances created by the husband which compelled the wife to look for means to sustain herself and she accordingly took up the job of teaching.

27. Though the wife has filed a separate revision petition claiming enhancement of maintenance and compensation, but after having gone through the records of the case, I find that award of maintenance at the rate of Rs.5,000/- and award of compensation to the tune of Rs.10,000/- is just and proper.

28. In view of the aforesaid discussion, I find no merit in both the petitions and the same are accordingly dismissed, leaving the parties to bear their own costs. The Registry is directed to place a copy of this judgment on the file of connected matter.

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

Mool Chand son of Shri Tulle Ram ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 522 of 2015
Order Reserved on 21st May 2015
Date of Order 3rd June, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 420, 468, 471 of 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- it was duly established prima facie by the police report that a forged certificate was prepared and was used – if anticipatory bail is allowed, interests of the State and general public will not be adversely affected- petitioner had cooperated with the police, therefore, bail application allowed and the petitioner ordered to be released on bail. (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. J.L. Bhardwaj, Advocate.
For the Non-petitioner: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with case FIR No. 36 of 2015 dated 9.5.2015 registered under Sections 420, 468, 471 IPC at P.S. Ani District Kullu H.P.

2. It is pleaded that petitioner has been falsely implicated in present case. It is pleaded that petitioner was initially engaged as Beldar on daily wages in the year 1994 and after completion of ten years service the petitioner was given work charge status. It is further pleaded that petitioner was regularized in the month of January 2007 and at the time of regularization the petitioner was directed to furnish the date of birth certificate with the department. It is further pleaded that petitioner had presented the date of birth certificate which was procured by father of the petitioner wherein date of birth of petitioner has been shown as 16.5.1959. It is pleaded that one Shri Om Parkash who was neighbour of petitioner sought the information from the Executive Engineer Outer Seraj Division HPPWD Nirmand regarding the regularization of service of petitioner and information was also sought regarding date of birth of petitioner. It is pleaded that information was given to complainant but complainant was not satisfied with certificate and asked the department to verify the said certificate from school authorities. It is further pleaded that thereafter Executive Engineer Seraj Division HPPWD Nirmand verified the date of birth of petitioner from school authorities and it was found that name of petitioner was not figuring in school as per information supplied by the Principal Govt. Senior Secondary School Teban District Mandi. It is pleaded that school certificate was procured by father of petitioner and there is no mens rea on the part of petitioner and school certificate was obtained by father of petitioner. It is pleaded that matter is relating to documentary evidence and custodial interrogation of petitioner is not required in present case. It is pleaded that petitioner undertakes to join the investigation as and when required by Investigating Agency and would also cooperate with Investigating Agency and would not influence any witness. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report Mr. Om Parkash son of Sita Ram filed complaint that forged certificate was submitted by petitioner in the

department. There is recital in police report that petitioner has joined the investigation. There is further recital in police report that petitioner Mool Chand had qualified only first and second class exam and petitioner could not read and write Hindi and only could sign. There is further recital in police report that the school certificate was prepared by father of petitioner in the year 1972. There is further recital in police report that as per petitioner version, petitioner has no knowledge that from where the father of petitioner procured the forged certificate.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Assistant 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 anticipatory bail application filed under Section 438 Cr.P.C. by applicant is liable to be accepted as mentioned in memorandum of grounds of bail application?

2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and offence is relating to documentary evidence only and on this ground anticipatory 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. In present case there is no recital in police report placed on record that custodial interrogation of petitioner is required. On the other hand there is recital in police report that petitioner has cooperated in investigation of present case. There is further recital in police report that as per investigation forged certificate was procured by father of petitioner. There is further recital in police report that petitioner has studied up to first and second class and petitioner could not read and write Hindi and only could sign. There is recital in police report that school leaving certificate was prepared in the year 1972. It is prima facie proved on record that in the year 1972 when forged certificate was prepared at that time the age of petitioner was 13 years and petitioner was minor. Court is of the opinion that if anticipatory bail is allowed to petitioner at this stage then interest of State and general pubic will not be adversely affected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly 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 438 Cr.P.C. is allowed and interim order dated 7.5.2015 is made absolute. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

M/s Sainsons Pulp & Papers Ltd. and another .... Petitioners.

Versus

State Bank of India and others ....Respondents

CWP No. 2805 of 2011

Date of Interim Order 03rd June, 2015

Constitution of India, 1950- Article 226- **Sick Industrial Companies (Special Provisions) Act 1985**- Section 22- Petitioners sought a direction to the bank to take steps to prevent the petitioner from becoming sick- petitioners had stated that an order was passed by BIFR which was upheld in AAIFR- held that where an inquiry under Section 16 of the Act is pending or where any scheme is under preparation or consideration then all the inquiries and legal proceedings would be suspended- Sick Industrial Companies (Special Provisions) Act is a special Act and will prevail over the general law, hence, proceedings in the Writ Petition will remain under suspension till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act. (Para- 16 and 17)

Cases referred:

Comet Filaments (India) Ltd. vs. Pradeshya Industrial and Investment Corporation of U.P. Ltd., (1989)Vol.66 Comp.Cases page124 (Allahabad High Court)

Raheja Universal Limited vs. NRC Limited and others, AIR 2012 SC 1440

Ghanshyam Sarda vs. M/s Shiv Shankar Trading Co. and others, AIR 2015 SC 403

M.D. Bhoruka Textiles Limited vs. M/s Kashmiri Rice Industries, AIR 2009 SC (Supp) 1947

For the Petitioners:	Mr. Vinay Kuthiala, Sr. Advocate with Mr.Rahul Mahajan, Advocate.
For Respondent No.1:	Mr. K.D. Sood, Sr. Advocate with Mr.Sanjeev Sood, Advocate.
For Respondent No.3:	Mr. J.S. Rana Assistant Advocate General.
For Respondent Nos. 4 & 5:	Mr. Angrej Kapoor Advocate vice Mr.Ashok Sharma, Assistant Solicitor General.

The following Interim Order of the Court was delivered:

P.S. Rana, Judge
INTERIM ORDER

Present civil writ petition is filed under Article 226 of Constitution of India seeking the following relief. (a) Direct respondent bank to immediately consider the issues raised in request letter/representation dated 3.3.2011 and provide for the measures to check and control the sickness of the unit of the petitioners inter alia with following provision: (a) (i) Conversion of the liability under existing/utilized cash credit limit of Rs.15.00 into working capital term loan and match the installments along with other term loans. (ii) Conversion of the liability under existing/utilized letter of credit and bank guarantee limits into working capital term loans and match the installments along with other term loans. (iii) Sanction of appropriate fresh/additional cash credit limit by assessing the requirement by applying the norms as per Tandon committee report with concessional rate of interest and others concessions/margins in tune with rate of interest and concessions/margins as provided for in the sanction letter dated 4.6.2008. (iv) Reversal by way of waiver the up to date interest as having been debited to the cash credit account and charged against term loans letter of credit limit and bank guarantee limit. (v) Re-schedulement of payment of term loans by extending the moratorium period up to 31.3.2012. (vi) Grant of permission to sell the properties belonging to clients at Sr. No. 2, 3, 5 and 6 alleged to have been mortgaged up to the bank by way of collateral security so that sale proceeds could be used and employed to meet out the paucity of working capital so as to ensure proper and profitable running of the unit. (vii) Restoration of margin on stocks and consumable stores, debtors, FLC/ILC/BG so as to be in consonance with terms of margins stipulated in the First Sanction of term loan.

2. (b) Direct respondent bank to provide for immediate measures so as to enable the petitioners to forthwith start the operation of the unit so that loss due to closure of the unit is averted and further sickness is arrested. (i) Release of the already sanctioned additional cash credit limit of Rs.5.00 crores without insisting for provision of corporate guarantees by M/s Sainsons Fibres Ltd. and M/s Executive Infrabuild Pvt. Ltd. (ii) Release requisite sum and requisite Bank Guarantee/Security to the HPSEB so that power connection is immediately restored. (iii) Allow full utilization of the letter of credit limit of Rs. 10.00 crores.

3. (c) Direct respondent Nos. 3 and 4 to forthwith cause the release of capital subsidy of Rs.30.00 lac.

4. (d) Direct respondent No. 5 to waive the condition of export obligation in the event of unit not being rehabilitated.

5. (e) Direct respondent No. 5 to consider the start of period of 8 years within which petitioner companies was obliged to complete the export obligation from the day when unit becomes operational after rehabilitation thereof.

6. E(i) Direct respondent No. 1 bank to reconsider the one time settlement proposal on realistic base and to grant an opportunity of hearing to the petitioners Companies to put forth their case for OTS.

7. E(ii) Quash and set aside letter dated 18.12.2014 rejecting OTS proposal.

8. E(iii) Direct the respondent bank to allow the petitioner to bring a better buyer in respect of the properties/assets and also in respect of the properties not mentioned in Annexure P-47.

9. E(iv) Direct respondent No. 1 bank to bear expenses of security guards, generators being run at the industrial premises at village Taliwal, Tehsil Haroli District Una H.P. amounting to Rs.5,00,000 per month in view of the facts that symbolic possession under SARFASI has already been taken by respondent No.1 bank.

10. E(v) To direct respondent No.1 bank to provide the guidelines for submitting of one time settlement as applicable to it and to follow these guidelines.

11. E(vi) Direct respondent No. 1 not to take any further action for recovery till the decision of proceedings pending before AIFR.

12. E(vii) In alternative respondent No. 1 may be directed to proceed against the principal security i.e. land, building and factory premises at the first instance.

13. Per contra response filed on behalf of the respondent i.e. State Bank of India pleaded therein that petitioners have violated the financial discipline of the bank and did not adhere to the payments schedule. It is pleaded that unit is not functioning. It is pleaded that power of unit was cut off in February 2011 by H.P. State Electricity Board for non-payment of dues to the tune of Rs.64 lacs and a sum of Rs.101,69,57,370/- were due from petitioners to the bank as on dated 27.5.2011. It is pleaded that notice dated 28.5.2011 was issued to the petitioners under Section 13 (2) of SARFESI Act and petitioners are not legally entitled to invoke the writ jurisdiction of High Court as alternative efficacious and speedy remedy is available to the petitioners to approach the Debt Recovery Tribunal in accordance with the provisions of Act. It is pleaded that OA No. 124 of 2012 for recovery of Rs.1161527277.95 was filed before the Debt Recovery Tribunal (I) Chandigarh on dated 29.12.2012 and proceedings are pending before the Debt Recovery Tribunal Chandigarh. It is pleaded that an amount of Rs.174,59,40,719.80 was due in March 2015 from petitioners Companies and presently an amount of Rs.179,67,14,362.38 is due on dated 30.4.2015. It is pleaded that after adjusting the sale proceeds of properties sold in village Baltana Zirakpur namely one commercial shop sold for Rs.21 lacs and second property namely residential house sold for Rs. 51 lacs on dated 14.3.2015 and properties were auctioned on dated 14.3.2015 and pursuant thereto the sale certificate was issued in favour of auction purchaser after receipt of the entire auction money. It is pleaded that petitioners resisted the taking over the factory in village Talhiwal on dated 19.1.2015 with help of local sympathizers including ladies and further pleaded that huge outstanding amount against the petitioners could only be recovered by sale of residential house in Panchkulla and factory, land, building including plant and machinery situated at Tahliwal which too would be insufficient to satisfy the amount outstanding to respondent bank. It is further pleaded that disputed facts are involved and thereafter one time settlement was turned down. It is pleaded that amount due could only be recovered by way of sale of properties of petitioners including residential house. Prayer for dismissal of civil writ petition sought.

14. Court heard learned Advocates appearing on behalf of the parties and Court also perused the entire record carefully.

15. Following points arise for determination in this civil writ petition at this stage of case:-

1. Whether proceedings of present civil writ petition No. 2805 of 2011 titled M/s Sainsons Pulp & Papers & others vs. State Bank of India and others are liable to be suspended as per Section 22 of

Sick Industrial Companies (Special Provisions) Act 1985 till the pendency of AAIFR appeal No. 13 of 2015 before the competent authority under Sick Industrial Companies (Special Provisions) Act 1985 or till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act 1985?

2. Final Order.

Findings on point No.1

16. Petitioners have specifically pleaded in para No. 112(i) of the amended petition that BIFR order was passed in case No. 79 of 2012 dated 3.11.2014 under Sick Industrial Companies (Special Provisions) Act 1985 and thereafter AAIFR appeal No. 13 of 2015 was filed against the BIFR order announced in case No. 79 of 2012 dated 3.11.2014 before the appellate authority under Sick Industrial Companies (Special Provisions) Act 1985 which is pending for disposal. As per Section 22 of Sick Industrial Companies (Special Provisions) Act 1985 where inquiry under Section 16 of Sick Industrial Companies (Special Provisions) Act 1985 is pending or where any scheme referred to under Section 17 is under preparation or consideration or where any appeal under Section 25 of the Sick Industrial Companies (Special Provisions) Act 1985 is pending then all other legal proceedings would be suspended. It was held in case reported in ***(1989)Vol.66 Comp.Cases page124 (Allahabad High Court) titled Comet Filaments (India) Ltd. vs. Pradeshya Industrial and Investment Corporation of U.P. Ltd.*** that as long as proceedings under Sick Industrial Companies (Special Provisions) Act 1985 are pending then property of the Companies would remain under direct control of the authorities under Sick Industrial Companies (Special Provisions) Act 1985 and no proceeding in respect of property of the Companies would be proceeded except with consent of competent authority under Sick Industrial Companies (Special Provisions) Act 1985. ***(See AIR 2012 SC 1440 titled Raheja Universal Limited vs. NRC Limited and others. Also see AIR 2015 SC 403 titled Ghanshyam Sarda vs. M/s Shiv Shankar Trading Co. and others. Also see AIR 2009 SC (Supp) 1947 titled M.D. Bhoruka Textiles Limited vs. M/s Kashmiri Rice Industries.)*** Sick Industrial Companies (Special Provisions) Act 1985 is a special Act and it is well settled law that when there is conflict between special law and general law then special law always prevails. It is held that Section 22 of Sick Industrial Companies (Special Provisions) Act 1985 would also apply to proceedings filed under Article 226 of Constitution of India. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final Order)

17. In view of above findings on point No. 1 it is ordered that proceedings of civil writ petition No. 2805 of 2011 will remain under suspension till pendency of proceedings under Sick Industrial Companies (Special Provisions) Act 1985 before the competent authority of law. It is further held that parties will be at liberty to obtain the consent of BIFR board or appellate authority for continuation of legal proceedings relating to civil writ petition No. 2805 of 2011. Amended response to amended petition will be filed by respondents after completion of proceedings under Sick Industrial Companies (Special Provisions) Act 1985 or after obtaining consent of competent authority under Sick Industrial Companies (Special Provisions) Act 1985 for continuation of proceedings of civil writ petition No. 2805 of 2011. Interim order passed accordingly.

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

M/s Sainsons Pulp & Papers Ltd. and another ....Applicants/Petitioners.

Versus

State Bank of India and others ....Non-applicants/Respondents

CMP No. 5525 of 2015
CWP No. 2805 of 2011
Order Reserved on CMP: 21.5.2015
Date of Order upon CMP 3rd June, 2015

Code of Civil Procedure, 1908- Order 6 Rule 17- Petitioners sought amendment of the Writ Petition which was opposed on the ground that application was filed with a view to delay the decision of civil writ petition- petitioners had violated the financial discipline of the bank and had not adhered to the payments schedule- notice was issued to the petitioner under Section 13(2) SARFESI Act and the Writ Petition is not maintainable- held, that Court should allow all the amendments, which are necessary for determining the real controversy between the parties and do not cause any prejudice to the other side which cannot be compensated in terms of money – in the present case, no prejudice would be caused if the application is allowed as the proposed amendment is explanatory in nature relating to subsequent events- application allowed subject to the payment of cost of Rs. 3,000/-.

(Para- 25 to 27)

Cases referred:

Abdul Rehman vs. Mohd. Ruldu, 2012(10 JT SC 97
M/s Ganesh Trading Co. vs. Moji Ram, AIR 1978 SC 484

For the Applicants/Petitioners:	Mr. Vinay Kuthiala, Sr. Advocate with Mr.Rahul Mahajan, Advocate.
For Non-applicant/ Respondent No.1:	Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.
For non-applicant/ Respondent No.3:	Mr. J. S. Rana Assistant Advocate General.
For Non-applicants/ Respondents Nos.4&5:	Mr. Angrej Kapoor Advocate vice Mr.Ashok Sharma, Assistant Solicitor General.

The following interim order of the Court was delivered:

P.S. Rana, Judge

INTERIM ORDER

Present application is filed under Order 6 Rule 17 CPC read with Section 151 CPC and Rule 13 of H.P. High Court Writ Jurisdiction Original Sides Rules 1997 and under Article 226(1) of the Constitution of India for amendment of CWP No. 2805 of 2011 titled as M/s Sainsons Pulp and Papers Ltd. vs. State Bank of India and another. It is pleaded that applicants filed civil writ petition which is pending adjudication before the Court. It is pleaded that applicants have set up a papers making unit under the name and style of M/s Saisons Pulp Papers Ltd. at village Taliwal Nichala Tehsil Haroli District Una H.P. with 200 TDP (Tone per day capacity) entailing a capital cost of Rs.125/- crores. It is pleaded that non-applicant State Bank of India granted credit facility to the applicant in the following manner:-

i) Term Loan-I Rs. 32.25 Crores

ii) Term Loan-II	Rs. 27.25 Crores
iii) Term Loan-III	Rs. 15.00 Crores
iv) Cash Credit limit	Rs. 15.00 Crores.

It is pleaded that apart from the above applicants company and its promoters had also invested an amount of Rs. 48.39 crores in setting up of the papers making unit at village Taliwal Nichala Tehsil Haroli District Una H.P. It is further pleaded that papers unit at village Taliwal started its operation on dated 27.3.2010 and fire broke out on dated 11.12.2010 in the industrial unit due to electrical short circuiting causing damage to revinder machine, finished stock of papers, instruments cable, electrical cable, control cable etc. It is pleaded that despite fire incident and despite hampering of production applicants company had paid to the State Bank of India a sum of Rs. 408.00 lacs by way of installments and interest as of 31.12.2010. It is pleaded that after filing the writ petition subsequent development took place. It is pleaded that by way of amendment applicants intended to bring on record the subsequent events which took place after filing of writ petition till date. It is pleaded that proposed amendment will not change the nature of writ petition and bringing on record subsequent events are necessary for just and proper adjudication of civil writ petition and for deciding the controversy inter se the parties properly. It is pleaded that no prejudice will be caused to non-applicants. Applicants sought following amendments.

2. 112(a) That applicants vide letter dated 19.01.2013 submitted a one time settlement (OTS)/proposal to non-applicant No.1. Applicants submitted that they desire of settlement with the Bank and Financial Institution after due consideration of statutory liability and market scenario condition of the assets and distress realization value so that the unit can be made viable with the help of investors, who are ready and willing to provide fund to the applicants company for amicable realistic OTS and later on for re-starting the operation of the industrial unit. It is pleaded that applicants also submitted that in order to make the unit viable fresh investments will also be required and to restart the operation and up-gradation working capital of Rs. 2000 to 2500 lac is required.

3. 112(b) That applicants company was asked by non-applicant No. 1 vide letter dated 22.1.2013 to improve OTS offer and further pleaded that applicants company vide letter dated 4.5.2013 justified one time settlement submit vide letter dated 19.1.2013 to non-applicant No.1. That non-applicant No.1/State Bank of India vide letter dated 7.5.2013 intimated the applicants that OTS submitted was put before the competent authority for action.

4. 112(c) That applicants thereafter again vide letter dated 30.7.2013 again requested the non-applicant No.1 to consider the OTS keeping in view the financial position and realizable value of the assets of the applicants company. It is further pleaded that non-applicant No. 1 vide letter dated 31.7.2013 intimated that the official of non-applicant No. 1 at Delhi have been asked to examine the “One time settlement” and they would respond to the applicants company directly. It is pleaded that however vide letter dated 26.8.2013 non-applicant No. 1 intimated that OTS was found not acceptable and it is further pleaded that applicants thereafter wrote letter dated 10.9.2013 requesting non-applicant No. 1 to allow applicants to meet its official for discussions on his proposal. It is also pleaded that request of applicants was accepted and was conveyed vide mail dated 13.9.2013 and in the meeting with official of non-applicant No. 1 bank applicants asked the bank officers at Chandigarh to get the assets valued from the recognized valuer of the assets who are on the list of non-applicant No.1.

5. 112(d) That applicants thereafter again vide letter dated 11.10.2013 submitted to non-applicant No.1 to consider the OTS of the assets of applicants company by taking a practical view and vide letter dated 14.11.2013 applicants also requested non-applicant No.1 to provide list of valuer and further pleaded that non-applicant No. 1 vide letter dated 16.11.2013 conveyed to the applicants that they have entrusted job of valuation of the property of applicants to M/s D.S. and Associates and applicants vide letter dated 16.12.2013 requested non-applicant bank to provide valuation report which would be done by M/S D.S. and Associates as conveyed vide letter dated 16.11.2013.

6. 112(e) That non-applicant No.1 bank got the valuation of assets and receipt of valuation conducted by M/s D.S. and Associates was submitted to the applicants and further pleaded that thereafter applicants immediately on the valuation which was done by M/s D.S. and Associates submitted to non-applicant No.1 OTS proposal of Rs.28.50 crores along with OTS schedule of payment. It is pleaded that non-applicant No.1 bank vide letter dated 4.11.2014 without personal hearing and giving an opportunity to the applicants to put forth their case of OTS in an unilateral and capricious manner submitted that OTS of Rs. 28.50 crores was too low and not acceptable.

7. 112(f) That it is submitted that the applicants had also asked non-applicant No.1 bank and its official to provide copy of latest valuation report vide letters dated 1.10.2014 and 3.10.2014 but no copies provided to applicants. It is pleaded that the applicants had submitted OTS on the basis of the valuation done by M/s D.S. and Associates and also justified OTS submitted by giving reasons for submitting Rs. 28.50 crores as one time settlement. It is pleaded that applicants thereafter again on 10.12.2014 submitted OTS by substantially enhancing the same to Rs.37.50 crores and also submitted therein that a buyer has approached the applicants on dated 7.12.2014 to buy the unit at village Taliwal and agricultural land at village Taliwal for Rs.31.25 crores. It is pleaded that reasons for substantial enhancing of OTS from Rs. 28.50 crores to Rs. 37.50 crores was also submitted on dated 10.12.2014. It is further pleaded that said revised proposal of Rs.37.50 crores which was submitted by applicants was also not considered and was rejected by non-applicant bank in an arbitrary and unilateral manner without giving an opportunity to the applicants to put forth their proposal in person. It is further pleaded that applicants are striving hard to revive the industrial unit and for the same have submitted OTS proposal and have approached various investors to invest in the papers making unit so that its operation could be started but hindrance was created by non-applicant No.1 bank every time whenever proposals were submitted for OTS and revival of applicants company.

8. 112(g) That applicants vide letters dated 28.11.2014, 3.12.2014, 25.12.2014 and 10.3.2015 has submitted application under Right to Information Act to non-applicant No. 1 bank-cum-Public Information Officer to provide the latest valuation report in respect of applicants company assets. It is pleaded that in spite of having written applications under Right to Information Act latest valuation report in respect of assets were not provided by non-applicant No.1 bank and it is further submitted that latest valuation report was not submitted to applicants company even in spite of submission of application under Right to Information Act but non-applicant No.1/bank in an application for early hearing filed before the Hon'ble Court clearly mentioned extract of latest valuation report of some of the property of the applicants company. It is pleaded that on the basis of extract of latest valuation report submitted by non-applicant No.1/bank revised OTS dated 10.12.2014 was submitted for Rs.37.50 crores and said OTS was also not considered in a just and proper manner and it was rejected vide letter dated 18.12.2014 by non-applicant No.1. It is pleaded that rejection of OTS submitted by applicants have been rejected without any basis and criteria and without looking into and without giving an opportunity of personal hearing to the applicants

company and OTS has been rejected in contravention of guidelines of RBI which are binding on non-applicant No.1.

9. 112(h) That it is submitted that non-applicant No. 1 bank vide latest valuation report carried out fixed reserve price of assets, plant and machinery of the applicants unit at village Taliwal, Tehsil Haroli District Una as Rs. 27.50 crores. It is pleaded that reserve price of House No. 1086 Sector 7 Panchkulla (Chandigarh) was not disclosed by non-applicant No. 1 bank in application filed for early hearing moved before the Hon'ble Court. It is further pleaded that applicants company since 2011 after industrial unit was closed down due to non-cooperative attitude of non-applicant No.1 bank and fire incident. It is pleaded that applicants deployed 10-12 guards every day and are also lightening the entire industrial premises as well as boundary by way of generators in order to ensure that there should be no theft in the industrial unit. It is further pleaded that assets, plant, machinery are installed in the industrial establishment of applicants company at village Taliwal, Tehsil Haroli District Una and non-applicant No.1 bank till date even after assessing the reserve price has not bothered to make detailed inventory of assets, plant and machinery stores. It is further pleaded that non-applicant No. 1 is instrumental in closing down of unit of applicants company at village Taliwal, Tehsil Haroli District Una which was installed for manufacturing of papers and till date valuation of two properties i.e. House No. 1086 Sector-7 Panchkulla (Chandigarh) and agricultural land at Khangesra in the name of Ramesh Kumar Saini and Smt. Shashi Bala have not been provided. It is pleaded that non-applicant No. 1 bank on dated 29.12.2014 has provided the valuation report of the properties, assets but in respect of two properties still valuation report has not been provided. It is also pleaded that applicants company vide letter dated 20.3.2015 has also written letter to non-applicant No. 1 that they are spending nearly Rs.5,00,000/- (Rupees five lacs only) every month in order to ensure that there should be no theft in the industrial unit and to keep secure the applicants company assets.

10. 112(i) That it is submitted that applicant have filed a reference before the Board of Industrial Financial Reconstruction at New Delhi under the provisions of Sick Industrial Company Special Provisions Act 1985 and said reference was registered as Reference No. 79 of 2013 (corrected as 79 of 2012 taking judicial notice on the basis of record placed on record). It is pleaded that on dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) BIFR deregistered the reference made by applicants company and applicants company against the BIFR order dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) passed by BIFR in Reference No. 79 of 2012 on 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) have filed an appeal before the Appellate Authority for Industrial and Financial Reconstruction New Delhi (AAIFR) and said appeal has been registered as AAIFR Appeal No. 13 of 2014 (corrected as 13 of 2015 taking judicial notice on the basis of record placed on record). It is also pleaded that at present the issues regarding the applicants company being a Sick Industrial Company under the Sick Industrial Special Provisions Act is pending adjudication before the Appellate Authority for Industrial and Financial Reconstruction New Delhi and if the appeal is allowed and order of BIFR dated 3.12.2014 (corrected as 3.11.2014 taking judicial notice on the basis of record placed on record) de-registering the reference will be set aside and the applicant will stand automatically registered in BIFR and provisions of Sick Industrial Company Special Provisions Act would have an overriding effect. It is pleaded that notices in appeal have been issued and is now listed on dated 27.5.2015.

11. 112(j) That non-applicant No.1 bank has filed an Original Application before the Debt Recovery Tribunal-I at Chandigarh and applicants company has also filed a suit for recovery/counter claim against non-applicant bank. It is also pleaded that said suit/counter

claim are also pending for adjudication and present writ petition was filed prior to the filing of suit and counter claim before the Debt Recovery Tribunal. It is also pleaded that appeal against the order of BIFR stand filed and notices have been issued to the non-applicant bank and if appeal is allowed then applicants company will be registered under BIFR. It is pleaded that order of BIFR deregistering the applicants company will have no force and applicants on registration in BIFR all proceedings will be abided as per provisions of Sick Industrial Special Provisions Act and non-applicant bank are harassing the applicants company by threatening them that they would sell the residential house situated at House No. 1086, Panchkulla, Chandigarh without even prior proceedings towards realization of the value of Industrial establishment i.e. paper unit at village Taliwal, Tehsil Haroli District Una H.P. which is primary security and non-applicant bank wants to make applicant No. 2 homeless and without any shelter.

12. 112(k) That it is submitted that applicants company still wants to revive its industrial establishment at village Taliwal, Tehsil Haroli District Una H.P. and applicants company has buyer and even investors who are ready and willing to buy and run the industrial establishment unit at village Taliwal Tehsil Haroli District Una H.P. provided non-applicant bank sits with open and listen to the problem of the applicants company and extended hands towards finalizing of OTS on the basis of realistic distress value of the assets and Rs. 48.39 crores has also been invested by promoters of the applicants company and promoters money have also gone down on account of act conduct and deed and non-cooperative attitude and malafide intention of non-applicant No.1 bank.

13. 112(l) That act, conduct of non-applicant No.1 bank is violative of Article 14 of Constitution of India and the Tandon Core Committee Report and Reserve Bank of India Guidelines has not been followed and in the month of December 2010 the term loan accounts/cash credit limits were regular and applicants company was not in default. It is pleaded that applicants company had paid Rs. 408 lac as on 31.12.2010 and in spite of all these things non-applicant No. 1 bank rather than extending a helping hand to the applicants company for its revival in fact by not releasing the sanctioned limits of loan and cash credit limit ensured that industrial establishment should close down. It is further pleaded that in fact non-applicant No. 1 bank, its officials are responsible for closing down of industrial establishment of applicants and the unit operated for barely about nine months and non-applicant No.1 started demanding exorbitant repayments.

14. Applicants also sought following amendments in relief clause. E(i) Direct respondent No. 1 bank to reconsider the one time settlement proposal on realistic base and to grant an opportunity of hearing to the applicants company to put forth their case for OTS.

15. E(ii) Quash and set aside letter dated 18.12.2014 whereby rejected OTS proposal.

16. E(iii) Direct the respondent bank to allow the applicant to bring a better buyer in respect of the properties/assets and also in respect of the properties not mentioned in Annexure P-47.

17. E(iv) Direct respondent No. 1 bank to bear expenses of security guards, generators being run at the industrial premises at village Taliwal, Tehsil Haroli District Una H.P. amounting to Rs.5,00,000 per month in view of the facts that symbolic possession under SARFASI has already been taken by respondent No.1 bank.

18. E(v) To direct respondent No.1 bank to provide the guidelines for submitting of one time settlement as applicable to it and to follow these guidelines.

19. E(vi) Direct respondent No. 1 not to take any further action for recovery till the decision of proceedings pending before AIFR.

20. E(vii) In alternative respondent No. 1 may be directed to proceed against the principal security i.e. land, building and factory premises at the first instance.

21. Per contra reply filed on behalf of non-applicant bank pleaded therein that present amendment application filed with a view to delay the decision of civil writ petition. It is pleaded that applicants have violated the financial discipline of the bank and did not adhere to the payments schedule. It is pleaded that unit is not functioning. It is pleaded that power of unit was cut off in February 2011 by H.P. State Electricity Board for non-payment of dues to the tune of ` 64 lacs and a sum of Rs.101,69,57,370/- were due from applicants to the bank as on dated 27.5.2011. It is pleaded that notice dated 28.5.2011 was issued to the applicants under Section 13 (2) of SARFESI Act and applicants are not legally entitled to invoke the writ jurisdiction of High Court as alternative efficacious and speedy remedy is available to the applicants to approach the Debt Recovery Tribunal in accordance with the provisions of Act. It is pleaded that OA No. 124 of 2012 for recovery of Rs.1161527277.95 was filed before the Debt Recovery Tribunal (I) Chandigarh on dated 29.12.2012 and proceedings are pending before the Debt Recovery Tribunal Chandigarh. It is pleaded that an amount of Rs.179,59,40,719.80 was due in March 2015 from applicants company and presently an amount of Rs.179,67,14,362.38 is due on dated 30.4.2015. It is pleaded that after adjusting the sale proceeds of properties sold in village Baltana Zirakpur namely one commercial shop sold for Rs.21 lacs and second property namely residential house sold for Rs.51 lacs on dated 14.3.2015 and properties were auctioned on dated 14.3.2015 and pursuant thereto the sale certificate was issued in favour of auction purchaser after receipt of the entire auction money. It is pleaded that applicants resisted the taking over the factory in village Talhiwal on dated 19.1.2015 with help of local sympathizers including ladies and further pleaded that huge outstanding amount against the applicants could only be recovered by sale of residential house in Panchkulla and factory, land, building including plant and machinery situated at Tahliwal which too would be insufficient to satisfy the amount outstanding to non-applicant bank. It is further pleaded that disputed facts are involved and thereafter one time settlement request has been turned down. It is pleaded that amount due could only be recovered by way of sale of properties of applicants including residential house. It is pleaded that applicants are not entitled for amendment in writ petition. Prayer for dismissal of application sought.

22. Applicants also filed rejoinder pleaded therein that applicants intended to bring on records subsequent events which are essential for resolving the real controversy intere se the parties and to avoid multiplicity of litigation. It is pleaded that outcome of entire proceedings would depend upon the ultimate order which would be passed by appellate authority under Sick Industrial Companies (Special Provision) Act 1985. It is pleaded that non-applicant bank is not adhering to the guidelines and principles laid down by Reserve Bank of India for one time settlement and non-applicant bank cannot be allowed to take advantage of his own act omission and commission. It is pleaded that proceedings are pending before appellate authority under Sick Industrial Companies (Special Provision) Act 1985.

23. Court heard learned Advocates appearing on behalf of the parties and Court also perused the entire record carefully.

24. Following points arise for determination in this civil writ petition:-

1. Whether application filed under Order 6 Rule 10 read with Section 151 CPC and Rule 13 of H.P. High Court Writ Jurisdiction Original Sides Rules 1987 and under Article 226(1) of Constitution of India is liable to be accepted as per grounds mentioned in application?
2. Final Order.

Findings on point No.1

25. It was held in case reported in ***2012(10 JT SC 97 titled Abdul Rehman vs. Mohd. Ruldu*** that Court should allow all amendments which would be necessary for determining the real controversy between the parties provided that amendment should not cause injustice or prejudice to the opposite party. Following principles should be followed in dealing with application for amendment of pleadings. (1) That all amendments will be generally permissible when they are necessary for determining the real controversy inter se the parties. (2) That party cannot be allowed to change the subject matter of controversy. (3) That inconsistent and contradictory amendments should not be permitted. (4) That amendment should not cause prejudice to other side which could not be compensated in terms of costs. (5) That amendment which is barred by law should not be allowed. The power of amendment is granted to Court in larger interest and to give full justice to parties. ***(See AIR 1978 SC 484 titled M/s Ganesh Trading Co. vs. Moji Ram)*** Since proposed amendment is just explanation of subsequent events Court is of the opinion that proposed amendment is essential in order to dispose of civil writ petition properly and effectively and to impart substantial justice inter se parties.

26. Submission of learned Advocate appearing on behalf of the non-applicants that present application has been filed with mala fide intention to delay the disposal of civil writ petition and on this ground application filed under Order 6 Rule 17 CPC be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that opportunity to file reply to proposed amendment will be granted to non-applicants and Court is of the opinion that no prejudice will be caused to non-applicants if proposed amendment is allowed as proposed amendment is only explainary in nature relating to subsequent events. Court is also of the opinion that non-applicant can be compensated with heavy costs for filing the proposed amendment at the belated stage. In view of above stated facts point No. 1 is answered in affirmative.

Point No.2 (Final Order)

27. In view of above stated CMP No. 5525 of 2015 is allowed and proposed amendments as sought in CMP No. 5525 of 2015 are allowed in the ends of justice. Costs to the tune of Rs.3000/- (Rupees three thousand only) also imposed which will be paid to non-applicant No. 1 i.e. State Bank of India. Observations made in this order will not effect the merits of civil writ petition in any manner and will strictly confine for the disposal of CMP No. 5525 of 2015. CMP is disposed of.

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

Rikhikesh son of Shri Narain Dass ....Revisionist

Versus

Om Parkash ....Non-Revisionist

Civil Revision No. 17 of 2015
Order Reserved on 22nd May 2015
Date of Order 3rd June, 2015

Code of Civil Procedure, 1908- Order 21 Rule 32- A counter-claim was filed for specific performance of the contract which was decreed- application for execution of the decree was filed- objections were filed pleading that Execution Petition is not maintainable and the

decree is not executable in view of the instructions issued by the govt.- held that, decree had attained finality and it cannot be nullified by taking course to administrative instructions.

(Para-7)

For the Revisionist: Mr. G.R. Palsara, Advocate
For the Non-Revisionist: Mr. Devender K. Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order:- Present revision is filed against the order dated 15.1.2015 passed by learned Civil Judge (Senior Division) Mandi in Execution Petition No. 223 of 2013 titled Om Parkash vs. Rikhikesh.

2. Brief facts of the case as pleaded are that Om Parkash filed execution petition under Order 21 Rule 32 CPC against revisionist pleaded therein that counter claim No. 43 of 2008 filed in Civil Suit No. 53 of 2003 was decreed by learned trial Court on dated 2.8.2008 and thereafter appeal was filed and learned Additional District Judge FTC Mandi District Mandi affirmed the judgment and decree passed by learned trial Court and dismissed the civil appeal No. 53 of 2008 on dated 21.2.2012 titled Rikhikesh vs. Om Parkash. It is pleaded that Rikhikesh filed a suit for partition and injunction relating to suit land. It is pleaded that suit filed by plaintiff was resisted and contested by defendant by way of filing written statement and by way of filing counter claim. Counter claim was filed for specific performance of contract dated 27.11.1996. It is pleaded that learned trial Court dismissed the civil suit and decreed the counter claim No. 43 of 2008. It is pleaded that Rikhikesh did not comply the judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court and prayer for execution of judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court sought by way of filing execution petition. It is proved on record that thereafter Rikhikesh filed objections under Section 47 of CPC in execution petition pleaded therein that execution petition is not maintainable and is not executable. It is pleaded that relinquish deed could only be executed by relative as per instructions of the Government and further pleaded that Om Parkash and Rikhikesh are not relatives but are only co-sharers and hence decree passed by learned trial Court could not be executed. It is pleaded that judgment and decree could not be executed by way of appointing the Reader. Prayer for acceptance of objection petition sought before Executing Court.

3. Per contra reply filed to the objections petition on behalf of Om Parkash pleaded therein that execution petition is maintainable and decree passed by learned trial Court is executable. It is pleaded that instructions issued by the Government could not override statute. It is pleaded that deficient court fee already stood deposited. It is pleaded that decree could be executed by way of appointing Reader of Court to execute the decree and prayer for dismissal of objections petition sought in execution petition.

4. Thereafter learned trial Court on dated 15.1.2015 dismissed the objections filed by objector under Section 47 of CPC and appointed the Reader of Court to execute the decree passed by learned trial Court. Feeling aggrieved against the order passed by learned trial Court dated 15.1.2015 revisionist filed the present revision petition.

5. Court heard learned Advocate appearing on behalf of the revisionist and learned Advocate appearing on behalf of the non-revisionist and also perused the record carefully.

6. Following points arise for determination in this revision petition:-

1. Whether revision petition filed by revisionist under Section 115 of CPC is liable to be accepted as mentioned in memorandum of grounds of revision petition?
2. Final Order.

Findings on Point No.1

7. Submission of learned Advocate appearing on behalf of revisionist that in view of instructions issued by Financial Commissioner Himachal Pradesh to the Registration Officers judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could not be executed is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Rikhikesh filed civil suit No. 53 of 2003 titled Rikhikesh vs. Om Parkash for partition and injunction. It is also proved on record that thereafter Om Parkash filed the counter claim No. 43 of 2008 pleaded therein that Rikhikesh had executed an agreement dated 27.11.1996 in favour of Om Parkash. It is proved on record that learned trial Court dismissed the suit filed by Rikhikesh and decreed the counter claim filed by Om Parkash. It is proved on record that thereafter Rikhikesh filed civil appeal No. 53 of 2008 and same was disposed of by learned Additional District Judge Fast Track Court Mandi on dated 21.02.2012 titled Rikhikesh vs. Om Parkash. Learned first Appellate Court framed following points for determination. (1) Whether plaintiff being joint owner and in joint possession of suit land is entitled to the partition of the suit land and to the equitable relief of injunction. (2) Whether there is a lawful agreement dated 27.11.1996 Ext.DA inter se the parties and the plaintiff agreed to relinquish his share in the suit land in favour of the defendant as the defendant has agreed to construct a retaining wall for the protection of the plaintiffs land. (3) Whether impugned judgment and decree dated 2.8.2008 passed by learned trial Court are liable to be set aside. It is proved on record that thereafter learned first Appellate Court decided point No. 1 and 3 against Rikhikesh and decided point No. 2 in favour of Om Parkash. Learned first Appellate Court dismissed the appeal filed by Rikhikesh. It is proved on record that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court attained the stage of finality. There is no evidence on record in order to prove that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court were set aside by Hon'ble High Court of H.P. in RSA. Both learned trial Court and learned first Appellate Court have held that lawful agreement dated 27.11.1996 Ext.DA was executed inter se the parties and both Court held that Rikhikesh had agreed to relinquish his share in the suit land in favour of Om Parkash. It is also proved on record that Om Parkash agreed to construct a retaining wall for protection of plaintiff's land. There is recital in order sheet of learned Civil Judge (Senior Division) Mandi dated 25.3.2015 that relinquishment deed already stood executed and learned Advocate appearing on behalf of Om Parkash had given the statement that counter claim decree has been duly satisfied and he intended to withdraw the execution petition as fully satisfied. Statement was given by learned Advocate on dated 25.3.2015 before the Executing Court. It is held that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could not be nullified by way of administrative instructions issued by Under Secretary (Revenue) Government of H.P. It is held that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court could be set aside only by Hon'ble High Court of H.P. in RSA or by Hon'ble Supreme Court of India in SLP. There is no evidence on record in order to prove that judgment and decree passed by learned trial Court and affirmed by learned first Appellate Court were set aside by Hon'ble High Court of H.P. in RSA or were set aside by Hon'ble Supreme Court of India in SLP. In view of above stated facts it is held that there is no illegality and irregularity in the order of learned Executing Court. It is further held that learned Executing Court had

not failed to exercise the jurisdiction so vested in learned Executing Court. It is held that learned Executing Court had not exercised the jurisdiction not vested in learned Executing Court by law. It is further held that learned Executing Court has passed the order in accordance with law. In view of above stated facts, point No. 1 is answered in negative against the revisionist.

Point No.2 (Final Order)

8. In view of my findings on point No.1 revision petition is dismissed. Order of learned Executing Court is affirmed. All pending application(s) if any also disposed of. No order as to costs File of learned Executing Court be sent back along with certified copy of this order forthwith. Civil Revision petition is disposed of.

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

State of H.P. .....Appellant.
Versus
Om Parkash ...Respondent.

Cr. Appeal No.: 253 of 2008
Reserved on: 28.5.2015
Date of Decision : 03.06.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1120 grams of charas- prosecution witnesses deposed in tandem and harmony- sample was taken on 14.5.2006 and was deposed on 19.5.2006- sample of 25 grams was taken at the spot but its weight was found to be 19.3711 grams in the laboratory- hence, variation in the weight of the sample leads to an inference that sample analysed was not connected to the sample taken at the spot. (Para-9 and 10)

For the Appellant: Mr. M.A.Khan, Addl. Advocate General.
For the respondent: Mr. Virender Singh Rathore, Advocate.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, *Judge*

This appeal is directed against the judgement of acquittal rendered on 15.11.2007 by the learned Special Judge (Court No.II), Kangra at Dharamshala, H.P. in Sessions Case No. 30-D/06 whereby the learned trial Court acquitted the respondent for his having committed offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act.

2. The prosecution story, in brief, is that on 14.5.2006 at about 7.10 p.m. SI Om Parkash, ASI Ranbir Singh HC Madan Mohan and C Anil Kumar were present at Kalapul for arranging a naka under rapat No. 10. At that time, the accused was seen by the police party. On seeing the police party, accused ran back, but was apprehended by the police after a chase. In the presence of two witnesses Om Parkash and Suresh Kumar, the accused has disclosed his name to the police to be Om Prakash. SI Om Parkash then gave his personal search to the accused but nothing incriminating was found on his personal search. On search of accused, Bag Ex. P-3, carried by him was checked and on its checking

a yellow coloured plastic bag Ex. P-4 was found in it, which on checking was found to be containing charas Ex. P-5 in the form of tikkis. After weighing the charas so recovered from the possession of the accused, it was found to be 1120 grams. Two samples of 25 grams each of the contraband were separately taken for the purpose of analysis which were kept inside the matchboxes and thereafter both these match boxes were separately sealed in two cloth parcels with seal D and the remaining bulk of charas had been separately sealed in a cloth parcel with seal D. NCB forms in triplicate Ex. PW-3/B were filled in and sealed with seal impression D. All the documents were signed by the witnesses at the site of the occurrence. Rukka Ex. PW-2/A was prepared at the spot. FIR comprised in Ex. PW-2/B was registered. Site plan comprised in Ex. PW-11/D was also prepared. The accused was arrested under memo Ex. PW-11/F. The case property was produced by SI Om Parkash before ASI Surjit Kumar, who had re-sealed the sample and bulk of charas with his own seal 'A' and had also affixed six seals 'A' on NCB form. Separate seal impression of seal "A" on a piece of cloth was taken which is Ex. PW-3/C and thereafter all the case property after re-sealing had been handed over to MHC of police Station, concerned. Special report comprised in Ex. PW-4/A was prepared by the SHO and was sent to SP Kangra through HC Balbir Chand which was handed over by him to HC Subhash Chand, the then reader of SP, Dharamshala, who entered the same in the register. On 18.5.2006 MHC Anil Kumar, Police Station, Dharamshala had sent the sample of charas, one NCB form, one docket and samples of seal 'A' and 'D' to CTL Kandaghat through HHC Bir Singh, who had deposited the same to CTL Kandaghat. Chemical examiner report is comprised in Ex. PW-11/J and receipt of all the items aforesaid is comprised in Ex. PW-5/A.

3. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court. The trial Court charged the accused for his having committed offence punishable under Section 20 of the NDPS Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused was given an opportunity to adduce evidence in defence and he chose not to adduce any evidence in defence.

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

6. The State of H.P. is aggrieved by the judgement of acquittal, recorded by the learned trial Court. Shri M.A.Khan, Additional Advocate General, has concertedly and vigorously contended that the findings of acquittal, recorded by the learned trial Court, are not based on a proper appreciation of the evidence on record, rather, they are sequelled by gross mis-appreciation of the material on record. Hence, he contends that the findings of acquittal be reversed by this Court, in the exercise of its appellate jurisdiction and be replaced by findings of conviction and concomitantly an appropriate sentence be imposed upon the accused/respondent.

7. On the other hand, the learned counsel appearing for the respondent-accused, has, with considerable force and vigour, contended that the findings of acquittal, recorded by the Court below, are based on a mature and balanced appreciation of evidence on record and do not necessitate interference, rather merit vindication.

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

9. Even though, the prosecution witnesses have deposed in tandem and in harmony in proof of each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, hence portraying proof of unbroken and un-severed links, in the entire chain of the circumstances, therefore, it is argued that when the prosecution case stands established, it would be legally unwise for this Court to acquit the accused. Besides, it is canvassed that when the testimonies of the official witnesses unravel the fact of theirs being bereft of any inter-se or intra-se contradictions, hence, consequently they too enjoy credibility.

10. The genesis of the prosecution version has been proved by the depositions of the official witnesses. The depositions of the official witnesses, in concerting to prove the prosecution case, are undiscardable in the event of theirs depositions not suffering from the taint of inter-se or intra-se contradictions. However, in the event of blatant or open discrepancies occurring in the depositions of the prosecution witnesses an apt conclusion would be drawable by this Court that their testimonies are imbued with the vice of incredibility. The upsurging of preponderant, blatant and stark discrepancies are embedded in the depositions of PW-7, PW-10 and PW-11 wherein they have disclosed the fact of sample of charas weighing 25 grams each having been on 14.5.2006 separately sealed in separate match boxes at the site of occurrence, in sequel to the recovery of contraband from the conscious and exclusive possession of the accused. The sample had come to be deposited on 14.5.2006 in the police Malkhana and an apposite entry qua deposit thereof was recorded in the Malkhana register. PW-2, who had recorded the entry in the Malkhana register qua deposit of the case property has also deposed that he had on 18.5.2006 sent the parcels for examination to the chemical examiner, Kandaghat, alongwith sample of seal and NCB forms through constable Bir Singh. The certificate appended to the report of the chemical examiner comprised in Ext.PW-11/J bespeaks the fact that the sample had been deposited on 19.5.2006 by the official concerned and on weighment it was found to be 19.3711 grams. The communication in the certificate appended to the report of the Chemical Examiner qua the variant weight of the sample as received by him, for analysis in the laboratory concerned viz.a.viz the weight which it bore at the time of its having been separated from the bulk as allegedly recovered from the conscious and exclusive possession of the accused at the site of occurrence, gives latitude or fillips a deduction that the sample on which opinion was returned by the Chemical Examiner in Ext.PW-11/J, is neither relatable nor connectable to the case property, as allegedly recovered from the conscious and exclusive possession of the accused, at the site of occurrence.

11. Furthermore, the oral testimonies of PW-2 and PW-11 underscore the fact that case property had been resealed by ASI Surjeet Kumar and on its resealing it had come to be deposited by him in the Malkahana. Besides, both communicate in their respective testimonies that ASI Surjeet Kumar had deposited the case property alongwith NCB forms and sample of seals, in the Malkhana concerned. However, the revelation in Ext.PW-2/E, the abstract of Malkhana Register, belies the oral testimonies of PW 2 and 11, qua the fact of ASI Surjeet Kumar after his having resealed the case property, his having deposited the same alongwith NCB forms and the sample of seals in the Malkhana concerned inasmuch, as, the factum of deposit of case property in the Malkhana concerned has been depicted therein to be at the instance of both Om Prakash and Surjeet Kumar. Ext.PW-2/E hence, undermining the oral testimonies of PW-2 and PW-11 qua the fact as deposed by them, sequels the concomitant inference that the case property had, besides passing through the hands of ASI Surjeet Kumar had also passed through the hands of S.I. Om Prakash, who may have with an oblique motive even after its initial resealing by ASI Surjeet Kumar undone the initial resealing and resealed it. Moreover, with documentary evidence

comprised in Ext.PW-2/E communicating the fact of NCB forms having been not deposited with the MHC, constrains an inference that the case property as transmitted through an official witness for its examination in the laboratory concerned was transmitted without it being accompanied by the NCB forms for facilitating the chemical analyst to collate the seal impression depicted in the NCB forms to be borne as such on the parcel sent for examination with the seal impressions borne on the parcel. In absence of transmission of NCB forms alongwith the official who carried the sample parcel for examination to the laboratory concerned, obviously precluded and deterred the chemical analyst to collate the seal impressions embossed on the NCB forms with the seal impression carried or borne on the sample parcel, for facilitating an inference that the opinion rendered on the sample parcel sent for analysis to the chemical examiner was qua the property recovered at the site of occurrence from the alleged conscious and exclusive possession of the accused. A further sequel thereof is that the opinion rendered on the sample hence cannot be construed to be relatable or connectable to the case property. The aforesaid pervasive infirmities and discrepancies pervading the prosecution case acquire enormity, with an obvious sequel of the prosecution case hence suffering from the vice of incredibility or prevarication.

12. Fortificatory accentuation to the aforesaid inference is lent by the factum of a conscious and deliberate omission on the part of the Investigating Officer to associate independent witness in the proceedings relating to search, seizure and recovery of contraband, even when there is portrayal in Ext.PW-2/C, of the police, having prior information qua consumption of contraband by tourists at Bhagsunag hence affording ample, abundant and sufficient time and opportunity to the Investigating Officer to solicit the participation of independent witnesses in the proceedings relating to search, seizure and recovery of contraband. Even when besides as deposed by PW-5, 7, 10 and 11 there being a thick habitation in the close vicinity of the site of occurrence hence, as such, despite availability of independent witnesses in close proximity to the site of occurrence , the non-solicitation of their participation by the Investigating Officer in the apposite proceedings, appears to have been goaded by a palpable and oblique motive on his part to smother the truth qua the genesis of the prosecution case or to falsely implicate the accused.

13. In view of above discussion, the learned trial Court is to be concluded to have appreciated the evidence in a mature and balanced manner and its findings, hence, do not necessitate interference. The appeal is dismissed being devoid of any merit and the findings rendered by the learned trial Court are affirmed and maintained. Records be sent back.

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

CWP No. 9521 of 2014 alongwith CWP No. 9539 of 2014 and CWP No. 9922 of 2014.
Date of Decision: 3.6.2015

CWP No. 9521 of 2014.

Miss Tanuja Bhatia .... Petitioner.

Vs.

H.P.University and others .... Respondents.

CWP No. 9539 of 2014.

Miss Chanchal Upreti .... Petitioner.

Vs.

H.P.University and others .... Respondents.

CWP No. 9922 of 2014.

Miss Anika Kumari .... Petitioner.

Vs.

H.P.University and others .... Respondents.

Constitution of India, 1950- Article 226- Petitioners are pursuing their studies in the St. Bedes College, Shimla- petitioners had obtained 8 marks whereas they were required to obtain 10 marks for obtaining admission in higher classes- a representation was made which was allowed by respondent No. 3 and the internal marks were changed- respondent No. 1 did not accept the recommendation of respondent No. 3- it was contended that there is a specific bar regarding the revision of internal assessment- held, that there is no provision in the statute for the revision/review of internal assessment- therefore, respondent No. 1 had rightly refused to accede to the request of respondent No. 3- petition dismissed.

For the petitioner(s): Ms. Archana Dutt, Advocate.

For the respondents: Mr. Jiya Lal Bhardwaj, Advocate for University in all the petitions.

Mr. K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate for respondent No.3 in all the petitions.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)*:*

Since all the writ petitions emanate out of a common impugned order comprised in Annexure P-4, hence, they are liable to be disposed of by a common order.

All petitioners are pursuing their studies in the St.Bedes College, Shimla. They are prosecuting studies in BBA final semester. The teachers supervising the studies of the petitioners carried out their internal assessment. In the initial internal assessment carried out by the supervising teachers qua the progress in studies of the petitioners, the petitioners obtained eight marks whereas they were enjoined to obtain a minimum 10 marks so as to render them qualified for obtaining admission to the higher class. The supervising teachers of the petitioners in the respondent No.3 college having not awarded them the minimum marks to render them qualified or eligible to obtain admission in the higher class, constrained the petitioners to move the respondent No.3 for enhancing the marks previously meted to them qua their internal assessment carried out by the teachers supervising the studies of the petitioners in the semester concerned. The motion or appeal made by the petitioners to the authority concerned for the purpose aforesaid aroused approbation of the authority concerned sequelling preparation of Annexure R-3/1. The respondent No.3 on revising the internal assessment of the petitioners forwarded a communication comprised in Annexure R-3/1 to respondent No.1 for permission being accorded to beget change in the internal assessment of the petitioners in consonance with the manifestation in annexure R-3/1. However, the respondent No.1 responded by relying upon Annexure P-5/A expressing therein its inability to accede to the request of respondent No.3 comprised in Annexure R-3/1. The constraint, which was projected by respondent No.1 to not accept the request of the respondent No.3 comprised in Annexure R-3/1, led the petitioners to institute CWP No. 5853, 5865, 5868 of 2014. This Court while disposing of the above said writ petitions rendered a direction to respondent No.1 to decide the representations made by the petitioners herein to them for not accepting the request made to it by respondent No.3 comprised in Annexure R-3/1. The reasons which beset the respondent No.1 to reject the

representations of the petitioners preferred before it by the petitioners, is entrenched in the fact of the revision of their internal assessment being impermissible. The learned counsel for the petitioners has impeached the decision arrived at by respondent No.1 on the representations made by the petitioners on the short score of the relevant provisions/rules of the University, which have been elucidated in paragraph 3 of the reply of respondent No.1 and which stands extracted hereinafter:-

> "The evaluation of BBA students shall consist of external as well as internal evaluation. The external evaluation will be from 75 marks and internal evaluation shall be from 25 marks. Internal evaluation shall be based on class test, assessment, class participation and attendance of the student. It is recommended that the system of internal assessment can be introduced for the batch of BBA to be admitted in 1996. The candidate has to pass in both internal assessment as well as the written examinations."

omitting to divulge a specific bar against the revision of internal assessment, as such, the decision of respondent No.1 constituted in Annexure A-2 is contended to be untenable. However, the said argument has no sinew or force in the face of an obvious lack of or omission of an explicit enunciation in the hereinabove extracted relevant provisions of the University statute qua bestowment of an inherent vested right in the petitioners to seek review/revision of internal assessment as previously carried out by respondent No.3. Even the submission of the learned counsel that with their being a reticence in the hereinabove extracted university ordinance qua availability of right of revision of internal assessment as initially carried out by respondent No.3, as such, an implied right is vested in the petitioners to seek revision of their internal assessment as previously carried out, is rudderless and without force, in the face of a right in the petitioners to seek reassessment or revision of internal assessment as previously carried out being necessarily enjoined to be expressly or explicitly enunciated in the relevant statute for hence its being invokable at the instance of the petitioners. However, lack of an explicit vestment, in the relevant provisions of the apt statute, of an inherent right in the petitioners to claim review or revision of internal assessment, as previously carried out, pronounces upon the fact that such a right was not thought fit nor contemplated to be vested in the petitioners. As such, the statute being silent qua availability of such a right to the petitioners obviously communicates the fact that no such right as claimed by the petitioners was intended to be foisted upon the petitioners. As a corollary, for reiteration, reticence in the rule qua the existence or availability of a right as claimed by the petitioners cannot facilitate the contention as addressed by the learned counsel for the petitioners nor can tantamount to availability of an implied right in the petitioners to claim revision or review of internal assessment. Moreover, given the fact that the right to obtain revaluation of marks secured by a candidate in examinations finds explicit expression in the apt provisions of the relevant statute, concomitantly then review or revision of internal assessment too ought, to have found explicit expression in the apt statute. Lack of explicit expression in the relevant rules/statute of a right of revision/ reassessment of internal assessment being available to the petitioners only garners an apt inference that no right of revision of marks previously accorded to a candidate in internal assessment was permissible. Consequently, the decision arrived at by the respondent No.1 in Annexure P-4 is vindicable. Besides the decision of respondent No.1 in refusing to accede to the request of respondent No.3 in its communication comprised in Annexure R-3/1, is, tenable Accordingly, all the petitions are dismissed. However, it is open to respondent No.3 to give internal assessment to the petitioners subsequent to their hitherto assessment carried out by the teachers supervising the studies of the petitioners and thereafter their result may be declared by respondent No.1. No costs.

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

Tilak Raj son of Sh. Amar Nath ....Revisionist

Versus

Gram Panchayat Barsar ....Non-Revisionist

Civil Revision No. 24 of 2014
Order Reserved on 21st May 2015
Date of Order 3rd June, 2015

Code of Civil Procedure, 1908- Section 80(2)- Plaintiff filed an application to institute the suit against Gram Panchayat without serving a notice- it was recorded in the resolution that plaintiff was creating obstruction on the public road- Naib Tehsildar (Settlement) mentioned that road was in existence since long time- Gram Panchayat had spent Rs. 7,15,000/- upon the road- Panchayat was repairing the road for the benefit of public - no urgent and immediate relief was required by the plaintiff, therefore, application was rightly dismissed.

(Para-6 and 7)

For the Revisionist: Mr. B.S. Chauhan, Advocate

For the Non-Revisionist: Mr. Sunny Dhatwalia, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present revision is filed against the order dated 21.2.2014 passed by learned Civil Judge (Junior Division) Barsar in CMA No. 58 of 2014 titled Tilak Raj vs. Gram Panchayat Barsar filed under Section 80(2) of Code of Civil Procedure for permission to institute the suit without issuance of notice under Section 80 CPC to Gram Panchayat Barsar.

2. Brief facts of the case as pleaded are that revisionist Tilak Raj filed application under Section 80(2) CPC pleaded therein that revisionist is co-owner in possession of Abadi deh land along with other co-sharers and is owner in possession along with his brother over a portion of land mentioned as ABCD in Annexure 'A' situated in immovable land comprised in Khata No. 981 min, Khatauni No. 1033 min, Khasra No. 1798 land measuring 0-17-06 hectares as per copy of Nakal Khatauni Bandobast Jadid Sani for the year 2009-10 situated in Tikka Barsar Tappa Panjgran Tehsil Barsar District Hamirpur H.P. It is pleaded that Gram Panchayat Barsar Tappa Panjgran Tehsil Barsar District Hamirpur H.P. is stranger to the suit land and Gram Panchayat Barsar started construction of road for vehicles with cement and concrete over the point ABCD as shown in Annexure A which is courtyard of the revisionist and his brother Baghirath. It is pleaded that Gram Panchayat Barsar has accumulated the construction material nearby the suit land and Gram Panchayat is adamant to construct the short road through the suit land which is in possession of revisionist. It is pleaded that if permission is not granted under Section 80(2) CPC to institute the suit then non-revisionist would carve out the road over suit land and in that eventuality revisionist would suffer irreparable loss and injury and same would amount to denial of justice. It is pleaded that matter is urgent in nature and prayer for acceptance of application filed under Section 80(2) CPC sought.

3. Per contra reply filed on behalf of Gram Panchayat Barsar through its Pardhan pleaded therein that application under Section 80(2) CPC is not maintainable and further pleaded that revisionist is estopped from filing application under Section 80(2) CPC

by his own act and conduct. It is pleaded that matter is subjudice before Deputy Commissioner Hamirpur District Hamirpur H.P. It is pleaded that revisionist is not owner nor in possession over the suit land mentioned in site plan ABCD. It is further pleaded that in fact over the land mentioned in site plan as ABCD there exists a road which leads to Jaure Amb from point 'A' and Rajput Basti from point 'B'. It is pleaded that revisionist intentionally and willfully trying to block the public road. It is pleaded that non-revisionist i.e. G.P. Barsar is maintaining the said road since the time immemorial and had invested an amount to the tune of Rs.7,50,000/- (Rupees seven lacs fifty thousand only) since 2009-2010 till up to date. It is pleaded that revisionist intentionally and willfully trying to block the passage in front of his room and non-revisionist i.e local Gram Panchayat had also passed the resolution on dated 11.12.2012 and sent the same to Naib Tehsildar (Settlement) and as per report of Naib Tehisildar (Settlement) revisionist in connivance with his wife Sushma is trying to encroach upon the road. It is pleaded that on dated 16.5.2013 the complaint was sent to Sub Divisional Magistrate Barsar and another complaint was also filed by general public against the revisionist to Deputy Commissioner Hamirpur and inquiry was conducted by Inquiry Officer and as per inquiry report submitted by Inquiry Officer revisionist had blocked the passage in front of his room. It is pleaded that revisionist is causing great inconvenience to the Panchayat as well as to the general public at large. It is pleaded that in fact the Gram Panchayat is repairing the road for the benefit of general public at large. It is pleaded that revisionist intends to create inconvenience to the general public and further pleaded that there exists three metre wide road in front of the room of revisionist. It is pleaded that revisionist has filed the application with malafide intention just to harass the Gram Panchayat and general public at large. Prayer for dismissal of application filed under Section 80(2) CPC sought.

4. Court heard learned Advocate appearing on behalf of the revisionist and learned Advocate appearing on behalf of the non-revisionist and also perused the record carefully.

5. Following points arise for determination in this revision petition:-

1. Whether revision petition filed by revisionist under Section 115 of CPC is liable to be accepted as mentioned in memorandum of grounds of revision petition?
2. Final Order.

Findings on Point No.1

6. Submission of learned Advocate appearing on behalf of revisionist that portion ABCD is used by revisionist as his courtyard and same is in exclusive possession of revisionist and revisionist has no other courtyard except the present courtyard situated in Abadi Deh land and on this ground revision petition filed by revisionist be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused site plan ABCD placed on record. In site plan road has already been shown in existence in portion ABCD. Even there is prima facie evidence on record that resolution was passed by Gram Panchayat Barsar on dated 15.8.2013 and there is recital in resolution that revisionist is creating obstruction upon the public road. Even in report of Naib Tehsildar (Settlement) placed on record it is specifically mentioned that road is in existence in suit land and there is also recital in report of Naib Tehsildar (Settlement) placed on record that road is in existence since long time. There is also prima facie evidence on record that Panchayat had already spent an amount of Rs. 7,50,000/- (Rupees seven lacs fifty thousand only) upon the road since 2009 till date. It is prima facie evidence on record that suit land is situated in Abadi Deh. It is also proved on record that no partition of Abadi Deh land took place till date. It is well settled law that Abadi Deh land is in ownership of all residents of

village who used to pay the land revenue. It is also proved on record that suit land i.e. Abadi Deh is joint between the owners. It is also well settled law that no co-owner can claim exclusive right in joint property till the joint property is not partitioned in accordance with law. It is proved on record that in Abadi Deh land interest of general public is involved. It is prima facie proved on record that Panchayat is repairing the road for the benefit of general public. It is well settled law that when there is conflict between the interest of individual and interest of general public then interest of general public always prevails. It is well concept of law that *necessitas publica major estquam privata.* (Public interest is greater than private interest.) In present case public exchequer to the tune of Rs.7.50 lacs (Rupees seven lacs fifty thousand only) is involved and suit property is public property, owned by residents of village jointly and welfare of all villagers is also material in present case. Even as per Section 193 of Himachal Pradesh Panchayati Raj Act 1994 no suit against any Panchayat would lie unless a notice under Section 80 of Code of Civil Procedure 1908 duly served.

7. Court is of the opinion that in present petition interest of general public is involved. Court is of the opinion that at this stage case of urgent and immediate relief is not proved by revisionist. It is held that there is no illegality and irregularity in the order of learned trial Court. It is further held that learned trial Court had not failed to exercise the jurisdiction so vested under law. It is also held that learned trial Court had not exercised the jurisdiction not vested in it by law. It is further held that learned trial Court has passed the order in accordance with law. In view of this, point No. 1 is answered in negative against the revisionist.

Point No.2 (Final Order)

8. In view of my findings on point No.1 revision petition is dismissed. Order of learned trial Court is affirmed. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of revision petition filed under Section 115 of CPC. All pending application(s) if any also disposed of. File of learned trial Court be sent back along with certified copy of this order forthwith. No order as to costs. Civil Revision is 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.

LPA No.68 of 2014 alongwith LPA No.69 of 2014.
Judgment reserved on : 30.05.2015.
Date of decision: June 04, 2015.

1. LPA No.68 of 2014.

Ashok Singh and others .....Appellants.

Versus

Ved Parkash and others .....Respondents.

2. LPA No.69 of 2014.

Ashok Singh and others .....Appellants.

Versus

Sushil Kumar and others .....Respondents.

Constitution of India, 1950- Article 226- Appellants were appointed as Panchayat Sahayaks- their appointments were quashed and set aside- an advertisement was issued for filling up 9 posts of Panchayat Sahayaks- a communication was sent to Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur – respondent appeared for interview- a communication was sent by respondent No. 4 to respondent No. 3 requesting him to issue appointment letter-

appointments were not given by respondent No. 3- private respondent approached the High Court pleading that suitability of the ex-serviceman was to be adjudged only by Ex-servicemen Cell and thereafter department is to offer appointment letters to the candidates- as per letter dated 17.8.1987 ex-servicemen once interviewed by State Level Selection Committee are not required to be subjected to any future interview for which they have been nominated - once the private respondents are found eligible, they could not have been subjected to further test- they were rightly held entitled for the appointment by the Writ Court. (Para-10 to 21)

For the Appellants : Ms.Ranjana Parmar and Mr.Naresh Kaul, Advocates, in both the appeals.

For the Respondents : Mr.Ramakant Sharma, Advocate, for respondent No.1, in both the appeals.

Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.Kush Sharma, Deputy Advocate General, for respondents No.2, 4 and 5 in both the appeals.

Nemo for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and facts arises for determination, therefore, both the appeals are taken up together for disposal.

2. All the private parties are Ex-servicemen. The appellants are those Ex-servicemen, who were appointed as Panchayat Sahayaks and their appointments have been quashed and set aside by the learned writ Court and respondent No.2 has been directed to issue appointment letters to the private respondents in place of these appellants.

3. Facts of the case are that respondent No.2 issued an advertisement for filling up of nine posts of Panchayat Sahayaks out of which three posts were reserved for Ex-servicemen category for Nurpur Panchayat Samiti. Communication in this regard dated 10.08.2011 was also sent to respondent No.3 i.e. Sub Regional Employment Officer, Ex-servicemen Cell, Hamirpur.

4. In response to this communication, the private respondents appeared for the interview on 30.08.2012 along with requisite documents before the State Level Selection Committee. The respondent No.4 sent a communication to respondent No.3 on 07.09.2012 requesting him to issue appointment letters to the private respondents for the post of Panchayat Sahayak to be appointed on contract basis. The private respondents submitted their joining on 17.09.2012, however, they were not given appointment by respondent No.3.

5. This resulted in private respondents approaching this Court with a grievance that as per the letters dated 06.11.1985, 17.08.1987 and 31.03.1990 issued by the State of Himachal Pradesh, the suitability of Ex-servicemen is to be adjudged only by the Ex-servicemen Cell and thereafter it is incumbent upon the department to offer appointment letters to the candidates.

6. Respondents No.2 and 4 filed their joint reply wherein they supported the claim of the private respondents by stating that in terms of the letter dated 17 August, 1987, the private respondents were required to be accepted by the employer for appointment of the said post.

7. Respondent No.3 filed a separate reply wherein it was stated that the selection to the post of Panchayat Sahayak was to be regulated by the Himachal Pradesh Panchayati Raj (Appointment and Condition of Service of Panchayat Sahayaks) Rules, 2008 and not by the Ex-servicemen Cell. It was also stated that respondent No.4 was never informed about the three posts to be filled up from the category of Ex-servicemen.

8. Appellants herein also filed a detailed reply wherein it was averred that the posts in question were to be filled up as per the statutory rules as amended from time to time and since they were duly qualified and had submitted their applications strictly as per the notification dated 10.08.2011 before the cut-off date and they were duly interviewed on 25.04.2012. Having qualified they were given appointment letters pursuant to which they have joined their duties on 26.09.2012, 20.09.2012 and 25.09.2012 respectively.

9. The learned writ Court allowed the writ petitions by holding that the appointments of the appellants were not in accordance with the rules readwith notifications (ibid) and, therefore, quashed their appointments. Aggrieved by the decision, the appellants have approached this Court by filing the present appeals.

10. The moot question required to be determined in these appeals is whether there is any conflict between the statutory rules and the instructions issued vide letters dated 06.11.1985, 17.08.1987 and 31.03.1990.

11. The State Government has laid down the procedure for notification of vacancies reserved for Ex-servicemen or a dependent or physically handicapped as per letter dated 08.03.1973 contained in Handbook on Personnel Matters, Vol.-1 (Second Edition) para 7.13, which reads as under:-

> *"7.13.1 Ex-servicemen and dependents: The ex-servicemen (and eligible dependents) should get their names registered at the nearest Employment exchange. The Employment Exchange will dispatch duplicate registration cards to the Ex-servicemen cell established in the Directorate of Employment and Training, Himachal Pradesh, Shimla (now Directorate of Sainik Welfare, Hamirpur). There is a State Selection Committee which interviews the Ex-servicemen (including eligible dependents of Ex-servicemen killed or disabled for civil service in action) for various post and prepares a panel of eligible candidates. The Departments should send requisition in respect of reserved vacancies for Ex-servicemen to the Cell which will sponsor the names of Ex-servicemen for the reserved post. The names sponsored by the Cell are considered to have been selected for the reserved posts. The Departments have to issue appointment letters to the Ex-servicemen candidates sponsored by the Cell without any interview/ test."*

12. Similarly, para 18.4.1 contained in Handbook on Personnel Matters, Vol.-1 (Second Edition) lays down the procedure to be followed by ex-servicemen or their dependents for applying against reserved posts, which reads as under:-

> *"(a) Ex-servicemen and their dependents should get their names registered at the nearest Employment Exchange. The exchange has to make an entry in the index card regarding the fact that the applicant is an Ex-serviceman or dependent of an Ex-serviceman as the case may be. The exchange will send duplicate registration card to the Ex-servicemen's Cell in the Directorate of Employment, Govt. of H.P. After an interview by a State Selection Committee, panels of eligible candidates for different categories of posts/services are prepared. Govt. Departments/ Corporations etc. who have to fill a reserved vacancy send a requisition to the Ex-servicemen's Cell simultaneously while sending requisitions*

to the Employment Exchanges, Public Service Commission in respect of vacancies not reserved for Ex-servicemen. The Ex-servicemen Cell sponsors names from the panel maintained by it in accordance with the requisition. The candidate so sponsored is to be appointed by the Department/ Corporation without any further interview/ test and such appointment is to be made within 15 days of the date of sponsorship by the Ex-servicemen's Cell. (b) Vacancies filled through State Public Service Commission on All India basis are advertised through the Press too and the eligible Ex-servicemen or their dependents, as the case may be, should obtain prescribed application forms from the Public Service Commission and then submit the form duly completed to the Commission."

13. It would be pertinent to take note of letter dated 17.08.1987 (Annexure R-1) governing the recruitment of Ex-servicemen by the Employers against Class-III and IV vacancies. Text of letter dated 17.8.1987 reads as under:-

"I am directed to refer to Labour Commissioner-cum-Director of Employment, H.P. letter No. DET, EMP (XS-CELL) 881/61-IV, dated the 14th July, 1987, addressed to you and copy among others endorsed to this department on the above cited subject and to state that the existing procedure as laid down by the Government for the selection of Ex-servicemen for employment in civil services/posts under the State Government is in order and there is no ambiguity in it. All Class-III posts/services where the recruitment is to be made against reserved vacancies for Ex-servicemen are exempted from the purview of the Commission. Accordingly the ex-servicemen once interviewed by the State Level Selection Committee constituted by the Government for the purpose in the Labour and Employment Department are not required to be subjected to future interview/test by the Department to which they are nominated by the Special Ex-servicemen Cell functioning in the aforesaid department. The State Level Selection Committee after examining/ensuring the suitability of the Ex-servicemen for appointment to Class-III and IV posts on the basis of their record of Military service drawn up a panel of those suitable candidates. The panel so drawn is maintained by the special Ex-servicemen Cell which nominate one candidate for one reserved post from this panel to the departments as per their requisition and the department concerned has to accept the candidate for appointment and issue appointment letter to the candidate accordingly. This procedure is also covered under the provisions of Rule 4 (1) of the Demobilized Armed Forces Personnel (Reservation of Vacancies in Himachal Non-Technical and Technical Services) Rules, 1972 and 1985. Accordingly there is no scope for any ambiguity or doubt about the implementation of Government instructions."

14. It is more than clear from the text of the letter dated 17.08.1987 that Ex-servicemen once interviewed by the State Level Selection Committee constituted by the Government for the purpose in the Labour and Employment Department are not required to be subjected to any future interview/test by the department to which they are nominated by the Special Ex-servicemen Cell functioning in the department.

15. As per the notification dated 31.03.1990 appointment letters are to be issued within 15 days to the persons selected by the Ex-servicemen Cell for the posts reserved for Ex-servicemen. A categorical reference to earlier letter dated 06.11.1985 also finds mention in this letter and the relevant text reads as follows:-

"I have been directed to say on the aforesaid subject that in accordance with the clearly given in letter No.GAD-E (C) 17-1/84 dated 6.11.1985, of the General Administration Department of the Government, the appointment letters be issued

within 15 days to the persons selected by the Ex-servicemen Cell for the posts reserved for the ex-servicemen. It has been brought to the notice of the Government that these orders are not being followed in some departments. Some Departments do not issue the appointment letters to the ex-servicemen till the time selection is made for the unreserved and other categories. This is totally wrong. All departments are requested to strictly follow the above orders. It is pertinent to clarify here that in the case of posts to be filled by direct recruitment, according to the orders of the Government, if necessary, after the approval of the Finance Department, as soon as the notification is sent to Public Service Commission or Employment Exchanges at that time itself, Ex-servicemen Cell, Hamirpur may be requested to sent the names of the selected candidates for the posts reserved for ex-servicemen. And as soon as the names are sent by the ex-servicemen, the selected candidates be issued appointment letter within 15 days.

All offices be made aware of the aforesaid orders and they be strictly followed."

16. This Court on 29.10.2014 passed the following orders:-

"Keeping in view the dispute involved in these appeals, we deem it proper to array The Secretary Panchayati Raj and Rural Development, H.P. as party respondent in the writ petitions as well as in the present LPAs. Ordered accordingly. The said respondent shall figure as respondent No. 7 in the writ petitions and respondent No. 5 in the LPAs. The Registry to carry out necessary corrections in the cause title.

Issue notice to the newly arrayed respondent. Mr. Romesh Verma, learned Additional Advocate General waives notice on behalf of the said respondent. Short reply be filed within four weeks. List on ***16th December, 2014.****"*

17. In compliance to the aforesaid order, the Secretary (Panchayati Raj) has filed affidavit, relevant portion whereof reads thus:-

"2. In this regard it is submitted that the procedure laid down by the State Government for notification of vacancies reserved for Ex-Servicemen as per letter dated 08.03.1973 contained in Hand Book on Personal Matters and letter dated 17.08.1987 governing the Recruitment of Ex-Servicemen by the employers against Class-III and IV vacancies, shall be applicable.

3. That in the present case recruitment/selection/ appointment to the post of Panchayat Sahayak was done under the provisions of H.P. Panchayati Raj (Appointment & Condition of Service of Panchayat Sahayak) Rules, 2008. But, the selection to the post reserved for Ex-Servicemen was to be done in accordance with procedure laid down by the State Government for notification of vacancies and governing the recruitment of Ex-Servicemen by employers against Class-III and IV vacancies reserved for them."

18. Now, in case we revert back to the rules, it would be seen that Rule-15 lays down the procedure for removing difficulties and reads thus:-

"If any difficulty arises in the interpretation of implementation of any of the provision of these rules, the matter may be referred to the State Government for clarification and guidance, who will be competent, to do anything to remove such difficulty by issuing an order not inconsistent with provisions of the Act."

19. Indisputably, under para 15 of the rules ibid it is the State Government which has the final say in matters relating to the interpretation of the rule.

20. Now, the State Government has clarified the position with respect to the rules and it has been specifically stated on affidavit that the recruitment/selection/appointment would be done under the provisions of the Act and Rules. But, the selection insofar as the posts reserved for Ex-servicemen is concerned, the same shall be done in accordance with the procedure laid down by the State Government in the notifications issued from time to time as has already been referred to hereinabove.

21. In this view of the matter, we have no difficulty in concluding that it was the private respondents, who had been appointed as per the procedure being followed by the State Government. The instructions issued vide notifications referred hereinabove would show that the same do not in any manner supplant the statutory rules and only supplements the same which is legally permissible.

22. Consequently, no fault can be found in the judgment rendered by the learned writ Court. Accordingly, the appeals are without merit and, therefore dismissed, leaving the parties to bear their own costs. The Registry is directed to place a copy of this judgment on the file of connected matter.

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

Court on its own motion .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CW PIL No. 02 of 2015
Reserved on : 11.05.2015
Date of decision: 4.6.2015

Constitution of India, 1950- Article 226- A letter was written to the High Court stating that there are 30 adult inmates housed in the State Home for Destitute Women at Mashobra- there is no Sweeper available between 5 p.m. to 10 a.m- there is no nurse to look after the mentally sick persons- there is no boundary wall around the Home- old age pension is not being provided to the inmates and their relatives had not been contacted- held, that it is responsibility of the State to provide necessary succor to the inmates- basic rights of the inmates are required to be protected by the State- inmates cannot be segregated on the basis of their domicile or citizenship- direction issued to provide fencing around the building, to pay disabled/old age pension, to appoint Sweeper, nurse and washerman - efforts be made to contact their nearest relatives. (Para-3 and 4)

For the petitioner: None.

For the respondents: 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:

Rajiv Sharma, J.:

The Court has taken cognizance of the letter, dated 22nd December, 2014, whereby the plight of inmates of State Home for Destitute Women at Mashobra, Distt.

Shimla, has been highlighted. There are about 30 adult inmates housed in the State Home for Destitute Women at Mashobra, Distt. Shimla. There is 6 years old boy also. The inmates are not provided with Sanitary Napkins. There is no Sweeper available between 5 p.m. to 10 p.m. There is no nurse to look after the mentally sick persons. There is no female nurse appointed at the State Home. There is no provision for psychological counseling. There is no boundary wall around the Home. They are neither provided newspapers nor magazines. Two minor girls aged 14 to 17 are also housed there. The inmates are not provided any disability pension. The inmates are not provided with old age pension, though they are 60 years old. The close relations of the inmates have not been contacted till date.

2. In the reply filed, it is admitted that on 31.01.2015, 34 inmates were enrolled in the State Home, which comprises of 32 adults, 1 minor girl, named Asha. Daughter of one of the inmate, namely, Smt. Sunita has now been shifted to Balika Ashram, Durgapur on 17.01.2015. Smt. Leela, Aya has been transferred from Children Home, Tutikandi to Nari Sewa Sadan, Mashobra. According to the averments contained in the reply, the inmates being mentally retarded are not able to handle and use the Sanitary Napkins. One daily waged Sweeper is working from 10:00 a.m. to 5:00 p.m. and the need for extra Sweeper shall be considered after assessing the situation. Since the staff sanctioned to this institution is not trained to attend/look after mentally ill women, who have been admitted in the Nari Niketan, the department has taken up the matter with the Health Department to shift the mentally ill inmates of Nari Niketan to Hospital for Mental Health and Rehabilitation, Boileauganj, Shimla. The inmates are got examined at IGMC. The Psychiatrists from IGMC, Shimla are visiting the State Home monthly. The trainer has been provided in the State Home, Mashobra to provide training on Cutting and Tailoring, Embroidery and making of soft toys to the inmates. A sum of Rs.24,56,900/- for providing and fixing of fencing around the building of Nari Sewa Sadan, Mashobra has been procured from the Executive Engineer, HPPWD Division, Theog, Distt. Shimla and the money would be sanctioned soon. Case of Neelam was pending for grant of old age pension. Damitri, being not bonafide Himachali, was not found eligible for old age pension. Case of Kamla for old age pension was being considered. Six inmates were produced before the District Medical Board for assessment of their disability on 27.02.2015 for granting disabled relief allowance after obtaining the disability certificate. Few inmates have been shifted to Old Age Home Basantpur. The efforts were being made to restore their kith and kin on the addresses mentioned by the inmates. Five inmates, namely, Saraswati Pal, Shayama Payari, Deepali, Muskanand Pooja Sahu have been restored to their kith and kin during the years 2012, 2013 and 2014. One inmate, namely, Ms. Bimla Devi was sent for vocational training in Vardhman Mills Baddi.

3. We are of the considered view that the prevailing conditions in the Aashram are not habitable. It is the duty of the State to provide all the basic amenities to the inmates taking into consideration the difficulties faced by them. Few of the inmates are mentally retarded, some are disabled. There is only one Sweeper available between 10:00 a.m. to 5:00 p.m. There is no female nurse appointed at the State Home. There is no provision for psychological counseling. There is no boundary wall around the Home. They are neither provided newspapers nor magazines. Few inmates have not been provided old age pension. Few inmates are denied the old age pension, though they are 60 years old. The close relations of the inmates have not been contacted till date. It is the responsibility of the State to provide necessary succor to the inmates, whether bonafide Himachali or not. It is humane problem and has to be tinkered with sympathy. The basic rights of the inmates are required to be protected by the State being a welfare State. All the inmates of the Ashram belong to one group and they cannot be segregated only on the basis of their domicile or citizenship. They are there due to adverse circumstances beyond their control. The basic needs of *bonafide* and *non-bonafide* Himachalis are the same. The action of the respondents of

denying the old-age pension and disability pension to the *non-bonafide* inmates of the Ashram is unreasonable and arbitrary.

4. Accordingly, we issue the following mandatory directions to the respondents:

1. The respondents are directed to fix the fencing around the building of Nari Sewa Sadan (State Home for Destitute Women at Mashobra, District Shimla, H.P.) within a period of three months from today.

2. Kiran, one of the inmates be paid the disability allowance/pension within a period of three weeks as per the disability certificate. Similarly, Damitri, even if not bonafide Himachali, is entitled to Old Age pension.

3. Kamla, one of the inmates be also paid the Old Age pension as per the affidavit, within a period of three weeks

4. Six inmates as per the reply, who have been produced before the Medical Board on 27.02.2015 be also paid the disability relief allowance/disability pension regularly.

5. A Sweeper be appointed between 5:00 p.m. to 10:00 p.m on regular basis. A Staff Nurse be also appointed to look after the inmates and, if necessary, by way of deputation/secondment basis from any Government run hospital.

6. The respondents are directed to provide Sanitary Napkins to all the inmates and they be also taught the basics how to use and handle the same.

7. The inmates be provided with neat and clean clothes every day and the Washer man be appointed to wash their clothes on day- to-day basis.

8. The Medical Superintendent, IGMC is directed to ensure that the Psychiatrist visits the Ashram fortnightly. The attendant staff be also appointed within a period of eight weeks from today to facilitate the inmates.

9. The efforts be made to find out the next kith and kin of inmates by constituting a committee by the Superintendent of Police, Shimla within a period of two weeks from today.

10. The Principal Secretary (Health), Government of Himachal Pradesh is directed to get the diet chart for the inmates prepared within a period of three weeks from today and all the inmates shall be provided the food as per the chart prepared by the dietitian.

11. The State Government is also directed to provide necessary vocational training to the inmates and also provide them atleast one newspaper in English and one in vernacular and one magazine.

12. The District Welfare Officer, Shimla i.e. respondent No.7 is directed to make surprise visit to State Home for Destitute Women at Mashobra, District Shimla, every month to supervise and ensure that all the basic facilities and amenities are provided to the inmates.

13. The Chief Secretary, Government of Himachal Pradesh shall be personally responsible to implement the directions in letter and spirit.

5. In the light of the aforesaid observations/directions, the petition stands disposed of, so also the pending application(s), if any. The Umang Foundation is awarded costs of Rs. One lakh to be utilized only for the welfare of the inmates of the Ashram.

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

Court on its own motion .....Petitioner.

Vs.

The Principal Secretary (Social Justice & Empowerment) and ors. .....Respondents.

CW PIL No. 18 of 2011
Reserved on : 11.05.2015
Decided on : 04.06.2015

Constitution of India, 1950- Article 226- State had not created any post of psychiatric in district hospital- direction issued to the State to create post of psychiatric in all district hospital- to increase rehabilitation grant, to provide protective electric heaters, neat and clean good quality towels and to provide necessary grant for taking cured to their houses. (Para-8)

For the petitioner: Ms. Archana Dutt, Advocate as Amicus Curiae.

For the respondents: Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 12.
Mr. Hamender Chandel, Advocate, for respondent No. 13.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

According to definition clause 2 (l) of the Mental Health Act, 1987, "mentally ill person" means a person who is in need of treatment by reason of any mental disorder other than mental retardation. Clause 2(q) of the Act provides "psychiatric hospital" or "psychiatric nursing home" means a hospital or a nursing home established or maintained by the Government or any other person for the treatment and care of mentally ill persons and includes a convalescent home established or maintained by the Government or any other person for such mentally ill persons.

2. We have gone through the various affidavits filed in sequel to the directions issued by this Court from time to time.

3. It is stated in the affidavit filed by the Secretary (Health), Government of Himachal Pradesh that no post of Psychiatrist was created in any District Hospital. However, efforts have been made to recruit the Medical Officers having undergone their Post Graduation Degree/Diploma/adequate experience in the field of Psychiatry through Walk-in-interviews. It is also stated that regular meetings of the State Mental Health Authority are held from time to time to discuss various issues relating to the Mental Health Act. It is also stated that the department is already providing short term rehabilitation to those diagnosed

with mental ailment through Himachal Hospital of Mental Health & Rehabilitation, Shimla. The rehabilitation of fully cured patients is out of the purview of the Health Department.

4. Learned Amicus Curiae has highlighted in the written submissions made at page No. 195 of the paper-book that the inmates of Nari Sewa Sadan who are suffering from mental diseases be shifted to H.H. Mental Health and Rehabilitation Centre, Shimla.

5. The Director, Women and Child Development, H.P., Shimla has filed the affidavit, dated 19th December, 2011. According to her, the Social Justice & Empowerment Department is running a Nari Niketan at Mashobra, District Shimla. The State Government has framed the rules for admission of inmates in the State Home (Nari Nekaten). As per rules, only from the following categories women are given admission in the State Home:

1. Unattached women and orphan girls who are in moral danger and in whose favour the Courts have passed orders to lodge them in the State Home.

2. Young widows including deserted wives.

3. Hard cases which are not covered by the above categories but in the opinion of the Director deserve admission.

Following measures have been provided to rehabilitate the women:

1. By providing various types of training in institutions enabling them to earn their livelihood after they are discharged from the home;

2. Rehabilitation grant of Rs.10,000/- per woman;

3. Marriage grant in case of woman desired to get married @ Rs.11001/-.

6. Learned Amicus Curiae has also highlighted in the written submissions made at page 227 of the paper-book that some of the inmates in the mental hospital are improving and their health condition is better now and they can be sent back to their homes. The details of such persons have been given in the written submissions. It has also been highlighted that there is shortage of Class-IV employees in the hospital. There is also dearth of Special Attendants.

7. The Principal Secretary (Health), Government of Himachal Pradesh, Shimla in his affidavit, dated 16th October, 2012 has stated that the department was in the process of creating facilities for rehabilitation of such inmates of the hospital, who have been cured of their mental illness and have no takers/carers by providing space in the lower storey of the building which is lying vacant and is altogether separate from hospital wards. The process for furnishing the space and making arrangement for diet as well as social counseling of the inmates is going on and will be completed shortly. The help of NGOs. was also solicited. The Rogi Kalyan Samiti at Himachal Hospital of Mental Health and Rehabilitation, Shimla has been constituted and registered under the Himachal Pradesh Societies Registration Act, 2006. It is stated that 12 bedded rehabilitation wing has been created in the hospital for housing these inmates who may be cured, but have no place to go. The Rogi Kalyan Samiti is now authorized to look after the patients in the Rehabilitation Wing apart from the regular patients. The Nari Niketan at Mashobra, District Shimla is not a licenced home under the Mental Health Act, 1987.

8. We are satisfied with the action taken by the respondents towards the implementation of the Mental Health Act, 1987 by providing necessary infrastructure.

However, we are of the considered opinion that the following mandatory directions are still required to be issued for further betterment of the persons suffering from mental ailment:

1. The Principal Secretary (Health) to the Government of Himachal Pradesh is directed to sanction, create and fill up the posts of Psychiatrist in all the District Hospitals in the State of Himachal Pradesh within a period of three months from today.

2. The Director, Women and Child Development, Himachal Pradesh is directed to ensure that mentally ill patients are admitted in Mental Health and Rehabilitation Centre, Boileauganj, Shimla. The rehabilitation grant for woman be increased from Rs.10,000/- to Rs.50,000/-, the marriage grant in case of woman desired to get married be increased from Rs.11001/- to Rs.51001/- within three months from today.

3. The Director, Women and Child Development, Himachal Pradesh is directed to ensure that the sufficient protective electric heaters are provided to the inmates in the Ashram during the Winter season alongwith adequate quilts and blankets.

4. The Director, Women and Child Development, Himachal Pradesh is also directed to ensure that the inmates are provided neat and clean good quality towels and bed sheets and pillow covers on day-to-day basis.

5. It is made clear that in future no woman suffering mental ailment would be admitted in Nari Niketan at Mashobra, District Shimla and all out efforts should be made to admit them either in Psychiatric Wards of general Hospitals or in the Mental Health and Rehabilitation Centre, Boileauganj, Shimla.

6. The steps be taken to send the inmates who have been cured to their homes by providing necessary conveyances by giving the grant depending upon the distance from the institution to the destinations.

7. The posts of Class-IV be increased at H.H. Mental Health and Rehabilitation Centre, Shimla to the extent of 30%.

8. Sufficient posts of attendants be sanctioned, created and filled up within a period of three months to assist the inmates at H.H. Mental Health and Rehabilitation Centre, Shimla

9. The Principal Secretary (Health) is directed to provide clothing and footwear to the inmates of Himachal Pradesh Hospital for Mental Health and Rehabilitation four times in a year subject to weather conditions.

10. All the Superintendents of Police in the State of Himachal Pradesh are directed to strictly comply with Section 23 of the Mental Health Act, 1987 and every person who is taken into protection and detained under this Section shall be produced before the nearest Magistrate within a period of 24 hours and thereafter the Magistrate shall pass appropriate orders as per Section 24 of the Mental Health Act, 1987.

9. In the light of the aforesaid observations and directions, the petition stands disposed of, so also the pending application(s), if any.

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

Court on its own motion .....Petitioner.

Vs.

The State of Himachal Pradesh and others .....Respondents.

CW PIL No. 30 of 2011
Reserved on : 11.05.2015
Date of decision: 04.06.2015

Constitution of India, 1950- Article 226- A letter was received by the High court highlighting the difficulties being faced by blind and deaf students- reply filed by the State shows that there are shortcomings in the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 - University directed to provide necessary amenities- direction also issued to provide basic facilities required for blind and deaf students in the school and to appoint the requisite number of teachers, to enhance their scholarship, to provide them screen readers, screen magnifiers, speech recognition software, Text-to-speech software, optical character recognition software, large monitors, hand held magnifiers and standalone reading machines. (Para-10 to 20)

Case referred:
Government of India through Secretary and another Vs. Ravi Prakash Gupta and another (2010) 7 Supreme Court Cases 626

For the petitioner: Ms. Rita Goswami, Advocate as Amicus Curiae.
For the respondents: 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:

Rajiv Sharma, J.:

According to the report of WHO of 2012, 15 millions visually impaired persons live in India out of 35 millions in the world. It is a staggering figure. Moreover, it is a wake up call for all of us to come together to take steps to recognize their basic human rights to live with dignity. It is their fundamental right and basic human right to be housed, protected and provided with all the basic amenities, i.e., food, clothing, special health care, provision for compulsory and free education and avenues for employment.

2. The Court has taken cognizance of the letter, dated 29.07.2011, whereby the difficulties faced by three blind and deaf students in the educational institutions either run by the State of Himachal Pradesh or by the H.P. Council of Child Welfare, have been highlighted. In the letter, it is also emphasized that the provisions of Persons with Disabilities Act, 1995 are not being followed scrupulously.

3. The respondents-State has filed a detailed reply. According to the averments made in the reply, there are nine institutions for children with special abilities, visually impaired, hearing impaired, orthopedically impaired and mentally retarded children. The stand of the respondents-State in the affidavit, dated 8th September, 2011, was that the Government is providing free education to disabled children having 40% disability or more

from the academic session 2001-02 at all levels of education right from their enrolment in the school till passing out from University, including technical & professional courses in all Government Institutions for persons with disabilities. The Education Department has identified four locations in the State where proper hostel facilities in running condition exists and where the physically challenged children for 10+1 and 10+2 will get education with other students and will also be given specialized education through special educators.

4. The petitioner has filed a detailed rejoinder to the reply filed by the respondent-State. It is specifically mentioned in paragraph No. 4 of the rejoinder that the respondents have failed to fulfill the special requirements of the blind students. The necessary facilities like books in Braille, audio books in digital format (DAISY), special DAISY players for audio books in digital format, Braille papers and special slates for writing in Braille have not been provided. It is also stated that there are 80 deaf and 20 blind girls studying in the school at Sundernagar. There is no subject teacher appointed for blind students. There are only two permanent teachers in the school for blind girls, one is Braille teacher and the other is Craft teacher. These teachers are not eligible to teach any subjects like English, Hindi, Social Studies, Mathematics, Science, Music and Arts etc. It is also stated that only one permanent teacher is appointed for deaf students that is speech impairment teacher. There is one JBT, one TGT and one Special Educator on contract basis for imparting teaching to the deaf students. These teachers teach 80 students from class 1st to 10th standard daily which is not possible. There is no teacher to teach the subject of Science and Art to the deaf students. Apart from this, one Vocational Instructor, one Craft teacher and two speech therapists are also there, who are not eligible to teach main subjects. The Special School at Sundernager lacks basic facilities for blind and deaf students like tables and chairs for them in their rooms to study before and after school time and holidays, a library with children's magazines, news papers, magazines in Braille and magazines in Audio format for blind students. Similarly, in Special School for deaf and blind boys at Dhalli, 87 deaf and 30 blind children students studying from Class 1st to 10th standard. There was no qualified principal in the School. There was no science laboratory for deaf and blind students in the School. There was no science teacher to teach blind and deaf students. There was no Art teacher for deaf students and also no Music teacher for blind students has been appointed. There was no digital library for blind students, no Baraille magazines are subscribed and no newspapers or magazines are made available to deaf students. There was only one TGT, one JBT and one Braille teacher for blind's section. They have to teach all subjects to the students varying from class 1st to 10th standard. There is no modern vocational course in the centre and only out dated courses like candle and chalk making are being run.

5. A counter affidavit was filed by the Chief Secretary. According to the averments made in the counter affidavit, the H.P. Board of School Education has provided helpers to 60 students. The matter with regard to fee waiver was under process by the H.P.U. for carrying out necessary amendments in the ordinances and prospectus. The efforts were being made to provide the requisite facilities before 30th October, 2012, positively. A Special Educator for the benefit of such students in GSSS, Portmore, Shimla was appointed. An estimate was submitted by the HPPWD for a sum of Rs.5,63,69,500/- against which the Government Department has also released an amount of Rs.4,12,48,000/- on 08.04.2011 and 07.04.2012 for construction of hostel at Sundernagar. The details of teachers at Sundernagar have also been given in the affidavit. There is also a reference to the advertisement for filling up the posts. The details of the teachers appointed at Dhalli have been given in paragraph No. 9 of the affidavit.

6. The latest affidavit was also filed by the Deputy Secretary, Social Justice & Empowerment, Government of Himachal Pradesh, whereby it has been specifically mentioned that the scholarship has been provided for the physically challenged students and separate scholarship has been provided to hostellers after completion of all the codal formalities as per the details given in paragraph No. 4 of the affidavit.

7. The advance society is the one which is sensitive towards the children with special needs. It is our fundamental duty to show them path and to preserve their dignity and respect. All out efforts should be made to assimilate them in the main stream and there should not be feeling amongst the disabled children that they are left alone on lonely island.

8. What emerges from the facts enumerated hereinabove, is that still there are shortcomings towards the implementation of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 by the respondents-State for care of the children with special need.

9. Their Lordships of the Hon'ble Supreme Court in **Government of India through Secretary and another** Vs. **Ravi Prakash Gupta and another** (2010) 7 Supreme Court Cases 626 have held that the object of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is to (i) integrate persons with disabilities into social mainstream, (ii) lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities, and for their education, training, employment and rehabilitation amongst other responsibilities, (iii) give effect to proclamation on full participation and equality of people with disabilities in Asian and Pacific regions. Their Lordships have held as under:

> *"22. We have examined the matter with great care having regard to the nature of the issues involved in relation to the intention of the legislature to provide for integration or persons with disabilitiets into the social mainstream and to lay down a strategy for comprehensive development and programmes and services and equalization of opportunities for persons with disabilities and for their education, training, employment and rehabilitation amongst other responsibilities. We have considered the matter from the said angle to ensure that the object of the Disabilities Act, 1995, which is to give effect to the proclamation on the full participation and equality of the people with disabilities in the Asian and Pacific regions, is fulfilled."*

10. The Himachal Pradesh University, the H.P. Board of School Education, Dr. Y. S. Parmar University for Horticulture and Forestry, CSK, H.P. Krishi Vishvavidyalaya, Palampur, District Kangra, the Himachal Pradesh Public Service Commission and Service Selection Board have failed to provide amanuensis to the blind and low vision students as per Section 31 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. There is no material placed on record that the Himachal Pradesh University has carried out the amendments in the ordinance and prospectus for providing fee waiver to the persons with disability. Accordingly, the Himachal Pradesh University, Dr. Y. S. Parmar University of Horticulture and Forestry, H.P. Krishi Vishvavidyalaya, Palampur, District Kangra, the H.P. Board of School Education, Himachal Pradesh Public Service Commission and Himachal Pradesh Subordinate Services Selection Board, Hamirpur, H.P. are directed to ensure that amanuensis are provided to all the students with special needs/candidates appearing in respective examinations as per Section 31 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The aforesaid three Universities are directed to carry out

necessary amendments in the respective ordinances and prospectus for providing free education to the children with special needs and the Himachal Pradesh Public Service Commission & the Himachal Pradesh Subordinate Services Selection Board, Hamirpur are also directed to amend their regulations accordingly within a period of six weeks from today.

11. Under Article 21-A of the Constitution of India, the State is required to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine. The children with special needs falls in separate class altogether. It is the duty of the State to provide free and compulsory education to the children with special needs up to University level and all the professional courses in all the educational institutions under Articles 21/21-A of the Constitution of India. It is also the duty of the State to provide financial support to these children by increasing their scholarships, stipends from time to time taking into consideration the price rise/inflation under Article 41 of the Constitution of India.

12. We have gone through the affidavits and the suggestions made by the learned Amicus Curiae. There is dearth of professional teachers in two Schools. The functional posts are required to be filled up. Ordinarily the Court cannot issue directions for sanctioning and creation of posts, but extraordinary situations require extraordinary measures.

13. The respondents-State has also failed to provide the children in Special School at Sundernager and at Dhalli the basic facilities required for blind and deaf students like tables and chairs for them in their rooms to study before and after school time and holidays, a library with children's magazines, news papers, magazines in Braille and magazines in Audio format for blind students as per Section 27 (e) and (f) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Consequently, there shall be direction to the State of Himachal Pradesh to provide the abovementioned facilities in these institutions, if not already provided within a period of three months.

14. According to the norms prescribed by the Union of India, the following posts are required for blind School: Principal, Special Educator, Trained Graduate Teacher, Assistant Teacher, Braille Teacher, Mobility Teacher, Therapist, Medical Doctor (Part Time), Warden, Cook & Helper, Accountant, Sweeper-cum-Chowkidar and Aya (one for every fifteen children).

15. We are of the considered view that there must be teachers to teach the subjects of Science, Craft and Speech Impairment Therapy to the visually impaired and deaf children and atleast two TGT (Arts) and TGT (Science) teachers to teach blind and deaf students. Besides, Mobile Instructors at Sundernagar and Dhalli, two more posts of JBT hearing impairment and TGT hearing impairment, one post of Braille teacher, JBT (Visually Impaired), TGT (Visually Impaired), Arts and TGT (Visually Impaired), Science are required to be created immediately. These posts should be filled up on regular basis. Accordingly, we direct the respondents to create abovementioned posts within a period of three months and to complete the selection process within a period of six months from today.

16. The respondent-State is also directed to construct the buildings as per the details given in paragraph No. 6 of the affidavit, dated 28th September, 2012 sworn by the Chief Secretary, Government of Himachal Pradesh, within a period of one year, if not already constructed.

17. Ms. Rita Goswami, learned Amicus Curiae has also stated that the facilities which have been provided to the children with special needs having more than 40% disability at all levels of education from the time of enrolment in the Government Schools till

the passing out from the University, including technical & professional courses in all Government institutions be also extended to the Himachal Pradesh University, Dr. Y.S. Parmar University for Horticulture and Forestry, Solan and CSK, Himachal Pradesh University at Palampur Indira Gandhi Medical College, Shimla and Dr. R.P.G.M.C. at Tanda from the current session.

18. There is merit in her contention. The children with special needs having more than 40% disability studying in these institutions are also entitled to free education as per the policy norms adopted by the State Government. Accordingly, we direct the Himachal Pradesh University, Dr. Y. S. Parmar University for Horticulture and Forestry and Chaudhary Sarwan Kumar, Himachal Pradesh Krishi Vishwa Vidayala through their respective Registrars to provide free education to these children for all the courses run by them.

19. The amount of scholarships paid to the visually impaired deaf and dumb students from class 1st to 5th be increased from Rs.350/- to Rs.500/-, from class 6th to 8th be increased from Rs.400/- to Rs.600/-, from class 9th to 10th be increased from Rs.450/- to Rs.750/-, for Senior Secondary be increased from Rs.500/- to Rs.1000/-, for BA/BSc./B.Com etc. be increased from Rs.550/-/- to Rs.1500/-, for BE/B.Tech/MBBS/LL.B./B.Ed. & other be increased from Rs.650/- to Rs.1750/- and for hostellers, the same be increased proportionately to Rs.1500/-, Rs.2000/- and Rs.3000/-, respectively in view of the inflation.

20. The respondents in addition to the facilities to be provided, as directed hereinabove, are also directed to provide additional assistive technology to the visually impaired children to hone their skills to be self dependent. The respondent-State is also directed to provide three of the following facilities, i.e., screen readers, screen magnifiers, speech recognition software, Text-to-speech (TTS) software, optical character recognition (OCR) software, large monitors, hand held magnifiers and standalone reading machines.

21. The respondent-State is also suggested to enact law for providing free and compulsory education to the children with special needs up to University level and professional courses in all the educational institutions including Universities within a period of six months from today.

22. Accordingly, the present petition is disposed of in view of the directions issued hereinabove. The Umang Foundation is awarded costs of rupees one lac. The same shall be used exclusively for the welfare of the children with special needs.

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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. 1098 of 2015 a/w CWP Nos. 3238 of 2014, 1099, 1102, 1103, 1104, 1105, 1106, 1107, 1108, 1109, 1110, 1124, 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749, 1750, 1755, 1756, 1757 and 1758 of 2015.
Judgment reserved on: 27.5.2015
Date of Decision: June 04, 2015.

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1. <u>CWP No. 1098 of 2015</u>

Desh Raj ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

2. CWP No.3238 of 2014
Narotam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

3. CWP No. 1099 of 2015
Suresh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

4. CWP No. 1102 of 2015
Karam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

5. CWP No. 1103 of 2015
Surjit Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

6. CWP No. 1104 of 2015
Kishori Lal ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

7. CWP No. 1105 of 2015
Harbhajan Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

8. CWP No. 1106 of 2015
Uttam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

9. CWP No. 1107 of 2015
Santosh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

10. CWP No. 1108 of 2015
Malkiat Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

11. CWP No. 1109 of 2015
Rohit Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

12. CWP No. 1110 of 2015
Parvesh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

13. CWP No. 1124 of 2015
Ramesh Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

14. CWP No. 1617 of 2015
Subhash Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

15. CWP No. 1622 of 2015
Bir Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

16. CWP No. 1624 of 2015
Pawan Kumar ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

17. CWP No. 1658 of 2015
Kashmiri Devi ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

18. CWP No. 1743 of 2015
Uttam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

19. CWP No. 1744 of 2015
Gurdass Ram ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

20. CWP No. 1745 of 2015
Dev Raj ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

21. CWP No. 1748 of 2015
Pritam Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

22. CWP No. 1749 of 2015
Kamaljit Singh ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

23. CWP No. 1750 of 2015
Ramesh Chand ...Petitioner
Versus
Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

24. CWP No. 1755 of 2015

Achhar Singh ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

25. CWP No. 1756 of 2015

Parvinder Singh ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

26. CWP No. 1757 of 2015

Ashok Kumar ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

27. CWP No. 1758 of 2015

Joginder Singh ...Petitioner

Versus

Chaudhary Shrawan Kumar Himachal Pradesh Krishi Vishvavidyalaya ...Respondent.

Constitution of India, 1950- Article 226- Petitioners are beldars who were placed beyond the parent cadre by way of secondment- it was contended that consent of the petitioners was not obtained prior to their transfer- respondent contended that Statute did not provide for obtaining consent for placement on deputation/secondment/foreign service- Statute did not provide that the consent of the employee need to be taken - willingness of posting beyond the cadre need not be expressly sought and can be implied – where the employees had joined without any reservation they are not entitled for any relief but where employees had approached the Court immediately after the passing of the order, they are entitled to the relief. (Para-11 to 17)

Case referred:

Kaviraj and others vs. State of Jammu and Kashmir and others (2013) 3 SCC 526

For the petitioner (s): M/s Dushyant Dadwal and Ajay Kumar Dhiman, Advocates, in respective petitions.

For the respondent(s) : M/s L. N. Sharma and B.M. Chauhan, Advocates, in respective petitions

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Since these petitions can be disposed of by a common judgment, therefore, they are being taken up together for disposal.

2. This batch of writ petitions can be categorized into two sets. One set pertains to the cases where the petitioners were sent on secondment and have joined without raising any objection. This set comprises of the following writ petitions:

CWP Nos. 1617, 1622, 1624, 1658, 1743, 1744, 1745, 1748, 1749 and CWP No. 1750 of 2015.

3. The second set of petitions is those where the petitioners immediately on the issuance of order of secondment, approached this Court and obtained interim relief. This set comprises of the following writ petitions:

4. It is not in dispute that in all these cases the petitioners are beldars whose services have been placed beyond the parent cadre by way of secondment.

5. The challenge to these orders of secondment is common to both sets of petitions and it is alleged that the impugned order(s) is/are illegal, arbitrary and unconstitutional on the ground that the petitioners consent was not obtained before ordering their transfer on secondment basis.

6. In response to the petition, the respondents have filed the reply wherein it has been alleged that the Government of Himachal Pradesh in accordance with the provisions of Section 9 of the H.P. Universities of Agriculture, Horticulture and Forestry Act, 1986 (for short 'Act') has constituted a Council for Education and Research to be called "The Himachal Pradesh Council of Agricultural, Horticultural and Forestry Education and Research", (for short 'Council'), who in its meeting held on 28.7.2012 had vide item No. 13 decided that the total core strength of the University be fixed at 1403 which includes the core strength of category 'D' staff as 250 only. It is pointed out that the University is facing acute financial crisis and has therefore to reduce its establishment cost.

7. As per the decision of the Council, the respondent University declared 200 category 'D' and 'C' employees surplus and sent list of 185 category 'D' employees and 15 category 'C' employees to the Additional Chief Secretary (Agriculture) to the Govt. of H.P. in the first phase. Out of the above list, 175 category 'D' and 10 category 'C' employees had been placed on secondment basis with the various departments of H.P.

8. Thereafter, since the working strength of the category 'D' employees in the University happens to be more than the fixed core strength of 250 and there was again communication from the Government to reduce the establishment cost, 289 more category 'D' employees were declared surplus in the second phase, out of which 146 employees have been ordered to be placed on secondment basis with the various departments of the Government. As per the requirement of Engineer-in-Chief (Project), IPH Department, Fatehpur, District Kangra, vide his letter dated 15.1.2015, 39 category 'D' employees including the petitioners had been placed on secondment basis with the Swan River Flood Management Project, Circle Una, H.P.

9. It is further contended that as per the appointment letter of the petitioners, their service condition are to be governed by the Act, Statutes and Rules/Regulations framed from time to time. There is no provision in the Act and Statute of the University to obtain any consent for placement on deputation/secondment/foreign service. However, as per Clause 7.11 (iv) of the Statutes, Vice Chancellor may send any employee/teacher of the University on deputation/secondment/ foreign service. Since the Unviersity is facing acute financial crisis as such keeping in view this aspect the services of the petitioners had been placed on secondment basis and, therefore, the same is legal and valid and not contrary to the provisions of law.

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

11. Learned counsel for the petitioners would contend that the issue in hand is squarely covered by a judgment rendered by learned Single Judge of this Court in similar case titled ***Bishan Dass vs. Chaudhary Shrawan Kumar, H.P. Krishi Vishvavidyalaya,***

CWP No. 352 of 2015, decided on 15.5.2015 wherein the learned Single Judge has held as follows:

> "Petitioner was appointed as Beldar in the respondent -University in the month of July, 1993. He was regularized on the post of Chowkidar in the year 2007. He is aggrieved by the issuance of office order dated 1.1.2015 , whereby his services have been placed at the disposal of the Ex -Servicemen Corporation, Hamirpur on secondment basis. It is averred in the reply that in sequel to Notification dated 22.12.2012; total cadre strength of University has been fixed at 1403, which includes the core strength of category 'D' staff as 250 only. 6 category 'D' employees including the petitioner have been placed on secondment basis with the Ex-servicemen Corporation, Hamipur. The authority to send an employee/teacher by the University on secondment basis / Foreign Service by the University has been derived from clause 7.11 (iv) of the Statutes.
>
> 2. Petitioner is merely working as a Beldar. It is stipulated in clause 7.11 (v) of the Statutes that the employee at the time of transfer or on Foreign Service / deputation should hold a substantive post in the University. It is in grey area whether the petitioner is holding a substantive post or not, as stipulated in clause 7.11 (v) of the Statutes.
>
> 3. It is settled law by now that an employee can not be sent on deputation without his/her consent. The petitioner is working in the respondent University and transferring him to the H.P. Ex-servicemen Corporation, Hamirpur would amount to change in the Department /cadre, which is not permissible under law.
>
> 4. Their Lordships of the Hon'ble Supreme Court in Jawaharlal Nehru University v. K.S. Jawatkar, 1989 Supp. (1) Supreme Court Cases 679, have held that contract of service entered into by the respondents was a contract with the appellant university and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it either expressly or by necessary implication, subject to the respondent's consent. In this case, the employee of the university i.e. Jawaharlal Nehru University was transferred to Manipur University without his consent, which was held to be bad in law. Their Lordships have held as under:
>
> > "[7] In this appeal the main contention of the appellant is that the respondent was appointed at the Centre of Post -graduate Studies, Imphal, and when the Centre A as transferred to the Manipur University his services were automatically transferred to that University, and consequently he could not claim to be an employee of the appellant University. The argument proceeds on the assumption that the Centre of Post-graduate Studies at Imphal was an independent entity which existed by itself and was not a department of the appellant University. The submission proceeds on a fallacy. The Centre of Post -graduate Studies was set up at Imphal as an activity of the appellant University. To give expression to that activity, the appellant University set up and organised the Centre at Imphal and appointed a teaching and administrative staff to man it. Since the Centre represented an activity of the appellant University the teaching and administrative staff must be understood as employees

of the appellant University. In the case of the respondent, there can be no doubt whatever that he was, and continues to be, an employee of the appellant University. There is also no doubt that his employment could not be transferred by the appellant University to the Manipur University without his consent, notwithstanding any statutory provision to that effect whether in the Manipur University Act or elsewhere. The contract of service entered into by the respondent was a contract with the appellant University and no law can convert that contract into a contract between the respondent and the Manipur University without simultaneously making it, either expressly or by necessary implication, subject to the respondent's consent. When the Manipur University Act provides for the transfer of the services of the staff working at the Centre of Post-graduate Studies, Imphal, to employment in the Manipur University, it must be construed as a provision enabling such transfer of employment but only on the assumption that the employee concerned is a consenting party to such transfer. It makes no difference that the respondent was not shown in the list of Assistant Professors of the appellant University or that the provision was not indicated in its budget; that must be regarded as proceeding from an erroneous conception of the status of the respondent. The position in law is clear, that no employee can be transferred, without his consent, from one employer to another. The consent may be express or implied. We do not find it necessary to refer to any case law in support of this conclusion.

[8] Inasmuch as the transfer of the Centre of Post -graduate Studies from the appellant University to the Manipur University could not result in a transfer of the employment of the respondent from the one to the other, it must be concluded that the respondent continues in the employment of the appellant University. The transfer of the Centre of Postgraduate Studies to the Manipur University may be regarded as resulting in the abolition of the post held by the respondent in the appellant University. In that event, if the post held by the respondent is regarded as one of a number of posts in a group, the principle "last come, first go" will apply, and someone junior to the respondent must go. If the post held by him constitutes a class by itself, it is possible to say that he is surplus to the requirements of the appellant University and is liable to be retrenched, But it appears that the respondent has been adjusted against a suitable post in the appellant University and, has been working there without break during the pendency of this litigation, and we cannot, therefore, permit the appellant University to retrench him."

5. Their Lordships of the Hon'ble Supreme Court in State of Punjab v. Inder Singh, in (1997) 8 Supreme Court Cases 372, have held that deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis and there should be no deputation without the consent of the person so deputed and would therefore know his right and privileges in the deputation post. Their Lordships have held as under:

> [19] Concept of "deputation" is well understood in service law and has a recognised meaning. 'Deputation' has a different connotation in -service law and the dictionary meaning of the word 'deputation' is of no help. In simple words 'deputation' means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per Recruitment Rules. Whether the transfer is outside the normal field of deployment or not is decided by the authority who controls the service or post from which the employee is transferred. There can be no deputation without the consent of the person so deputed and he would, therefore, know his rights and privileges in the deputation post. The law on deputation and repatriation is quite settled as we have also seen in various judgments which we have referred to above. There is no escape for the respondents now to go back to their parent departments and working there as Constables or Head Constables as the case may be."
>
> 6. In the case in hand, the transfer of the petitioner ordered by the respondent University without his consent is illegal.
>
> 7. Accordingly, the writ petition is allowed. Annexure P-2 dated 1.1.2015, qua the petitioner, is quashed and set aside. Pending applications, if any, also stand disposed of. No costs."

12. On the other hand, learned counsel for the respondents would contend that the ratio of the judgment in ***Bishan Dass*** case (supra) can at best be applicable to the second set of cases where the petitioners had approached the Court immediately on the issuance of the orders of secondment and had obtained the stay but the same would not apply to the category of cases where the petitioners had joined and after joining for years together had not protested and had come to the Court only when interim orders in the case of the recently deputed employees had been obtained.

13. Clause 7.11 (v) of the Statutes of the respondent reads as follows:

> *"(v) The Vice-Chancellor may send any employee/teacher of the University on deputation/foreign service."*

A perusal of the aforesaid provision only goes to show that the Vice Chancellor may send any employee/teacher of the University on deputation/foreign service. But then it is nowhere provided that this power can be exercised without obtaining the consent of the employee/teacher.

14. In ***Kaviraj and others vs. State of Jammu and Kashmir and others (2013) 3 SCC 526***, the Hon'ble Supreme Court was seized of a matter where the writ court had interfered with the posting of the employees to a different department on the ground that before sending them on deputation outside the parent department, their consent was not obtained. The Division Bench in LPA disturbed the said finding. The Hon'ble Supreme Court opined that the view taken by the learned Single Judge was clearly erroneous on the aspect of obtaining consent before deputation. The Hon'ble Supreme Court opined that no statutory rule was brought to its notice requiring the prior consent of an employee before his

deployment against a post beyond his parent cadre. It further held that '*the mere fact that the appellants' consent was not sought before their posting at Government Medical College, Jammu (and/or at the hospitals associated therewith) would not in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible."*

This squarely answers the proposition as canvassed in the second set of cases.

15. Insofar as the first set of the petitioners, who have already joined the places outside the parent cadre without any objection or demur, even their cases are squarely covered by the ratio of the judgment in ***Kavi Raj's*** case where the Hon'ble Supreme Court held that willingness of posting beyond the cadre need not be expressly sought and can be implied. It was held that *"willingness of posting beyond the cadre (and/or parent department) need not be expressly sought and can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer".*

16. At this stage it is apt to reproduce para 24 of the judgment wherein both the propositions have been answered in the following terms:

> *"24. Before concluding, it is essential to deal with certain inferences drawn by the learned Single Judge of the High Court. According to the learned Single Judge, prior consent of an employee is imperative, binding, peremptory and mandatory, before he is posted on deputation outside his parent department. No statutory rule has been brought to our notice, requiring prior consent of an employee, before his deployment against a post beyond his parent cadre. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not, in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu, dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical*

Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. We are therefore of the view, that the learned Single Judge of the High Court, clearly erred on the instant aspect of the matter."

17. In view of the aforesaid exposition of law, the judgment rendered by the learned Single Judge of this Court in ***Bishan Dass*** case (supra) would only be applicable in cases of employees, who have immediately on the order of their secondment approached this Court but the same cannot be applied to the cases of employees, who have been transferred outside the parent cadre and have already joined there.

18. In view of the aforesaid discussion, the first set of petitions, as detailed above, is dismissed, whereas the second set of petitions is allowed and the impugned order of secondment is quashed and set-aside. Pending application(s) if any also stands disposed of. The parties to bear their own costs. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

Dr. Lalita Bansal ..... Petitioner.

Vs.

State of H.P. & ors. ..... Respondents

CWP No. 2821 of 2015-C.
Judgement reserved on: 3.6.2015.
Date of decision: 04.06.2015.

Constitution of India, 1950- Article 226- Petitioner sought a direction to the respondent to issue NOC to the petitioner on the basis of remarks obtained in the All India Post Graduation Medical Entrance Examination 2015- Clause No. 1.9 of the notification is illegal and not applicable to the case of the petitioner- petitioner joined PG courses at Chandigarh- she came to know about her critical pregnancy diagnosed as "HYPEREMESIS GRAVIDARUM"- she was not entitled to any maternity leave - she had no option but to submit her resignation- she requested the respondent to relax the P.G. policy so that she could appear in P.G. examination in future as a sponsored candidate- she applied for no objection certificate but the certificate was not issued in her favour- clause No. 1.9 clearly provided that In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years- held, that provisions relating to admission to PG courses were clear and unambiguous- Court cannot pass any direction to accommodate the petitioner- petitioner had not made any attempt to obtain leave or to withdraw the resignation furnished by her- she made a request to consider her posting in the blood bank at IGMC, Shimla which shows that her condition was not critical - rule cannot be declared unreasonable because it operates harshly in a given case- petition dismissed. (Para-8 to 18)

Case referred:

State of Gujarat vs. Shantilal Mangaldas and others AIR 1969 SC 634

For the petitioner : Mr. Sanjeev Bhushan, Advocate with Mr. Sanjeev Kumar Suri, Advocate.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. Vikram Singh Thakur and Mr. Kush Sharma, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the petitioner has sought the following relief(s):-

1. That respondents may kindly be directed to issue the NOC to the petitioner for competing under the category of GDO in service group on the basis of the marks obtained in the All India Post Graduation Medical Entrance Examination 2015 (AIPGMEE) for the admission to the PG (MD/MS) degree Course for the academic year 2015-2018.
2. That the clause No. 1.9 of the Notification dated 02-04-2013 and condition No. 3 (1) (vi) of the Prospectus may very kindly be held inoperative in the exceptional case of the petitioner.
3. That the clause No. 1.9 of the Notification dated 02-04-2013 and condition No. 3(1) (vi) of the prospectus may very kindly be held illegal as unconstitutional, arbitrary against the public policy.

The facts in brief may be noticed.

2. On 11.11.2009 the petitioner was appointed as Medical Officer. Thereafter, the petitioner after availing the study leave joined the Post Graduate course for the academic year 2014-2017 at Post Graduate Institute of Medical Education and Research, Chandigarh (PGIMER). On 12.8.2014, the petitioner came to know about her critical pregnancy diagnosed as "HYPEREMESIS GRAVIDARUM", being on study leave, she was not entitled to any maternity leave and therefore had no option but to submit her resignation.

3. The petitioner vide her letter dated 27.8.2014 requested the respondents to relax the P.G. policy so that she can appear in P.G. examination in future as sponsored candidate on medical and humanitarian grounds.

4. The respondent No. 2 vide notification dated 9.9.2014 issued a notification, wherein it was stated that the State Government is not going to conduct separate Entrance Test for filling up of 50% State quota PG (MD/MS) degree seats in government colleges and the seats for the academic year 2015-2018 would be filled up on the state merit drawn on the basis of marks obtained in All India Post Graduate Medical Entrance Examinations-2015 (AIPGMEE).

5. The petitioner applied through proper channel under the GDO in-service group. On 18.3.2015, the petitioner submitted a representation before respondent No. 2 for grant of no-objection certificate. The respondents on 26.3.2015 circulated the final merit list of PG (MD/MS) degree courses, but the name of the petitioner did not find mention therein.

6. The non-issuance of no-objection certificate by the respondents has been questioned as being illegal, unjust and unreasonable on the ground that it was on exceptional circumstances that petitioner had to leave her MD/MS course in midstream on account of her critical pregnancy and being not entitled to any kind of leave she was compelled to resign.

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

8. Clause No. 1.9 of the notification issued by the government on 2.4.2013 reads as follows:-

"1.9 The In-Service Medical Officers who leave the PG/ Diploma course midway shall stand debarred to re-appear in the PG/ Diploma Entrance Examination for next 5 years. Further if the Medical Officer is on duty or on paid leave, full recovery of the amount for the period of PG/ Diploma course attended would be made."

9. Similarly conditions No. 3, 3.1 and (vi) of the prospectus read as follows:-

"3. ELIGIBILITY & DISTRIBUTION OF SEATS

3.1. (A) HPHS (In-service GDO) Group

(i) 66.6% of the State Quota Seats will be filled-up by in-service Medical Officers. The in-service group will consist of two sub-groups i.e. one sub-group consisting of regularly appointed Medical Officer and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18 the distribution of seats between above two sub-groups will be in the ratio of 2:1.

(ii) The eligibility conditions regarding mandatory period of service (area-wise) in-respect of In-service group will be as under:-

	Area	**Mandatory service period**
I	Chamba-Pangi & Bharmour, Tissa, Lahaul & Spiti-All Medical Blocks, Kinnaur Sangla & Pooh, Nichar (Except Bhabanagar). Shimla-Chirgaon, Nerwa & Tikkar. Mandi-Chohar Valley of Padhar Block.	2 years
II	Kinaur-Bhabanagar of Nichar Block. Kullu-Nirmand & Ani. Mandi-Karsog & Janjelhi. Chamba-Phukhari, Choori, Kihar, Samote. Sirmour-Shillai & Sangrah. Kangra-Mahakal. Shimla-Nankhari, Matiana, Kotkhai & Kumarsain	3 years
III	Other Medical Blocks of the State (excluding the above and below) and NRHM Office.	4 years
IV	Within the limits of Shimla Municipal Corporation, within the limits of Solan Municipal Corporation and within	5 years

	Baddi-Brotiwala-Nalagarh notified area	

(iii) ……..

(iv) …….

(v) ……..

(vi) The candidates from In-Service Group who leave their PG course in midway shall stand debarred to re-appear in the PG Entrance Examination Counselling for State quota seats next 5 years. Further if the Medical Officer is on duty or on paid leave, full recovery of the amount for the period of PG course attended would be made."

10. Indisputably the aforesaid provisions relating to admission to PG courses are absolutely clear and unambiguous and therefore, this court cannot pass any direction to accommodate the petitioner or else the same would amount to judicial overreach, unless this court otherwise holds these provisions to be illegal, arbitrary and ultra-vires etc.

11. It is clear from the record that the petitioner did not even made a slightest attempt to obtain leave and even in her representation dated 27.8.2014, the petitioner has simply stated that she resigned from the P.G. course on 12th August 2014 on medical grounds. It is further revealed that even no attempt was made by the petitioner to withdraw her resignation which as per own showing came to be accepted only on 22nd August 2014.

12. It is pertinent to note that petitioner vide her aforesaid representation had not sought the leave, but had made a specific request to consider her posting as Medical Officer in the Blood Bank, IGMC Shimla. In case the condition of the petitioner was so critical as alleged then why she sought continuity of her job as a Medical Officer at Shimla that too within three days of the acceptance of her resignation. If the petitioner was fit enough to work as a Medical Officer at Shimla then why she could not have continued with the PG course at PGI Chandigarh is not forthcoming.

13. The petitioner has then sought to invoke the provisions of FRSR Leave Rules to contend that petitioner being on study leave was not entitled to any leave whatsoever and therefore had no other option but to resign. He has placed reliance upon FR 43 of the aforesaid Rules, which reads as follows:-

"43. Maternity Leave

(1) A female Government servant (including an apprentice) with less than two surviving children may be granted maternity leave by an authority competent to grant leave for a period of (180 days) from the date of its commencement.

(2) During such period, she shall be paid leave salary equal to the pay drawn immediately before proceeding on leave.

NOTE :- In the case of a person to whom Employees' State Insurance Act, 1948 (34 of 1948), applies, the amount of leave salary payable under this rule shall be reduced by the amount of benefit payable under the said Act for the corresponding period.

(3) Maternity leave not exceeding 45 days may also be granted to a female Government servant (irrespective of the number of surviving children) during the entire service of that female Government in case of miscarriage including abortion on production of medical certificate as laid down in Rule 19:

`Provided that the maternity leave granted and availed of before the commencement of the CCS(Leave) Amendment Rules, 1995, shall not be taken into account for the purpose of this sub-rule.

(4) (a) Maternity leave may be combined with leave of any other kind.

(b) Notwithstanding the requirement of production of medical certificate contained in sub-rule (1) of Rule 30 or sub-rule (1) of Rule 31, leave of the kind due and admissible (including commuted leave for a period not exceeding 60 days and leave not due) up to a maximum of (two years) may, if applied for, be granted in continuation of maternity leave granted under sub-rule (1).

(5) Maternity leave shall not be debited against the leave account."

14. The interpretation sought to be given by the petitioner is erroneous because what sub-rule(5) of Rule 43 contemplates is that maternity leave shall not be debited against the leave account, meaning thereby that maternity leave is a special benefit extended to pregnant woman employee during pregnancy and has no connection with any other kind of leave. The maternity leave as dealt with in rule-43 is a self contained provision and has not been subjected to the conditions applicable to any other leave including extra-ordinary leave.

15. The learned counsel for the petitioner would then contend that clause No. 1.9 of the notification dated 2.4.2013 and conditions No. 3 (1) (vi) of the prospectus be declared inoperative in case of the petitioner or in the alternative the same be held to be unconstitutional, arbitrary and against the public policy.

16. It is more than settled that a rule cannot be declared unreasonable merely because in a given case, it operates harshly.

17. In **State of Gujarat** vs. **Shantilal Mangaldas and others AIR 1969 SC 634,** it has been held as follows:-

"52. It was urged that in any event the statute which permits the property of an owner to be compulsorily acquired by payment of market value at a date which is many years before the date on which the title of the owner is extinguished is unreasonable. This Court has, however, held in Smt. Sitabati Debi v. State of West Bengal, (1967) 2 SCR 949 that a law made under clause (2) of Article 31 is not liable to be challenged on the ground that it imposes unreasonable restrictions upon the right to hold or dispose of property within the meaning of Art. 19 (1) (f) of the Constitution. In Smt. Sitabati Debi's case, (1967) 2 SCR 949 an owner of land whose property was requisitioned under the West Bengal Land (Requisition and Acquisition) Act, 1948, questioned the validity of the Act by a writ petition filed in the High Court of Calcutta on the plea that it offended Article 19 (1) (f) of the Constitution. This Court unanimously held that the validity of the Act relating to acquisition and requisition cannot be questioned on the ground that it offended Article 19 (1) (f) and cannot be decided by the criterion under Article 19 (5). Again the validity of the statute cannot depend upon whether in a given case it operates harshly. If the scheme came into force within a reasonable distance of time from the date on which the declaration of intention to make a scheme was notified, it could not be contended that fixation of compensation according to the scheme of Section 67 per se made the scheme invalid. The fact that considerable time has

elapsed since the declaration of intention to make a scheme, cannot be a ground for declaring the section ultra vires. It is also contended that in cases where no reconstituted plot is allotted to a person and his land is wholly appropriate for a public purpose in a scheme, the owner would be entitled to the value of the land as prevailing many years before the extinction of interest without the benefit of the steep rise in prices which has taken place all over the country. But if Section 71 read with Section 67 lays down a principle of valuation it cannot be struck down on the ground that because of the exigencies of the scheme, it is, not possible to allot a reconstituted plot to an owner of land covered by the scheme."

18. It is equally settled that merely because a law causes hardship, it cannot be interpreted in a manner so as to defeat its object. A plea of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of statute is obscure. It is trite law that where the meaning of any provision is clear and explicit, but if any hardship or inconvenience is felt, it is for the authorities to take appropriate steps to amend the provision and not for the courts to virtually legislate under the guise of interpretation. Hard cases make bad law and the plea of hardship and inconvenience has been said to be a dangerous and a misleading one and if acceded to, would lead the court to forbidden territories.

19. The learned counsel for the petitioner has not been able to show as to how the aforesaid provisions can be held to be unconstitutional or even arbitrary being against the public policy. As already observed this is a matter which can only be considered by the respondents and this court has no authority to declare that the clauses and the conditions as referred to herein above, be not applied to the case of the petitioner.

20. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Kansara Mayur .....Appellant.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 4030 of 2013
Reserved on: 03.06.2015
Date of decision: 04.06.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.3 k.g of charas in a bag held in right hand- PW-1 stated that Investigating Officer had stopped the ongoing vehicles and had asked the occupants of the vehicles to become witness- it is not believable that occupants would not have become independent witnesses to support the arrest, search and seizure- place of apprehension is a busy Highway and police could have easily associated independent witness- no entry was made in the malkhana register regarding the taking out of the property for production in the Court and re-deposit of the property in malkhana- entries required to be made in malkhana register at the time of taking out of the property and depositing the same in malkhana- these circumstances created doubt regarding the prosecution version- accused acquitted. (Para-12)

For the appellant : Mr. Chaman Negi, Advocate.
For the respondent: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This appeal is instituted against the judgment, dated 05.01.2013, rendered by the learned Special Judge (II), Mandi, District Mandi, H.P. in Sessions Trial No. 2 of 2012, whereby the appellant-accused (hereinafter referred to as 'the accused' for the sake of convenience), who was charged with and tried for an offence punishable under Section 20(b)(ii)(c) of the ND & PS Act, was convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs.1,00,000/- and in default of payment of fine to further undergo simple imprisonment for a period of one year.

2. Case of the prosecution, in a nut-shell, is that on 15.10.2011, police party was present at Suki Bain NH-21. Accused came from Pandoh side having a bag in his right hand. On seeing the police party, he turned back and tried to run away. The police party suspected the accused carrying some contraband. Police party gave their personal search to accused and thereafter, search of light maroon and yellow bag was conducted, which was being carried by the accused in right hand. It contained envelope in which black material in the shape of *chapattis*, sphere and stick was found, which on smelling was found to be cannabis/*charas.* It weighed 2 kg. 300 grams. It was sealed with seal H at 10 places. NCB form in triplicate was prepared and seal impression H was affixed on it. Sample seal was taken on piece of cloth. *Rukka* through Constable Kashmir Singh was sent, on the basis of which, FIR No. 248/10, dated 15.10.2011, under Section 20 of NDPS Act was registered against the accused. The contraband was deposited with MHC. It was sent to FSL, Junga. The report was received. Thereafter, the challan was put up after completing all the codal formalities.

3. The prosecution has examined as many as 11 witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. He pleaded innocence. He was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

4. Mr. Chaman Negi, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Mr. P. M. Negi, learned Deputy Advocate General, supported the judgment, dated 05.01.2013.

6. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

7. PW-1, HC Vijay Kumar has deposed that on 15.10.2011 at about 8:50 a.m., they were present near Suki Bain. Accused came from the Pandoh side. He was carrying a light maroon and yellow coloured raxine type bag. He got frightened on seeing the police. He tried to run away. He was apprehended. There was no *abadi* in the vicinity. Investigating Officer stopped the ongoing vehicle and asked the occupants of the vehicle to become witness, but none of them come forward. The Investigating Officer associated him and Constable Dhameshwar. Police gave the search of the police party to the accused. Bag of the accused was checked. It contained *charas.* It weighed 2 kg. 300 grams. *Charas* was put in the polythene bag and polythene bag was put in a cloth parcel. Parcel was sealed with 10 impressions of seal H. Form NCB-1 was filled in triplicate at the spot. *Charas* was seized

vide seizure memo Ex. PW1/C. Rukka was prepared. It was sent through Constable Kashmir Singh to the Police Station. FIR was registered. Investigating Officer completed the investigation. During the course of recording of his statement, one sealed parcel sealed with 10 impressions of seal H, six impressions of seal A and six impressions of seal of FSL were produced. Seals were intact and legible. The parcel was opened. PW-1 Vijay Kumar identified the same. In his cross-examination, he admitted that they had set up *nakka* and they were stopping the vehicles. They had stopped about 5-7 vehicles. No challan was issued.

8. PW-2, Constable Kashmir Singh also deposed the manner, in which the accused was apprehended, search, seizure, sealing and other codal formalities were completed on the spot. He took the *rukka* to the Police Station.

9. PW-3, HHC Thakur Singh, deposed that Additional SHO Sardari Lal had handed over one cloth parcel sealed with ten impressions of seal H, six impressions of seal A alongwith NCB-1 form in triplicate, sample seals A and H and seizure memo to him on 15.10.2011. He made an entry in the *malakhana* register at Sr. No. 1279, Ex. PW3/A. He deposited the same in the *malakhana.* Re-seal memo Ex. PW3/B was signed by him. He sent the parcel, NCB-1 form in triplicate, sample seals A and H, copy of FIR and seizure memo to FSL, Junga for analysis on 17.10.2011 through Constable Kesar Singh vide RC No. 215/11, copy of which is Ex. PW 3/C. He deposited all the articles in FSL and handed over the receipt to him on his return. The case property remained intact till it remained in his custody. In his cross-examination, he has admitted that he has not obtained the signatures of the person depositing the case property. PW-4, HC Girdhari Lal is a formal witness. PW-5, Sardari Lal, Additional SHO, has deposed that PSI Sanjeev Kumar handed over one parcel sealed with 10 impressions of seal H alongwith sample seal H and NCB-1 form in triplicate on 15.10.2011 at 2:40 p.m. He re-sealed the parcel with six impressions of seal A. He obtained the seal impression on separate pieces of cloths. He filled the columns No. 9-11 of NCB-1 form Ex. PW-3/D.

10. PW-6, ASI Surinder Kumar, PW-7 Inspector Surinder Pal are formal witnesses. PW-8, Constable Kesar Singh, deposed that HHC Thakur Dass handed over one parcel sealed with ten impressions of seal H and six impressions of seal A, copy of FIR, NCB-1 form in triplicate, sample seals H and A and copy of seizure memo with the direction to carry them to FSL, Junga for analysis. He took the case property to FSL, Junga. He deposited all the articles at FSL Junga on the same day and handed over the receipt to MHC on his return.

11. PW-10, SI Sanjeev Kumar deposed the manner in which the accused was apprehended on the spot, the *charas* was seized, the sealing procedure was completed by him and seal was handed over to Vijay Kumar after use. He prepared *rukka* Ex. PW10/A. He also prepared the site plan Ex. PW10/B. Accused was arrested vide arrest memo Ex. PW1/D. In his cross-examination, he admitted that Sukki bain falls on National Highway. He was not aware that there was dumping site at Kawari. PW-11, LHC Mast Ram is a formal witness.

12. The accused was apprehended on National Highway. According to PW-1, HC Vijay Kumar, the Investigating Officer stopped the ongoing vehicles and he asked the occupants of the vehicles to become witness. It is not believable that if the vehicles had been stopped by PW-10, SI Sanjeev Kumar, the occupants would not have become independent witnesses to support the arrest, search and seizure. The police have ample powers to take action against the persons who are not willing to help in their investigation. The National Highway-21 is a busy Highway. The police could easily associate independent witnesses. Moreover, when the *nakka* has been laid and the vehicles were being checked. It is not one

of those cases where the recovery was effected from an isolated or secluded place. The recovery has been made from the National Highway and, in these circumstances, the police ought to have associated the independent witnesses being available. The case property was deposited in the *malkhana* by the Additional SHO on 15.10.2011 alongwith NCB-1 form and sample seals H and A. These were sent to FSL, Junga for chemical examination through PW-8, Constable Kesar Singh. He deposited the same at FSL, Junga. The case property has been produced while recording the statement of PW-1, HC Vijay Kumar. Vijay Kumar has identified Ex.-P1. There is no entry in the *malkhana* register when the case property was taken out for being produced in the Court. Similarly, there is no entry when the case property was re-deposited in the *malkhana*. Moreover, it has not come in the evidence, who has produced the case property in the Court. An entry is required to be made when the case property is taken out from the *malkhana* for production the Court in Form-19. Similarly, entry is required to be made when the case property is taken back and re-deposited in the *malkhana*. There is neither any entry at the time of taking out of the case property nor at the time of re-depositing of the same. There is no DDR report also prepared at the time of producing the case property in the Court and when it was taken back to be re-deposited in the *malkhana*. Thus, it casts doubt whether it was the same case property which was recovered from the accused and sent to FSL, Junga and produced in the Court or some other case property was produced in the Court without there being any corresponding entries at the time of taking out and re-deposit in the *malkhana* register. Consequently, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

13. Accordingly, in view of the observations and discussions made hereinabove, the appeal is allowed. The accused is acquitted of the charge framed against him. He be released immediately, if not required in any other case. The Registry is directed to prepare the release warrant and send it to the concerned Superintendent of Jail.

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

Kashmir Singh and others. ...Appellants.

Versus

State of Himachal Pradesh ...Respondent.

Cr.A. No. 60/2012
Reserved on: 3.6.2015
Decided on: 4.6.2015

Indian Penal code, 1860- Sections 302 and 323 read with Section 34- Complainant was thrashing the paddy in his courtyard- houses of the deceased and accused are adjoining to each other- there was a passage between the houses- accused had stacked Bajri on the passage due to which the walls of the house of the complainant were damaged as a result of dampness- complainant asked the accused to remove Bajri but the accused started quarreling with the complainant- accused also assaulted the deceased and 'B'- matter was reported to the police, when the complainant party returned home from the police they found that deceased had died- record showed that complainant was asking the accused to remove Bajri immediately at 10:00 P.M, which led to a sudden fight- therefore, case would fall under Exception (4) of Section 300 of IPC- prosecution had also not explained the injury received by the accused- role of accused 'K' and 'N' was not established- appeal partly allowed. (Para-21 to 23)

For the appellants: Mr. Manoj Pathak, Advocate.
For the Respondent: Mr. Ramesh Thakur, Asstt. A.G.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 6.1.2012/10.1.2012 rendered by the Additional Sessions Judge (1), Kangra at Dharamshala in Sessions Case No.6-P/2010, whereby the appellants-accused (hereinafter referred to as the "accused" for convenience sake), who were charged with and tried for offence punishable under section 302 and 323 read with section 34 of the Indian Penal Code have been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- and in default of payment of fine, they were further ordered to undergo simple imprisonment for a period of six months for offence under section 302 IPC. They were also convicted and sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs. 1,000/- and in default of payment of fine, they were further ordered to undergo simple imprisonment for one month for offence punishable under section 323 of the Indian Penal Code. Both the sentences were ordered to run concurrently.

2. Case of the prosecution, in a nutshell, is that PW-2 Madan Lal was working as a Driver at Baddi. He came to his home at Lahru on 21.10.2009. He was threshing the paddy in their courtyard. Accused were in their houses. House of accused Kashmir Singh, uncle of Madan Lal, was adjoining to the house of Prem Dass. There was a passage in between the houses of complainant and accused Kashmir Singh. Accused had stacked Bajri on the passage besides the house of complainant, due to which the walls of house of Madan Lal got damaged due to dampness. Madan Lal asked accused Kashmir Singh and aunt to remove the Bajri. However, all the accused persons started quarreling with Madan Lal. First of all, accused Gulzar started quarreling with complainant Madan Lal and at that time, father of complainant, Bhagwan Dass, uncle Prem Dass and brother Man Chand also reached on the spot. Thereafter, accused Gulshan carrying hockey stick assaulted the complainant. Accused Gulzar carrying danda also assaulted the complainant. The other accused started beating the complainant with fist and kick blows. Complainant received injuries on his left shoulder, back and other parts of the body. The incident was witnessed by Rajinder Kumar, Karam Chand and Deepo Devi. Accused also assaulted Bhagwan Dass and Prem Dass with hockey stick, danda and fist blows. Madan Lal, Man Chand and their father went to the Police Station, Bhawarna and Rapat Ex.PW-11/A was lodged against the accused. Thereafter, complainant party returned from the Police Station to their home and their medical examination was conducted at C.H.C. Bhawarna. They found their uncle Prem Dass has died. Thereafter, complainant party again went to the Police Station, Bhawarna and told the police about the death of Prem Dass. FIR Ex.PW-2/A was registered at Police Station, Bhawarna. Police visited the spot. Photographs were taken. Investigating Officer prepared inquest report. Dead body was taken for post-mortem to Sub Divisional Hospital, Palampur. PW-12 Dr. K.L. Kapoor conducted the post-mortem. Danda Ex.P-1 and hockey stick Ex.P-2 were taken into possession by the policevide memo Ex.PW-2/B. I.O. also lifted blood from the verandah and put it in a plastic container. 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 14 witnesses in all to prove its case against the accused. Statements of accused under Section 313 Cr.P.C. were recorded. Accused Kashmir Singh has admitted his relationship with the complainant party. He has denied that any Bajri was kept on the passage. Accused Gulshan has admitted his

relationship with the complainant party. He has admitted that complainant Madan Lal had provoked the accused party to remove the Bajri. He has denied that he was armed with hockey stick and assaulted the complainant. Accused Gulzar has admitted relationship with complainant Madan Lal, however, denied that he was armed with danda. Accused Nirmala Devi has admitted her relationship with the complainant party. She has denied the case of the prosecution. Learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. Manoj Pathak, learned counsel for the accused, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, learned Assistant Advocate General has supported the judgment passed by the trial Court.

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

7. PW-1 Dr. Anjali Gupta has medically examined Bhagwan Dass on 22.10.2009. She issued MLC Ex.PW-1/A. She has also examined Man Chand and issued MLC Ex.PW-1/B. She has also examined Madan Lal and issued MLC Ex.PW-1/C.

8. PW-2 Madan Lal has testified that he reached at Lahru on leave on 21.10.2009. He was thrashing the paddy in their courtyard. Accused were present in their house. Their house, his uncles Kashmir Singh and Prem Dass houses were adjacent to each other. There was a passage in between his and Kashmir Singh's house. Family of Kashmir Singh had kept Bajri on the passage besides their house. Due to this, wall of their house was damaged due to dampness. He asked his uncle and aunt to remove the Bajri. However, Kashmir Singh, Nirmala Devi, Gulshan and Gulzar started quarrelling with him. First of All, Gulzar started altercation with him. In the meantime, his father Bhagwan Dass, uncle Prem Dass and brother Man Chand also reached. All of the accused started beating them with hockey stick and danda. Gulshan was having hockey stick and Gulzar was having dada with him. They beat them with hockey stick and danda. Other accused gave them beating with fist and kick blows. He sustained injuries on left shoulder, back and other parts of the body. All of them sustained injuries. Rajinder Kumar, Karam Chand and Deepo Devi reached the spot. They rescued them. He alongwith his father and brother went to the Police Station. They lodged report at 2.30 A.M. His medical examination was also conducted. When they came back, they found that Prem Dass has died. FIR Ex.PW-2/A was registered at his instance. Police recovered hockey stick Ex.P-1 and danda Ex.P-2 and took the same into possession vide memo Ex.PW-2/B. In his cross-examination, he has deposed that the quarrel continued for half an hour.

9. PW-3 Dr. Navneet Chauhan has examined accused Kashmir Singh. He noticed the following injuries on the person of Kashmir Singh:

1. Abrasion over the forehead with brownish clotted blood.
2. Abrasion over left forearm lateral aspect with brownish clotted blood.

He issued MLC Ex.PW-3/A qua accused Kashmir Singh.

He also examined Gulzar Singh and noticed the following injuries on his person:

1. Clotted brownish blood in right nostril.
2. Tenderness left foot with no evidence of fracture.

He issued MLC Ex.PW-3/B qua accused Gulzar Singh.

He also examined accused Gulshan and noticed the following injuries on his person:

1. Abrasion over right hand, dorsum with clotted brownish black blood.
2. Tenderness over left shoulder. No evidence of any fracture.

He issued MLC Ex.PW-3/C qua accused Gulshan.

Accused Nirmala Devi was also examined by PW-3 Dr. Navneet Chauhan and he noticed the following injuries on her person:

1. Tenderness left elbow posterior aspect. No evidence of any fracture.
2. Contusion over left side of forehead with bluish discolouration.

He issued MLC Ex.PW-3/D qua accused Nirmala Devi.

10. PW-4 Man Chand has testified that on 21.10.2009, he, Bhagwan Dass and Madan were thrashing the paddy at about 10.00 P.M. Their houses were adjacent to each other, i.e. Bhagwan Dass, Prem Dass and Kashmir Singh. There was a passage in between the houses of Kashmir and Bhagwan. Bhagwan Dass is his father. During those days, Bajri was kept by his uncle Kashmir Singh besides the wall of their house. The wall of the house was damaged. His brother Madan Lal asked Nirmala Devi to remove the Bajri. Then Gulzar came out and started exchanging hot words with his brother. He alongwith his father and uncle Prem Dass also reached there. Gulzar was carrying danda. Gulshan was carrying hockey stick. All of them started beating them. Accused Kashmir and Nirmala gave fist and leg blows while Gulzar and Gulshan gave them beatings with danda and hockey stick. On hearing noise, Karam Chand, Deepo Devi and Rajinder, their neighbours also came there. They rescued them from the clutches of the accused. He received injuries on his head and chest. His father, brother and uncle also received injuries. He alongwith his father and brother went to the Police Station. When they came back to their home, they found uncle has died. In his cross-examination, he has admitted that no quarrel has taken place between 5.00 P.M. to 10.00 P.M. According to him, accused kept them beating for one hour. He has also admitted that people gathered on the spot and they separated them and thereafter they went to their respective houses.

11. PW-5 Shambu Ram has deposed that he remained Pradhan of Gram Panchayat, Jatnula in the year 2009. Police had come to the house of Bhagwan Dass and Kashmir Singh on 22.10.2009. Police took photographs. Police also took blood stains and put the same in a plastic container and sealed the same with seal impression 'A'. He produced the seal in the Court. Police also seized one danda and one hockey stick vide seizure memo Ex.PW-2/B. He signed the same.

12. PW-6 Deepo Chaudhary has deposed that she knew Prem Dass, Kashmir Chand and Bhagwan Dass. Her house is on the back side of their house. All these persons were brothers and they were '***Dever'*** (brother-in-law) in relationship. She did not remember the date though it was around one and half years ago. It was around 9-10 P.M., she heard the noise. She alongwith Pappu went to the spot. She saw Bhagwan Dass and Kashmir Chand were arguing with each other and Prem Dass was asking for removing of Bajri. Kashmir Chand was present alongwith his children and wife at the spot and the family of Bhagwan Dass was also present there. She alongwith Pappu persuaded the parties not to quarrel and thereafter they went away. Kashmir Chand's children were not having anything with them. Bhagwan Dass and Prem Dass had not sustained any injuries nor blood was oozing out. She was declared hostile. She was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she has deposed that Prem Dass died next day of the quarrel.

13. PW-7 Karam Chand has deposed that around two years ago, some incident had happened in their village. However, he had gone to the spot in the morning. He came to know from some lady that Prem Dass and Kashmir Chand had some quarrel during the

previous night. He had not gone to the spot at the time of quarrel during night. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has deposed that he heard the noise of quarrel coming from the house of Prem Dass, Bhagwan and Kashmir Chand and he went there alongwith Deepo Chaudhary and Rajinder alias Pappu. His house was just behind the house of Bhagwan Dass. He has denied the suggestion that he told the police that accused Gulshan, Gulzar, Kashmir Chand and Nirmala Devi were assaulting Bhagwan, Prem, Madan and Man Chand in the courtyard of Bhagwan Dass. He has also denied the suggestion that accused Gulzar was having Danda and accused Gulshan was having hockey stick and assaulting these persons. He has also denied the suggestion that he alongwith Deepo Chaudhary intervened and saved the injured. He has also denied the suggestion that Bhagwan Dass, Prem Dass, Madan Lal and Man Chand had sustained injuries. He has also denied the suggestion that accused persons assaulted Prem Dass in his presence and caused injury on his head, due to which he died.

14. Statements of PW-8 Purshotam Lal, PW-9 Surjeet Singh, PW-10 Paramjeet Singh and PW-11 Trilok Raj are formal in nature.

15. PW-12 Dr. K.L. Kapoor has conducted post mortem and issued post mortem report Ext. PW-12/B. According to him, accused died due to Hypovolemic shock and respiratory failure secondary to right lung puncture and liver injury secondary to direct trauma to right fractured lower ribs. The time between injury and death was within one hour and post mortem was conducted within less than 24 hours. According to him, the injuries mentioned in PMR could be caused by Danda and hockey sticks.

16. PW-13 Prem Chand has deposed that on 22.10.2009, after registration of FIR, he received the file for investigation. He visited the spot. He took photographs. He prepared the inquest report. The hockey sticks and Danda were taken into possession vide memo Ext. PW-2/B. He got the post mortem of the dead body conducted.

17. Statement of PW-14 Kamal Kumar is formal in nature.

18. What emerges from the analysis of the statements of the witnesses mentioned herein above is that the complainant, accused and deceased are related to each other. PW-2 Madan Lal alongwith his family members was thrashing the paddy. The passage lies between the houses of the accused and complainant party. PW-2 Madan Lal asked them to remove the Bajri lying on the passage. Accused came on the spot. Gulshan gave beatings to them with hockey stick and accused Gulzar gave them beatings with Danda. They received injuries. They went to the Police Station. They came back to their home and found Prem Dass has died. Thereafter, FIR Ext. PW-2/A was registered. Hockey stick Ext. P-1 and Danda Ext. P-2 were taken into possession vide memo Ext. PW-2/B. The cause of death as per PMR Ext. PW-12/B is due to Hypo volumic shock and respirator failure secondary to right lung puncture and liver injury secondary to direct trauma to right fractured lower ribs. The time between injury and death was within one hour and post mortem was conducted within less than 24 hours. According to him, the injuries mentioned in PMR could be caused by Danda and hockey sticks.

19. Accused persons were also medically examined by PW-3 Dr. Navneet Chauhan. She issued MLCs Ext. PW-3/A, Ext. PW-3/B, Ext. PW-3/C and Ext. PW-3/D. It is evident from the MLC's that accused persons have also received injuries, as noticed herein above. The cause of quarrel is stacking of Bajri, which was lying between the houses of the complainant and accused. PW-2 Madan Lal had asked accused party to remove the Bajri. It led to arguments and thereafter the quarrel took place. It was not a pre-meditated act on behalf of the accused. According to PW-2 Madan Lal, quarrel lasted for half an hour and according to PW-4 Man Chand the quarrel lasted for one hour. They were rescued by

Rajinder Kumar, PW-7 Karam Chand and PW-6 Deepo Devi. Rajinder Kumar has not been examined by the prosecution. PW-6 Deepo Devi and PW-7 Karam Chand have not supported the case of prosecution. They were declared hostile and cross-examined by the learned Public Prosecutor. Other independent witness Rajinder Kumar has not been examined.

20. Now, the Court is left with only the statements of closely related witnesses i.e. PW-2 Madan Lal and PW-4 Man Chand. Statements of the related witnesses can be taken into consideration but after due caution and care.

21. Mr. Manoj Pathak, learned advocate for the appellant has vehemently argued that it is not a case of murder. According to him, it was not a premeditated act. It was a sudden fight in the heat of passion. We have already noticed that it was not a premeditated act. The complainant party had asked the accused party to remove the Bajri which led to fight in the heat of passion. It has come in the evidence that complainant was asking the accused to remove the Bajri immediately. It was 10.00 pm at night. It was not expected from the accused to remove the Bajri during night at 10.00 P.M. The complainant party insisted at night the accused to remove the Bajri, which led to a sudden fight, thus the offence would be covered under Exception (4) of Section 300 of the Indian Penal Code as far as accused Gulshan and Gulzar are concerned. The evidence led qua the role of accused Kashmir Singh Nirmala is very sketchy and vague. Even if it is assumed that accused Kashmir Singh and Nirmla Devi have given kick and fist blows, it could not lead to fracture of the ribs of the deceased. Kashmir Singh was 61 years old at the time of recording of his statement under Section 313 CrPC on 26.11.2011 and incident is dated 21.10.2009, thus he was 59 years of age at the time of incident. Nirmala Devi was 56 years at the time of recording of her statement under section 313 CrPC on 16.11.2011 and was 54 years on the date of incident on 21.10.2009. The prosecution has also not explained the injuries received by the accused. The prosecution has not led any evidence to whom beatings were given by accused Kashmir Singh and Nirmala Devi with fist and kick blows. There is only a bald assertion that they started giving beatings with fist and kick blows. Thus, the prosecution has failed to prove the case beyond reasonable doubt as far as accused Kashmir Singh and Nirmala Devi under sections 302 and 323 of the Indian Penal Code is concerned.

22. We have scanned the entire evidence and are of the considered opinion that it is not a case of murder. However, accused Gulshan and Gulzar knew that injuries caused by them to the deceased could cause death. Thus, the case would fall within the ambit of section 304 Part-II of the Indian Penal Code. Accused Gulshan and Gulzar have rightly been convicted under section 323 of the Indian Penal Code for the injuries caused by them to the complainant party as per medical evidence of PW-1 Dr. Anjali Gupta.

23. Accordingly, the appeal is partly allowed. Accused Kashmir Singh and Nirmala Devi are acquitted of the charges framed against them by giving them benefit of doubt. Accused Gulshan and Gulzar are convicted under Section 304 Part-II of the Indian Penal Code, instead of Section 302 of the Indian Penal Code. Conviction of accused Gulshan and Gulzar under section 323 IPC is upheld. Accused Gulshan and Gulzar be produced before the Court on **17.6.2015** to be heard on the quantum of sentence. Fine amount, if already deposited by accused Kashmir Singh and Nirmala Devi be refunded to them. Since both the accused i.e. Kashmir Singh and Nirmala Devi are in jail, they be released forthwith, if not required in any other case.

24. The Registry is directed to prepare the release warrant of accused Kashmir Singh and Nirmala Devi 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 MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Mohinder Kumar .....Petitioner.
Versus
Union of India and others .....Respondents.

CWP No.6161 of 2014.
Judgment reserved on: 26.05.2015.
Date of decision: June 04, 2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as Lower Division Clerk on contract basis- Department invited application for three posts of Lower Division Clerk for which the petitioner also applied- his case was rejected on the ground that he was over age- when his contract was not renewed, he filed an application before Central Administrative Trinunal which was also dismissed - selected candidates were not arrayed as party- this application was not filed before the High court, therefore, it could not be said as to what plea was taken by the petitioner before the Court. (Para-5 to 12)

Cases referred:
Prabodh Verma and others versus State of Uttar Pradesh and others AIR 1985 SC 167
Tridip Kumar Dingal versus State of West Bengal and others (2009) 1 SCC 768
Public Service Commission, Uttaranchal versus Mamta Bisht and others (2010) 12 SCC 204

For the Petitioner : Ms.Ranjana Parmar, Advocate.
For the Respondents: Mr.Ashok Sharma, Assistant Solicitor General of India, for respondent No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Anup Rattan and Mr.Romesh Verma, Additional Advocate Generals, for respondent No.2
Mr.K.B.Khajuria, Advocate, for respondent No.3 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this writ petition, the petitioner has questioned the order passed by the Central Administrative Tribunal whereby the petition filed (O.A.No.1387-HP-2013) was dismissed.

2. The facts as set out in the petition are that the petitioner was appointed by respondent No.3 on 20.08.2002 as Lower Division Clerk on contract basis. The respondent-department on 11.12.2012 invited applications for the purpose of appointment of three posts of Lower Division Clerk for which the petitioner also applied. However, his case was rejected on the ground of his being overage. When the contract of the petitioner was not being renewed, he filed writ petition bearing CWP No.6124 of 2012 which ultimately was withdrawn by him on 18.09.2013 with liberty to approach a competent authority. The petitioner thereafter approached the Central Administrative Tribunal, but the Tribunal too dismissed the petition.

3. The petitioner has not cared to place on record the copy of the petition (original application) whereby it could be inferred as to what exactly were the reliefs and the grounds taken in such application. But, insofar as the present petition is concerned, the petitioner has sought regularization of his services and for quashing the order passed by the Tribunal and has further prayed for directions for reinstatement since his services have been terminated in compliance to the impugned order of the Tribunal.

4. In response to petition, respondents No.3 and 4 have filed their reply wherein it has been averred that the petitioner cannot claim regularization as per the regularization policy framed by the State of Himachal Pradesh since the employees of the Institution are governed by the Recruitment and Promotion Rules of the Central Government. It is further averred that since the petitioner was overage, his case could not be considered for regularization. As per the advertisement, the maximum age limit was 28 years as on 01.07.2011 and the petitioner admittedly was more than 28 years on the cut-off date.

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

5. Ms.Ranjana Parmar, learned counsel for the petitioner has vehemently argued that once the age relaxation is prescribed in the Manual on Establishment and Administration for Central Government Offices (in short 'Manual') wherein the age relaxation has been granted to all those casual labourers for absorption in the regular establishment in Group-D. The learned Tribunal ought to have considered this and rendered a finding thereupon.

6. We cannot agree with such submissions. In absence of the original application filed before the Tribunal, we are not in a position to ascertain as to whether this ground was infact taken before the Tribunal. Nonetheless, even in case the present petition is perused, then nowhere in the entire petition has the petitioner made a whisper regarding the applicability of these rules so as to afford a fair chance to the respondents to rebut the same.

7. Further, the contention of the petitioner that the question of relaxation of age was not dealt with by the Tribunal is not supported by the record because the Tribunal in para-10 of its judgment has categorically held as follows:-

> ***".....In so far as relaxation in age is concerned, the relevant selections have not even been called in question by the applicants nor any relief has been claimed in that regard...."***

8. No exception can be taken to this finding of the Tribunal because it cannot be disputed that the selected candidates are necessary parties as they would be only ones, who would be directly affected by the outcome of this litigation. It is also equally settled that no adverse order can be passed against a person, who is not made party to the litigation.

9. In ***Prabodh Verma and others*** *versus* ***State of Uttar Pradesh and others AIR 1985 SC 167*** and ***Tridip Kumar Dingal*** *versus* ***State of West Bengal and others (2009) 1 SCC 768***, it has been held that if a person challenges the selection process, successful candidate or atleast some of them are necessary parties.

10. In ***Public Service Commission, Uttaranchal*** *versus* ***Mamta Bisht and others (2010) 12 SCC 204*** while dealing with the concept of necessary parties and effect of non impleadment of such party in the matter when the selection process is assailed, the Hon'ble Supreme Court observed thus:-

> ***"9. In case Respondent 1 wanted her selection against the reserved category vacancy, the last selected candidate in that category was a***

necessary party and without impleading her, the writ petition could not have been entertained by the High Court in view of the law laid down by nearly a Constitution Bench of this Court* in *Udit Narain Singh Malpaharia v. Board of Revenue AIR 1963 SC 786, wherein the Court has explained the distinction between necessary party, proper party and pro forma party and further held that if a person who is likely to suffer from the order of the court and has not been impleaded as a party has a right to ignore the said order as it has been passed in violation of the principles of natural justice. More so, proviso to Order 1, Rule 9 of the Code of Civil Procedure, 1908 (hereinafter called "CPC") provides that non-joinder of necessary party be fatal. Undoubtedly, provisions of CPC are not applicable in writ jurisdiction by virtue of the provision of Section 141 CPC but the principles enshrined therein are applicable. (Vide Gulabchand Chhotalal Parikh v. State of Gujarat AIR 1965 SC 1153, Babubhai Muljibhai Patel v. Nandlal Khodidas Barot (1974) 2 SCC 706 and Sarguja Transport Service v. STAT (1987) 1 SCC 5.).

10. In Prabodh Verma v. State of U.P. AIR 1985 SC 167 and Tridip Kumar Dingal v. State of W.B.(2009) 1 SCC 768, it has been held that if a person challenges the selection process, successful candidates or at least some of them are necessary parties."

11. In absence of the selected candidates, it is immaterial as to whether the petitioner is below 40 years or is duly qualified under the Manual.

12. Even otherwise, in absence of the original application filed before the Tribunal, we have no other option, save and except, to draw an adverse inference against the petitioner. After-all, the petitioner was well aware that this Court while adjudicating this petition is only exercising the powers of judicial review and, therefore, it was incumbent upon him to have placed on record the entire material on the basis of which the Tribunal rendered its decision.

13. Having said so, we find no merit in this petition and the same is accordingly dismissed alongwith pending application, if any, leaving the parties to bear their own costs.

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

Shri Ajai Srivastava .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CW PIL No. 01 of 2015
Reserved on : 11.05.2015
Date of decision: 05.06.2015

Constitution of India, 1950- Article 226- A letter was received stating there are 17 inmates in the Old Age Home at Basantpur- out of them, four inmates are severely handicapped- it was prayed that these inmates be given disability/rehabilitation pension, a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide some vocational training and that inmates suffering from mental illness be

shifted to the Hospital of Mental Health and Rehabilitation- held, that it is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded person by providing them necessary assistance- old age pension has been denied to two persons on the ground that they are not citizens of India - the policy enacted by the State Government to deny the pension on the ground of domicile is arbitrary and unreasonable- direction issued to the State to open separate home for adult disabled and mentally retarded and to check whether basic amenities are being provided- further direction issued to provide vocational training, disability allowance and to release old age pension. (Para-5 to 9)

For the petitioner: Mr. C. N. Singh, Advocate as Amicus Curiae.
For the respondents: 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:

Rajiv Sharma, J.:

The Court has taken cognizance of the letter, dated 29.12.2014, addressed to Hon'ble the Chief Justice by Shri Ajai Srivastava, Honorary Chairman, Umang Foundation, whereby the questions of vital public importance have been raised.

2. In India, 95 million people are above the age of 60 and by the year 2025, nearly 80 million more will be added to this bracket of population. There are about 8 million people who are currently above the age of 80 years. It is the need of hour to provide them with shelter, food, clothing and medical care. The old people are leading isolated lives due to change in value system and of course due to economic considerations. It is the duty of all of us to restore their dignity in their twilight.

3. According to the averments made in the letter, dated 29.12.2014, there are 17 inmates in the Old Age Home at Basantpur, District Shimla, run by the H.P. State Social Welfare Advisory Board. Out of them, four inmates, namely, Mr. Sonam Bahadur, Mr. Surat Ram, Mr. Ram Singh and Ms. Krishna are severely handicapped. They are in the age group of 40-50 years. Both legs of Mr. Sonam Bahadur were amputated after he met with a major fire accident while he was working as a labourer with a Contractor of H.P. State Forest Corporation in District Kullu. He was treated at Indira Gandhi Medical College, Shimla. However, neither the Contractor nor the State Government paid any compensation to him. He is living in the Old Age Home for the last about 13 years. He has also not been paid any disability pension. Mr. Surat Ram had a brain stroke leading to paralysis. He was admitted in the Old Age Home about one year ago. He has also been denied the disability pension. Mr. Ram Singh is living in the Home for the last eight years. He has also been denied the disability pension by the State. Ms. Krishna is mentally retarded. There is no skilled employee to tackle with such persons in the Home. She has also been denied the disability pension. Petitioner has prayed that these inmates be given disability/rehabilitation pension. Petitioner has also prayed that a separate rehabilitation centre should be opened by the State for the helpless disabled persons with facility to provide them some vocational training. It is also prayed that the inmates also need psychological counseling. The petitioner has also prayed that the inmates who suffers from serious mental sickness, should be shifted to the Hospital for Mental Health and Rehabilitation, Boileauganj, Shimla. Petitioner has further prayed that a separate rehabilitation centre is required for the helpless persons with mental retardation.

4. Respondents No. 1, 2, 5, 6 and 8 have filed their replies. According to the averments made in the reply filed by respondents No. 1 to 5 and 6, it is stated that the Old Age Home, Basantpur is being run by the H.P. State Social Welfare Advisory Board, which is a voluntary organization. The State Government provides grant-in-aid to the concerned organization. It is admitted in the reply that there is no separate Home for the adult disabled shelter less and destitute persons in the State. A Home for Mental Retarded adult males has been established at Nahan by the Aastha Welfare Society, Nahan and the Government is providing grant-in-aid to the NGO. Similarly, the efforts are also being made to run Home for Mental Retarded females in the State. But, for the time being, these persons are lodged in the Old Age Home. The feasibility and mechanism for running/opening separate home for shelter less in a need of immediate shelter is under active deliberation/consideration of the State Government. The Secretary, H.P. State Social Advisory Board was directed to provide all the basic facilities to all the inmates lodged in the Home vide letter, dated 21.02.2015. The District Welfare Officer, Shimla was directed to take immediate steps for providing Disability Rehabilitation Allowance/Old Age Pension to all the eligible inmates admitted in the Home and to inspect the said Home regularly. According to the reply, there are 19 inmates lodged in the Old Age Home Basantpur, out of which 14 are old aged inmates and 5 are physically handicapped inmates. Out of 14 old aged inmates, 12 inmates are getting Old Age Pension. Case of one Saleem for grant of Old Age Pension is under consideration. According to the provisions of Social Security Pension Scheme, Old Age Pension/Disability Relief Allowance can only be provided to Bonafide Himachalis. Since Smt. Ganga, an old aged inmate belongs to Nepal and not being a bonafide Himachali, is not eligible for old age pension as per the provisions of Social Security Pension Scheme. Similarly, out of five disabled inmates, one Smt. Meera Wati is getting Widow Pension and disability certificate of two inmates, namely, Smt. Krishna Devi and Sh. Surat Ram has been obtained from the District Medical Board and the cases of these two inmates are being processed for granting Disabled Relief Allowance. Two disabled inmates, S/Sh. Sanam Bahadur and Ram Singh belong to Nepal and are not bonafide Himachalis and as per Social Security Pension Scheme, both are not eligible for getting Disabled Relief Allowance. The Managing Director, H.P. Forest Corporation has been requested to make proper inquiry of the accident relating to Mr. Sonam Bahadur vide letter, dated 21.02.2015. A Counsellor has been appointed by the H.P. Social Welfare Board and the counseling is provided to the needy inmates twice in a month. Regular health check up of all the inmates is conducted once in a month by the Medical Officer, Community Health Centre, Sunni. Medical health check up of four mentally sick/mentally retarded inmates is conducted by the Specialist Medical Officer of Indira Gandhi Medical College & Hospital, Shimla. The relations of the inmates are not known, but the efforts are made to trace out the relations of the inmates with the help of police administration.

5. According to Preamble of The Constitution of India, India is a Sovereign Socialist Secular Democratic Republic. The respondent-State is a welfare State. It is the duty cast upon the respondent-State under Article 41 of the Constitution of India that it shall within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement and in other cases of undeserved want. It is the constitutional duty of the State Government to look after the interests of shelter less, disabled, destitute, mentally retarded males/females by providing them necessary assistance. Out of 14 old aged inmates, 5 are physically handicapped inmates. Only 12 inmates are getting Old Age Pension. The Old Age Pension has been denied to Smt. Ganga, S/Sh. Sanam Bahadur and Ram Singh only for the reason that they are not Indian citizen. Cases of Smt. Krishna Devi and Sh. Surat Ram are under consideration for granting them Disabled Relief Allowance.

6. All the inmates of the Old Age Home belong to one group and they cannot be segregated only on the basis of their domicile or citizenship. They are there due to adverse circumstances beyond their control. The basic needs of bonafide and non-bonafide Himachalis are the same. The action of the respondents of denying the Old Age Pension/ disability relief allowance to the non-bonafide Himachali inmates of the Old Age Home is unreasonable and arbitrary.

7. We are of the considered view that all the persons lodged in the Old Age Home are entitled to Disabled Relief Allowance/Old Age Pension. There is nobody to look after them and the efforts made by the authorities concerned to trace out their relations are futile. There is no separate Home for the adult disabled shelter less and destitute persons in the State. There is no Home for Mental Retarded females in the State. But, for the time being, these persons are lodged in the Old Age Home. The State Government is seized of the matter and the feasibility and mechanism for running/opening separate home for shelter less is under active deliberation/consideration of the State Government, as noticed hereinabove.

8. The inmates of the Old Age Home have a right to life under Article 21 of the Constitution of India. They are required to be provided with disability relief allowance, Old Age Pension, clothes, nutritive food and vocational training. The basic amenities are required to be provided by the State to all the inmates lodged in the State Home in the State of Himachal Pradesh without any discrimination/segregation.

9. Accordingly, we issue the following mandatory directions to the respondent No. 1:

1. A separate Home for adult disabled shelter less and destitute persons in the State be established within a period of one year.
2. A separate Home for mentally retarded males and females be established within a period of one year from today.
3. Smt. Ganga be released Old Age Pension within a period of three weeks from today.
4. S/Sh. Sanam Bahadur and Ram Singh be provided with Disability Relief Allowance within a period of three weeks from today.
5. Cases of Sh. Saleem, Meera Wati and Krishna Devi be processed within a period of two weeks and the Old Age Pension be released to them.
6. The Principal Secretary (Social Justice & Empowerment), Government of Himachal Pradesh is directed to release adequate funds for the construction of a separate Home for adult disabled shelter less and destitute persons in the State and for the construction of a separate Home for mentally retarded males and females within a period of eight weeks from today.
7. The Director Welfare, Himachal Pradesh, Shimla, i.e., respondent No. 5 is directed to visit the Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu every month to look into whether the basic amenities are being provided to the inmates lodged therein, if not, the same be made available within a period of two weeks after visiting the Home.

8. The Chief Secretary, Government of Himachal Pradesh is directed to issue necessary directions to the H.P. Civil Supply Corporation to provide adequate *rations* for all the inmates of Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu at subsidized rates.

9. The Director General of Police is directed to constitute a special team headed by a officer not below the rank of Superintendent of Polcie to find out the relations of the inmates of Old Age Home Basantpur, Shimla, Old Age Home Dari, Dharamshala, Old Age Home Bhangrotu, Mandi and Old Age Home Alleo, New Manali, Kullu

10. The State Government is also directed to provide necessary vocational training to the inmates and also provide them atleast one newspaper in English vernacular and one magazine.

11. The Chief Secretary, Government of Himachal Pradesh shall be personally responsible to implement and execute the directions made hereinabove, in letter and spirit.

10. We place on record our appreciation for the sincere efforts made by the petitioner by bringing to the notice of the Court the conditions prevailing in the Old Age Homes in the State of Himachal Pradesh. The Umang Foundation is awarded costs of rupees one lac. It is made clear that the costs shall only be used for the welfare of disabled, shelter less, destitutes, mentally retarded males/females in the State of Himachal Pradesh.

11. In the light of the aforesaid observations/directions, the petition stands disposed of.

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

Court on its own motion ……Petitioner.

Vs.

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

CW PIL No. 03 of 2014
Reserved on : 11.05.2015
Date of decision: 05.06.2015

Constitution of India, 1950- Article 226- Status report filed regarding the condition of various institutions for Mentally Challenged and Differently-abled Children/Adults established throughout the State- report pointed out many deficiencies- direction issued to remove the deficiencies- further, direction issued to establish one institution for mentally retarded children in cluster of three Districts- direction issued to Municipal Council, Nagar Panchayats and the State to accord "No Objection Certificate" to cut/remove the trees for constructing public utility building by imposing necessary condition. (Para-2 to 23)

Cases referred:

Air India Statutory Corporation and others Vs. United Labour Union and others (1997) 9 Supreme Court Cases 377

For the petitioner: Mr. Dilip Sharma, Senior Advocate as Amicus Curiae with Ms. Nishi Goel, Advocate.

For the respondents: 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:

Rajiv Sharma, J.:

The respondents were directed to file the status reports vide orders, dated 23.04.2014, 12.05.2014 and 03.06.2014. In sequel to the directions issued by this Court, the respondents No. 1 to 4 have filed a detailed reply dealing with all the institutions for Mentally Challenged and Differently Abled Children/Adults established throughout the State of Himachal Pradesh. In District Bilaspur, the institution by the name of Chetna Sanstha, Bilaspur is run by the NGO. According to the averments made in this affidavit, the NGO. has removed all the deficiencies pointed out by the learned District and Sessions, Judge, Bilaspur during his visit to the Centre on 10.02.2014. The NGO Chetna runs three Day Care centres at Bilaspur, Ghumarwin and Jhandutta, respectively for mentally challenged children. Eighty mentally challenged children enrolled in these centres. This NGO has engaged twenty staff members including two Drivers. These institutions were also inspected by the District Welfare Officer, Bilaspur on 11.06.2014. The mentally challenged children with disability of 40% and above are admitted in these centres as per PWDs. Act, 1995 and the NGO has prepared guideline for admission in these day care centres. The regular medical checkups have been started in these centres and the last medical checkups of the special children were conducted at Day Care Centres Bilaspur, Ghumarwin and Jhanduta on 13.05.2014, 03.06.2014 and 06.06.2014, respectively. Accordingly, the Chetna Sanstha, Bilaspur, through the District Welfare Officer, Bilaspur is directed to conduct the medical checkups of special children every month and maintain the record of the same.

2. Asha Kiran Viklang Shiksha Sansthan, Kothi, Tehsil Ghumarwin, District Bilasspur is being run by the NGO. According to the averments made in the affidavit, the NGO has removed all the deficiencies pointed out by the learned District & Sessions Judge during his last visit to the NGO centre on 10.02.2014. The rented building cannot be made barrier free, therefore, the NGO has already started the work of its own building at Kothi near Palsoti and the construction of which will be completed within six months and the same will be made barrier free. The NGO has enrolled 20 differently abled children (including 13 mentally challenged and 7 hearing impaired) alongwith 7 staff members. The NGO has provided adequate and proper bedding to the inmates. The personal files of all 20 children with educational profiles and health charts have been maintained. Regular medical checkup of all the children are being done and the latest check up was conducted on 16.05.2014 by the Block Medical Officer, Ghumarwin. Free medicines like calcium, iron and other nutrition supplements etc. are being distributed to the children regularly. The NGO has maintained the Diet Chart. Accordingly, the Asha Kiran Viklang Shiksha Sansthan, Kothi, Tehsil Ghumarwin, District Bilaspur through District Welfare Officer, Bilaspur is directed to ensure that the new building is got constructed, if not already constructed, within a period of six months from today. It must conform all the norms laid down as per The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.

3. In District Kullu, the Chander Abha Mahila Kalyan Sarwari, Kullu is being run by the NGO. The District and Sessions Judge, Kullu conducted the inspection on 03.02.2014 and 04.02.2014. The inspection of the institution was conducted by the District

Welfare Officer, Kullu on 17.06.2014. This voluntary organization is providing formal education and residential facility up to senior secondary level for Visually Impaired Children. During the inspection of the institution, the building, kitchen, bed rooms and class rooms found neat and clean. This NGO is registered under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The NGO also avails grant-in-aid from the GOI under "*Deen Dayal Rehabilitation Scheme*". The NGO is running the institution properly. The District Welfare Officer, Kullu is directed to visit the Centre every month.

4. Nav Chetna Parents Association for the mentally challenged, Kullu is also run by the NGO. The inspection of the institution was conducted by the District Welfare Officer, Kullu on 17.06.2014. It is a day care institution. The NGO is registered under the Indian Societies Registration Act, 1860. During the inspection of the institution, the building/rooms found neat and clean. The District Welfare Officer, Kullu is directed to visit the institution every month.

5. Now, we will advert to District Shimla. In District Shimla, there is a Home for visually and hearing impaired (boys), Dhalli. It is run by the H.P. Council for Child Welfare, Shimla. The Additional Deputy Commissioner, Shimla has carried out the inspection on 11.06.2014. The Himachal Pradesh Council for Child Welfare has initiated the departmental action as per the procedure against the defaulting staff and have issued warning to all the absentee employees. However, the floors and walls of kitchen and Home need immediate repair. The District Administration has directed the Block Development Officer, Mashobra to prepare the estimates for undertaking immediate repair work. There is scarcity of space for the hostel of both the institutions. The matter was accordingly taken up with the Indian Red Cross Society to hand over the adjoining two buildings to Himachal Pradesh Council for Child Welfare to ease out the space problem. The Indian Red Cross Society agreed and handed over the building to HPCCW on 23.6.2014 on nominal monthly rent of Rs.15,000/-. All the inmates earlier kept in School/home in Dhalli, as mentioned in the report of learned Chief Judicial Magistrate have been shifted to the new Home at Nahan. Regarding establishing separate Home for Mentally retarded females, the Government of Himachal Pradesh has already granted the approval for starting the same through the Prem Ashram Una. It is run by Sister of Charity. Accordingly, we direct the Deputy Commissioner, Shimla to ensure that the floors and walls of kitchen are repaired within a period of three months from today. We also direct the Red Cross Society to hand over the adjoining two buildings to Himachal Pradesh Council for Child Welfare, if not already handed over, within a period of three months from today to be utilized by the Aashram.

6. Learned District & Sessions Judge, Chamba has carried out the inspection of Bal Ashram-cum-Children Home Mehla, Gujjar Ashram Kalsuin on 26.05.2014, 27.05.2014 and 19.06.2014. Bal Ashram-cum-children Home Mehla is run by the HP Council for Child Welfare. There are no Benches and Tables for the inmates to take their meals. The Deputy Commissioner, Chamba is directed to ensure that the Benches and Tables are provided to the inmates of Bal Ashram-cum Children Home Mehla to take their meals.

7. Balika Ashram-cum-Children Home Chilli is also run by the HP Council for Child Welfare. But, the proposed building was to be financed by the NHPC. The Council was required to take up the matter with the Government for the purpose of construction of building by NHPC. Accordingly, the H.P. Council for Child Welfare is directed to take up the matter with the State Government. The Deputy Commissioner, Chamba is directed to process the matter for making the land available to the HP Council for Child Welfare. Thereafter, the NHPC shall construct the building as per the norms within a period of one year from today.

8. The Balika Ashram-cum-Children Home Chamba is being run by the Mahila Kalyan Mandal Chamba. Stock register is maintained regularly in the Ashram. All facilities are being provided to the inmates regularly as per the norms. In Gujjar Ashram Kalsuin, Chamba, rooms, kitchen and bath rooms are regularly cleaned by the Ashram staff. The Ashram is running in Govt. building. But, there is some leakage of roof during rainy season. Benches and tables were not available in the Home. The Deputy Commissioner, Chamba is directed to ensure that the leakage is plugged at Gujjar Ashram Kalsuin, Chamba. Similarly, the Benches and tables be provided to the inmates of the Gujjar Ashram Kalasuin, Chamba. Gujjar Ashram Sahoo, Chamba, is being run in the departmental building. There are some minor leakages from the roof and floor of the Ashram which requires some repairs. Solar system for heating water also needs some repairs. The estimates be prepared and submitted to the Deputy Commissioner, Chamba for taking necessary steps for undertaking the repair work. The Deputy Commissioner, Chamba is directed to ensure the plugging of the leakage. He is also directed to ensure that the proper repairs are undertaken within a period of four weeks from today.

9. Bal Balika Ashram-cum-Children Home Killar, Pangi is being run by the Women & Child Development in Government building, which requires some repairs No Benches and Tables are available in the Ashram. Estimates have been prepared. Accordingly, the Deputy Commissioner is directed to do the needful within a period of three weeks from today.

10. Learned District & Sessions Judge, Hamirpur has visited the Children Home Sujanpur. There is immediate need for minor repair, replacement of the doors of the bath room etc., white wash and painting etc. Accordingly, the Deputy Commissioner, Hamirpur, H.P. is directed to ensure that minor repairs are undertaken, the doors of the bath room are replaced, white washing and painting is undertaken within a period of three months. The Chief Medical Officer, Hamirpur is directed to depute a Medical Officer in the Home for medical examination of the inmates fortnightly.

11. The Balika Ashram, Garli was inspected by the learned District and Sessions Judge, Kangra on 06.02.2014. 14 girls are residing in the Home, out of which, 13 are studying in different classes in Government High School (Girls), Garli and Government Primary School (Girls), Garli. According to the affidavit, dated 20.06.2014, filed by the Deputy Commissioner, Kangra, the construction of the new building for the Balika Ashram has been undertaken and the funds to the tune of Rs.3,14,56,000/- have been provided for this purpose. Accordingly, we direct that the construction of the building will be carried out within a period of one year from today.

12. In District Kinnaur, there is one Children Home, namely, Balika Ashram-cum-Children Home Kalpa. The accommodation was found to be sufficient as per the report of the District and Sessions Judge, Kinnaur, dated 17.06.2014. Sh. Mathura Dass was appointed as Warden. The District Welfare Officer, Kinnaur is directed to ensure that some female Warden is appointed in Balika Ashram-cum-Children Home Kalpa. The Deputy Commissioner, Kinnaur is directed that the repairs of the kitchen and dining hall be undertaken within a period of three weeks. Minor repairs like installing of grills in the upper rooms and plastering work on one of walls be carried out through the Deputy Commissioner, Kinnaur within a period of six weeks from today.

13. In District Kullu, there is a Bal Ashram Kalehali. It was inspected by the learned District and Sessions Judge, Kullu on 29.05.2014 and 16.06.2014. According to the affidavit filed by the Deputy Commissioner, Kullu, dated 22.06.2014. The department has located a suitable piece of Government land to construct a new building. The process to

transfer land in the name of the department has been initiated. The Deputy Commissioner, Kullu is directed to ensure the transfer of the land for the purpose of construction of new building in order to shift the inmates to the new building. The construction of the building be completed within a period of one year.

14. In District Mandi, the learned District & Sessions Judge, Mandi has visited the Divya Manv Jyoti Anathalya Dehar and the Child Care Institution, Sundernagar. The post of Superintendent was lying vacant. The Deputy Commissioner, Mandi is directed to ensure that the Superintendent is appointed within a period of four weeks from today.

15. No shortcomings were found in Bal Ashram-cum-Children Home Tutikandi. The Deputy Commissioner, Shimla has also filed the latest status report on 28.06.2014. He has visited the Bal Ashram-cum-Children Home Tutikandi. According to him, four mentally challenged boys residing in Bal Ashram-cum-Children Home Tutikandi have been shifted to Astha Welfare Society. According to his report, Balika Ashram-cum-Children Home Mashobra, was run by the Department of Social Justice & Empowerment. The existing building was in dilapidated condition. A proposal for construction of new building for this Home is under active consideration of the Government. Consequently, the new building as per the initiative already taken, be completed within a period of one year from today and the Deputy Commissioner, Shimla would be the nodal officer to supervise the construction and its early completion.

16. The inspection of Bal Ashram-cum-Children Home Masli was undertaken by the Committee on 11.06.2014. The inspection of the Bal Ashram-cum-Children Home Saharan was undertaken on 10.06.2014. The inspection of Balika Ashram-cum-Children Home Sunni was undertaken on 11.06.2014. The inspection of Balika Ashram-cum-Children Home Durgapur was undertaken on 11.06.2014 and the inspection of Bal Ashram-cum-Children Home Rockwood was undertaken on 11.06.2014. According to the reports, all the facilities were available. However, the Deputy Commissioner, Shimla and District Welfare Officer, Shimla are directed to visit the Ashrams after every three months to ensure that all the basic amenities are provided to the inmates.

17. In District Una, a Special School-cum-Observation Home, Una has been housed in the newly constructed building at Samoorkalan, Una since 09.02.2006. No discrepancy was found during the inspections carried out by the learned District & Sessions Judge, Una on 06.05.2014 and by the Deputy Commissioner, Una.

18. The Deputy Commissioner, Kangra, H.P. has filed a separate status report in respect of Balika Ashram and Homes run for physically challenged persons/mentally retarded persons at Dari, Saliana and Garli. Home for physically disabled persons at Dari is run by the Department of Social Justice and Empowerment through H.P. State Council for Child Welfare, Shimla. The Home is functioning in Government building. It is manned by a regular Principal alongwith five other supporting staff. The School for mentally challenged children, Saliana is being run by the Palampur Rotary Eye Foundation. An Incharge has been appointed by the Palampur Rotary Eye Foundation to look after the School alongwith nine supporting staff. Balika Ashram, Garli is run by the Directorate of Women and Child Development under the department of Social Justice and Empowerment. This Ashram is manned by an Assistant Superintendent alongwith five other supporting staff. The problem of leakage at Dari Home has been rectified.

19. The status report has also been filed on behalf of the Deputy Commissioner, Shimla under his affidavit, dated 8th July, 2014. He has underlined the initiatives taken for

the improvement in the basic amenities. The measures undertaken be completed within a period of three months from today, if not already completed.

20. All the Deputy Commissioners and the District Welfare Officers are directed to ensure the due compliance of the directions issued hereinabove qua Bal Ashrams/Homes situated in the State of Himachal as per the deficiencies pointed out by the learned District & Sessions Judges in their reports and in the reports filed by the Deputy Commissioners from time to time.

21. The State Government has not provided any separate Home for mentally retarded children. In a welfare State, it is duty of the State to provide institutions for mentally retarded children in cluster of three Districts each. This is a very important duty and cannot be left to be managed by the private bodies. Accordingly, the State of Himachal Pradesh is directed to establish at least one institution for the mentally retarded children in a cluster of three Districts as per the geographical and topographical conditions within a period of one year from today and also by providing teaching and non-teaching staff. The State Government is also directed to ensure opening of a new Aashram/Home for physically challenged children throughout the State of Himachal again in the cluster of three Districts within a period of one year. The necessary funds shall be made available by the State Government for construction of all the institutions for mentally retarded and physically challenged children.

22. The Court while dealing with the matter, has come across various instances, whereby the construction of even public utility buildings is held up for want of "No Objection Certificate" to remove the trees. The public utility buildings are to be treated separately vis-à-vis private buildings. We can take judicial notice of the fact that even the construction/execution of the hospital building has been held up due to No Objection Certificate, not being issued promptly by the statutory authorities. The matters concerning public utility buildings are to be addressed with promptitude to reduce the cost of construction. If the permissions are not accorded for months and years together, the costs escalate and it affects the entire society at large. The needy are also deprived of the basic facilities which are proposed to be provided in the new public utility buildings. We have to maintain the balance between the environment and development. Accordingly, we direct the Municipal Corporation, Municipal Council, Nagar Panchayats and the State of H.P. to accord "No Objection Certificate" to cut/remove the trees for the purpose of executing the construction of public utility buildings within a period of three weeks from today, if necessary by visiting the spot. Stringent conditions can also be imposed while granting "No Objection Certificate" for felling/removing the trees. It is made clear, in larger public interest that if the necessary permission is not accorded within a period of three weeks, the Executing Agency shall be permitted to construct the buildings.

23. We have also taken judicial notice of the reckless manner in which the debris is being disposed of while constructing public parking lot near lift, Shimla. Uncontrolled dumping of debris, that too, without any scientific method is destroying the flora and fauna of the area. The debris rolls down towards rivulet affecting the quality of water. The Engineer-in-Chief, Public Works Department, Government of Himachal Pradesh cannot be oblivious to the glaring illegality repeatedly perpetuated by the contractors throughout the State of Himachal Pradesh in the manner in which the debris is being dumped either in rivulets or simply rolled down to the hills. Accordingly, we direct the Engineer-in-Chief to personally visit the site of public parking lot near lift within 24 hours and to ensure that the debris is not rolled down towards the rivulet. This shall be done by him by issuing order in writing and in case there is any defiance of the orders issued by the Engineer-in-Chief, the construction work shall be stopped forthwith. We also direct the Secretary, Public Works

Department to ensure that the debris is not rolled down into the rivulets/ravine/rivers and hill side causing irreparable damage to the fragile environment and ecology of the area throughout the State of Himachal Pradesh. We authorize the Secretary, Public Works Department to stop the construction forthwith if debris is disposed of without identifying the proper dumping site.

24. Their Lordships of the Hon'ble Supreme Court in **Air India Statutory Corporation and others** Vs. **United Labour Union and others** (1997) 9 Supreme Court Cases 377 have held that the Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity. Their Lordships have further held that social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results. Their Lordships have held as under:

> ***"42. The Preamble and Article 38 of the Constitution envision social justice as the arch to ensure life to be meaningful and liveable with human dignity. Jurisprudence is the eye of law giving an insight into the environment of which it is the expression. It relates the law to the spirit of the time and makes it richer. Law is the ultimate aim of every civilized society, as a key system in a given era, to meet the needs and demands of its time. Justice, according to law, comprehends social urge and commitment. The Constitution commands justice, liberty, equality and fraternity as supreme values to usher in the egalitarian social, economic and political democracy. Social justice, equality and dignity of person are cornerstones of social democracy. The concept of "social justice" which the Constitution of India engrafted, consists of diverse principles essential for the orderly growth and development of personality of every citizen. "Social justice" is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic device to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and elevate them to the level of equality to live a life with dignity of person. Social justice is not a simple or single idea of a society but is an essential part of complex social change to relieve the poor etc. from handicaps, penury to ward off distress and to make their life liveable, for greater good of the society at large. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation and constitutional goal. Social security, just and humane conditions of work and leisure to workman are part of his meaningful right to life and to achieve self-expression of his personality and to enjoy the life with dignity. The State should provide facility and opportunities to enable them to reach at least minimum standard of health, economic security and civilized living while sharing according to their capacity, social and cultural heritage.***
>
> ***43. In a developing society like ours, steeped with unbridgeable and ever-widening gaps of inequality in status and of***

opportunity, law is a catalyst, rubicon to the poor etc. to reach the ladder of social justice. What is due cannot be ascertained by an absolute standard which keeps changing, depending upon the time, place and circumstances. The constitutional concern of social justice as an elastic continuous process is to accord justice to all sections of the society by providing facilities and opportunities to remove handicaps and disabilities with which the poor, the workmen, etc. are languishing and to secure dignity of their person. The Constitution, therefore, mandates the State to accord justice to all members of the society in all facets sof human activity. The concept of social justice embeds equality to flavor and enliven the practical content of life. Social justice and equality are complementary to each other so that both should maintain their vitality. Rule of law, therefore, is a potent instrument of social justice to bring about equality in results. It was accordingly held that right to social justice and right to health are Fundamental Rights. The management was directed to provide health insurance during service and at least 15 years after retirement and periodical tests for protecting the health of workmen."

25. In the light of the aforesaid observations/directions, the petition stands disposed of.

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

FAOs No. 109, 110, 111, 112,
120, 128 & 157 of 2008
Date of decision: 05.06.2015

1. **FAO No. 109 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Naresh Kumar & others ...Respondents

2. **FAO No. 110 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Ganga Ram & others ...Respondents

3. **FAO No. 111 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Indira & others ...Respondents

4. **FAO No. 112 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Joginder & others ...Respondents

5. **FAO No. 120 of 2008**
Himachal Road Transport Corporation ...Appellant
Versus
Meena & others ...Respondents

6. **FAO No. 112 of 2008**

Himachal Road Transport Corporation ...Appellant

Versus

Krishan Kumar & others ...Respondents

7. **FAO No. 157 of 2008**

Himachal Road Transport Corporation ...Appellant

Versus

Santosh & others ...Respondents

Motor Vehicle Act, 1988- Section 166- A bus hit a group of persons standing near the vehicle bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to them - Tribunal held that accident was outcome of the contributory negligence of the drivers of the bus and jeep- accordingly, 50% liability was fastened upon the insurer of the jeep as well as HRTC - it was contended that awards were excessive- On scrutiny, some of the awards were found to be excessive which were ordered to be modified and the excess amount was ordered to be refunded to HRTC. (Para-12 to 27)

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

FAOs No. 109 & 112 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 to 3.
Mr. Rakesh Dogra, Advocate, for respondent No. 4.
Mr. Rajinder Thakur, Advocate, for respondent No. 5.
Mr. Deepak Bhasin, Advocate, for respondent No. 6.

FAO No. 110 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 & 2.
Mr. Rakesh Dogra, Advocate, for respondent No. 3.
Mr. Rajinder Thakur, Advocate, for respondent No. 4.
Mr. Deepak Bhasin, Advocate, for respondent No. 5.

FAOs No. 111, 120 & 157 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondents No. 1 to 4.
Mr. Rakesh Dogra, Advocate, for respondent No. 5.
Mr. Rajinder Thakur, Advocate, for respondent No. 6.
Mr. Deepak Bhasin, Advocate, for respondent No. 7.

FAO No. 128 of 2008

For the appellant : Mr. N.K. Thakur, Senior Advocate with Mr. Ramesh Sharma, Advocate.

For the respondents: Mr. Dalip K. Sharma, Advocate, for respondent No. 1.
Mr. Rakesh Dogra, Advocate, for respondent No. 2.

Mr. Rajinder Thakur, Advocate, for respondent No. 3.
Mr. Deepak Bhasin, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

A vehicular traffic accident has given birth to these appeals, thus I deem it proper to deal with all these appeals by this common judgment.

2. These appeals are outcome of the awards made by the Motor Accident Claims Tribunal, Solan (hereinafter referred to as 'the Tribunal') in different claim petitions filed by the claimants for grant of compensation, as per the break-ups given in the respective claim petitions (for short 'the impugned awards')

3. It is averred in the claim petitions that driver, namely, Jagdish Chand, has driven the vehicle-bus bearing registration No. HP-06-2824, rashly and negligently, on 12.10.2005, near Shoolini Guest House, at about 1.30 a.m., hit a group of persons standing near vehicle-Jeep bearing registration No. HP-64-0238, parked on the extreme left side of the road with parking lights on, as a result of which, 7 persons sustained injuries and succumbed to the injuries.

4. The respondents resisted the claim petitions on the grounds taken in the respective memo of objections.

5. The Tribunal, on the pleadings of the parties, framed common issues in all the claim petitions. It is apt to reproduce the issues framed in Claim Petition No. 126-S/2 of 2005:-

1. *Whether the death of deceased had been caused on account of rash/negligent driving of the bus by respondent No. 2? ...OPP*
2. *If issue No. 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled to and from whom? ....OPP*
3. *Whether the petition is bad for misstatement of facts and concealment of material facts, if so, its effect? ...OPR-1*
4. *Whether the accident was cause due to rash/negligent act of driver of the Mahindra Utility and petition against respondent No. 1 is not maintainable? ...OPR-1*
5. *Whether Mahindra jeep was being driven in breach of the policy conditions, if so, its effect? OPR-4*
6. *Relief."*

6. The parties have led evidence in all the claim petitions.

7. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that the accident was outcome of the contributory negligence of the drivers of the bus and jeep. Accordingly, 50% liability was fastened upon the Himachal Road Transport Corporation (for short 'the HRTC') and 50% liability was fastened upon the insurer of the jeep.

8. The claimants, owner-insured and insurer of the offending jeep and drivers of both the vehicles have not questioned any of the impugned awards, on any count, thus, all the impugned awards have attained finality, so far as the same relate to them.

9. Only, the HRTC has questioned the impugned awards on the ground that the Tribunal has fallen in error in holding that its driver was negligent.

10. Learned Counsel for the appellant-HRTC has frankly conceded that finding recorded by the Tribunal that the accident is contributory, stands proved and is not disputed, but stated that the amount awarded is excessive in all the claim petitions. Further stated, that the Tribunal has fallen in error in applying the multiplier, which is not in accordance 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** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** and prayed that amount awarded be slashed.

11. In this background, I deem it proper to deal with the claim petitions one by one.

FAO No. 109 of 2008

12. The Tribunal, after taking the income of the deceased as Rs. 4,000/- per month assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs. 8,64,000/-, under the head, loss of dependency'. The Tribunal has also awarded Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 8,84,000/-.

13. Admittedly, the age of the deceased was 22 years at the time of accident. The Tribunal applied the multiplier of '18', which is not in consonance with ***Sarla Verma's*** case, *supra*. The multiplier of '15' was to be applied. Thus, the claimants are held entitled to Rs. 4,000/- x 12 = Rs. 48,000 x 15 = Rs. 7,20,000/- under the head 'loss of dependency', Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 7,40,000/-.

FAO No. 110 of 2008

14. The Tribunal has applied the novel method in assessing the compensation. Admittedly, the age of the deceased was 20 years at the time of accident and was ITI Diploma holder. After completing his diploma, he would have made earnings and also would have his own family after solemnizing marriage within 2-3 years. In today's scenario, even the monthly income of a labourer is not less than Rs. 5,000/-. Therefore, it can safely be held that that the income of the deceased was Rs. 5,000/- per month at the time of accident. After deducting 50% towards his personal expenses, the loss of source of dependency towards the claimants can be said to be Rs. 2500/- per month, in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra*.

15. The Tribunal has wrongly applied the multiplier of '18'. Admittedly, the age of the deceased was 20 years at the time of accident. Therefore, I am of the considered view that the multiplier of '16 is applicable in the present case. Thus, the claimants are held entitled to Rs. 2500 x 12 = Rs. 30,000 x 16 = Rs. 4,80,000/- under the head 'loss of dependency, Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 5,00,000/-.

FAO No. 111 of 2008

16. The Tribunal, after taking the income of the deceased as Rs. 6,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '14', held the claimants entitled to compensation to the tune of Rs. 6,72,000/-. The Tribunal has also awarded Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs.6,92,000/-.

17. Admittedly, the age of the deceased was 38 years at the time of accident. The multiplier of '14' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 6,72,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 6,92,000/- .

FAO No. 112 of 2008

18. The Tribunal, after taking the income of the deceased as Rs.4,000/- per month assessed the loss of dependency to the claimants to the tune of Rs.48,000/- per annum and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.8,64,000/- under the head 'loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs.8,84,000/-.

19. Admittedly, the age of the deceased was 22 years at the time of accident. The Tribunal applied the multiplier of '18', which is not in consonance with ***Sarla Verma's*** case, *supra.* The multiplier of '15' was to be applied. Thus, the claimants are held entitled to Rs.4,000/- x 12 = Rs.48,000 x 15 = Rs.7,20,000/- under the head 'loss of income', Rs.15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs.7,40,000/-.

FAO No. 120 of 2008

20. The Tribunal, after taking the income of the deceased as Rs.7,500/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs.60,000/- per annum and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs. 9,00,000/- under the head 'loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs.5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 9,20,000/-.

21. The age of the deceased was 30 years at the time of accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 9,00,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 9,20,000/- .

FAO No. 128 of 2008

22. The Tribunal, after taking the income of the deceased as Rs. 7,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 55,800/- per annum and applying the multiplier of '12', held the claimants entitled to compensation to the tune of Rs. 6,69,600/- under the head 'loss of dependency'. The Tribunal has also awarded Rs. 15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 6,89,600/-.

23. Admittedly, the age of the deceased was 42 years at the time of accident. The multiplier of '12' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 6,69,600/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 6,89,600/-.

FAO No. 157 of 2008

24. The Tribunal, after taking the income of the deceased as Rs. 5,000/- per month and deducting one third towards his personal expenses, assessed the loss of dependency to the claimants to the tune of Rs. 48,000/- per annum and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.7,20,000/- under the 'head loss of dependency'. The Tribunal has also awarded Rs.15,000/- under the head 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, thus awarded total compensation to the tune of Rs. 7,40,000/-.

25. Admittedly, the age of the deceased was 32 years at the time of accident. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the ratio laid down by the apex Court in ***Sarla Verma's*** case, *supra,* needs no interference. Thus, the claimants are held entitled to Rs. 7,20,000/- under the head 'loss of dependency', Rs. 15,000/- under the heads 'conventional charges, loss of love and affection and loss of consortium' and Rs. 5,000/- under the head 'funeral and other incidental expenses, total compensation amounting to the tune of Rs. 7,40,000/-.

26. Accordingly, the impugned awards passed in MAC Petitions No. 126-S/2 of 2005, 125-S/2 of 2005 and 123-S/2 of 2005 are modified, as indicated above and the impugned awards passed in MAC Petitions No. 124-S/2 of 2005, 122-S/2 of 2005, 121-S/2 of 2005 and 127-S/2 of 2005, are upheld.

27. The Registry is directed to release the entire compensation amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned awards. The excess amount be released in favour of the appellant-HRTC through cross-cheque.

28. Send down the records after placing a copy of the judgment on each file of the claim petitions.

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

Kehar Singh and another .....Appellants.
Versus
Ashwani Kumar and others ...Respondents

FAO (MVA) No.305 of 2008.
Date of decision: 5th June, 2015.

Motor Vehicle Act, 1988- Section 166- Deceased was aged 19 years at the time of accident – annual income of the deceased was taken as Rs. 15,000/- by the Tribunal- deceased was young person aged 19 years- he was pursuing three years diploma Course in Electrical Engineering and had almost put in two years - by guess work his income can be taken as Rs. 6,000/- p.m.- 50% of the amount is to be deducted towards personal expenses and parents had lost Rs. 3,000/- p.m. as source of dependency - they are entitled to Rs. 3000x12x14= 5,04,000/-, as compensation for loss of dependency and Rs. 30,000/- as funeral charges and compensation for love and affection. (Para-10 and 11)

Cases referred:
Sarla Verma and Ors versus Delhi Transport Corporation and anr. AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and anr. 2013 AIR (SCW) 3120.

For the appellants: Mr. Suneet Goel, Advocate.
For the respondents: Mr.B.C. Verma, Advocate, for respondent No.1.
Respondents No. 2 and 3 ex parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *Oral.*

Subject matter of this appeal is the judgment and award dated 8.3.2008, made by the Motor Accident Claims Tribunal, (II), Solan, Camp at Nalagarh in MAC Petition No. 7-NL/2 of 2006, titled *Sh. Kehar Singh and another versus Sh. Ashwani Kumar and others,* whereby compensation to the tune of Rs.2,40,000/- with 9% interest was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The claimants have lost their son, namely Harpreet Singh, who was 19 years of age at the time of accident, which was caused by Ashwani Kumar, who had driven the vehicle bearing Registration No. CH-28-T-1680 rashly and negligently on 19.4.2006 at about 8 P.M. near Govt. College Nalagarh, on the National Highway-21A.

3. The parents of the deceased filed claim petition for the grant of compensation, as per the break-ups given in the claim petition.

4. Owner, driver and insurer have filed objections and following issues came to be framed by the Tribunal.

(i) Whether the deceased Harpreet Singh died in an accident as a result of rash and negligent driving of the offending vehicle by respondent No.1, as alleged? OPP.

(ii) *If issue No.1 proved in affirmative, whether the petitioners are entitled for the compensation, if so, to what amount ?OPP*

(iii) *Whether the accident took place due to the negligence of the deceased as alleged? OPR 1 and 2.*

(iv) *Whether the petition is bad for non-joinder of necessary parties? OPR-2.*

(v) *Whether the offending vehicle was being used for commercial purposes at the time of the accident, if so, its effect? OPR-3.*

(vi) *Whether the respondent No. 1 was not holding valid and effective driving licence to drive the offending vehicle at the time of accident? OPR-3.*

(vii) *Relief.*

5. The claimants examined as many as five witnesses, namely, Sh. Vishesh Kumar, (PW1), Smt. Surinder Kaur claimant No.2, (PW2), Sh. Kulvinder (PW3), Sh. Bharat Bushan (PW4) and Sh. Rakesh Kumar (PW5).

6. On the other hand, respondents have not examined any witness. Thus, the evidence led by the claimants have remained un-rebutted.

7. The Tribunal held that the driver had driven the vehicle rashly and negligently on the said day and Issues No. 1 and 3 came to be decided in favour of the claimants and against the respondents. Thus the findings returned on these issues have attained finality and are accordingly upheld.

8. The insurer has failed to lead any evidence on issues No. 2 to 6 as such it has failed to discharge the onus. The Tribunal has rightly decided these issues in favour of the claimants and against the insurer. The Tribunal held that the claimants are entitled to Rs.2,40,000/-, which, on the face of it, is meager for the following reasons.

9. Admittedly, the deceased was 19 years of age at the time of accident and the multiplier applicable is "15" in view of the ratio laid down in ***Sarla Verma and Ors versus Delhi Transport Corporation and anr.*** reported in ***AIR 2009 SC 3104*** which has also been followed and affirmed in ***Reshma Kumari and others versus Madan Mohan and anr.*** reported in ***2013 AIR (SCW) 3120***. But the Tribunal has applied the multiplier of "12".

10. The notional income of the deceased has been assessed at Rs.15000/- per annum by the Tribunal. The deceased was a young boy of 19 years, was pursing three years diploma Course in Electrical Engineering, had almost put in two years therein in pursuit of his studies and had a bright career in future. By a guess work, it can be safely said that, he would have been earning, at least, Rs.6000/- per month. The Tribunal has fallen in an error in holding that deceased was earning Rs.15,000/- per annum only.

11. The parents of the deceased have lost, at least, Rs.3000/- per month as source of dependency, thus are entitled to Rs.3000x12x14= 5,04,000/-, as compensation. Viewed thus, the claimants are held entitled to Rs.5,04,000/- + Rs.30,000/- as funeral charges and love and affection, total to the tune of Rs.5,34,000/-., with interest at the rate of 7.5% per annum.

12. Accordingly, amount of compensation is enhanced. The impugned award is modified and appeal is allowed. The insurer is directed to deposit the entire amount of

compensation minus the amount already deposited, within eight weeks from today in the Registry.

13. On deposit, the Registry is directed to release the amount in favour of the claimants strictly, in terms of the conditions contained in the impugned award, through payee's cheque account.

14. Accordingly, the appeal is allowed and the impugned award stands modified, as indicated hereinabove.

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

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

Master Sachin & others ...Appellants.
Versus
Smt. Urmila Chauhan & others ...Respondents.

FAO No. 278 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 166- Deceased was aged 38 years at the time of accident- he was a government servant drawing salary of Rs. 9,610/- p.m before the accident - 1/4th of the amount was to be deducted towards personal expenses- loss of dependency would be Rs. 6,400/- applying multiplier of '14', claimants will be entitled for compensation of Rs. 6,400 x 12 x 14=10,75,200/-- in addition to this they will be entitled for compensation of Rs. 28,000/- under other heads- petitioners are entitled to total compensation of Rs. 11,03,200/-. (Para-10 to 13)

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. G.S. Rathore, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Ramesh Sharma, Advocate, for respondent No. 2.
Ms. Seema Sood, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 29.02.2008, made by the Motor Accident Claims Tribunal (III), Shimla (for short "the Tribunal") in MACT No. 20-S/2 of 2006/04, titled as Master Sachin and others versus Smt. Urmila Chauhan and others, whereby compensation to the tune of Rs. 7,00,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The claimants became the victims of a vehicular accident, when their father, aged 38 years, died in a cruel accident, which was caused by the driver, namely Shri Veer

Singh, while driving taxi, i.e. Maxi Cab, bearing registration No. HP-01 A-3004, rashly and negligently on 03.03.2003, near Kuthar, Tehsil Nerwa, constraining them to file claim petition before the Tribunal seeking compensation to the tune of Rs.25,00,000/-, as per the break-ups given in the claim petition, on the grounds taken therein.

3. The driver, owner-insured and the insurer contested the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 24.04.2006:

> *"1. Whether on 3.3.2003 near Kuthar the respondent No. 2 was driving the Maxi Cab No. HP-01 A-3004 rashly and negligently and caused the death of Shri Jai Lal? OPP*
>
> *2. If issue No. 1 is proved in the affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP*
>
> *3. Whether insured has committed breach of terms and conditions of the insurance policy? OPR*
>
> *4. Relief."*

5. The claimants, in support of their claim, examined Sapinder Singh as PW-1, Jiwan Lal as PW-2, Varinder Singh as PW-3, and Roshan Lal as PW-4. The owner-insured appeared in the witness box as RW-1.

6. The Tribunal, after scanning the evidence, oral as well as documentary, came to the conclusion that the claimants have lost source of dependency to the tune of Rs.4,000/- per month and awarded compensation to the tune of Rs.7,00,000/- with interest @ 7.5 % per annum vide impugned award.

7. The owner-insured, the driver and the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

8. The claimants-appellants, by the medium of the appeal in hand, have questioned the impugned award on the ground of adequacy of compensation.

9. Thus, the only question to be determined in this appeal is - whether the amount awarded is just and appropriate? The answer is in negative for the following reasons:

10. Admittedly, the deceased was 38 years of age at the time of the accident. The Tribunal has rightly applied the multiplier of '14', but has fallen in an error in making the deductions and holding that he was contributing Rs. 4,000/- per month to the family, is not legally correct. Admittedly, he was a government employee, drawing salary to the tune of Rs.9,610/- per month before the accident, in terms of the salary certificate, Exhibit PW-2/B.

11. Applying the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** one fourth was to be deducted towards his personal expenses. However, keeping in view the fact that the mother of the claimants is also an earning hand and is a party before this Court as the owner-insured of the offending vehicle, at least one third was to be deducted, which has not been done.

12. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.6,400/- per month. Viewed thus, the claimants are held entitled to Rs.6,400 x 12 x 14 = Rs.10,75,200/-. The compensation awarded under other heads to the tune of Rs.28,000/- is just and appropriate, needs no interference.

13. Having glance of the above discussions, total compensation to the tune of Rs.10,75,200 + Rs.28,000/- = Rs.11,03,200/- with interest @ 7.5% per annum is awarded in favour of the claimants.

14. Having said so, the appeal is allowed and the impugned award is modified, 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 after proper identification.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAO No. 272 of 2008
a/w FAO No. 276 of 2009
Decided on: 05.06.2015

FAO No. 272 of 2008

Oriental Insurance Company ...Appellant.
Versus
Sh. Dinesh Kumar & others ...Respondents.

FAO No. 276 of 2009

Oriental Insurance Company Ltd. ...Appellant.
Versus
Smt. Raj Kumari @ Anita & others ...Respondents.

Motor Vehicle Act, 1988- Section 166- Compensation of Rs. 40,000/- and Rs.1,09,000/- were awarded with interest to the claimants – appeals were preferred against the award - held, that even under no fault liability compensation of Rs.25,000/- has to be awarded, hence amount of Rs. 40,000/- awarded as compensation is reasonable- claimant had suffered injury which had shattered her physical frame and, therefore, compensation of Rs.1,09,000/- awarded to her cannot be said to be excessive, rather, same was not just, however, it was not questioned by victim and it was upheld reluctantly. (Para-3 to 9)

For the appellant(s): Mr. G.D. Sharma, Advocate.
For the respondents: Mr. K.R. Thakur, Advocate, for respondent No. 1.
Mr. Rajiv Rai, Advocate, for respondent No. 2.
Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Both these appeals are outcome of a traffic accident, which was allegedly caused by the driver, namely Shri Jitender Kumar, while driving bus, bearing registration No. HP-20-5665, rashly and negligently, on 05.05.2005, at about 10.30 A.M. at Main Bus Stand, Mandi, in which Shri Dinesh Kumar and Smt. Raj Kumari sustained injuries. Thus, I deem it proper to determine both these appeals by this common judgment.

2. Being victims of the said vehicular accident, injured-Dinesh Kumar filed Claim Petition No. 104 of 2005, titled as Sh. Dinesh Kumar versus Shri Trilochan Singh and others, and injured-Raj Kumari filed Claim Petition No. 103 of 2005, titled as Smt. Raj Kumari versus Shri Trilochan Singh and others, and the Motor Accident Claims Tribunal, Mandi, H.P. (for short "the Tribunal"), after scanning the evidence, awarded compensation to the tune of Rs. 40,000/- and Rs.1,09,000/- with interest @ 7.5% per annum in favour of the claimants-injured respectively, vide separate awards, dated 15.01.2008, (for short "the impugned awards").

3. It is travesty of justice that the claimants-injured are still deprived of the compensation for the last ten years, which is against the purpose of granting compensation.

4. Virtually the insurance company has conducted this case in a way which is against the concept of granting of compensation, is an eye opener for the said insurance company.

5. Only a meager amount of Rs.40,000/- has been awarded in favour of the claimant-injured-Dinesh Kumar in Claim Petition No. 104 of 2005, should not have been questioned by such a reputed insurance company. In terms of the mandate of Section 140 of the Motor Vehicles Act, 1988 (for short "the MV Act"), Rs.25,000/- has to be awarded under 'No Fault Liability'. I wonder why the insurance company has filed appeal in this case.

6. However, I have gone through the record. The impugned award in FAO No. 272 of 2008 is just and proper, needs no interference.

7. In Claim Petition No. 103 of 2005, claimant-injured-Raj Kumari has suffered injuries, which have shattered her physical frame. Not only this, the claimant-injured-Raj Kumari was carrying three-four months pregnancy and suffered miscarriage due to the accident.

8. The insurer has questioned the impugned awards on the ground that the original driver of the offending vehicle was not arrayed as party-respondent in the array of respondents, which has been thrashed out by the Tribunal, needs no interference.

9. The compensation to the tune of Rs.1,09,000/- awarded in favour of the claimant-injured-Raj Kumari, is not just in the given circumstances of the case. But, claimant-injured-Raj Kumari has not questioned the same, is accordingly upheld.

10. Viewed thus, both the appeal are dismissed and the impugned awards are upheld.

11. At this stage, Mr. G.D. Sharma, learned counsel for the appellant(s), stated at the Bar that the insurer has deposited the entire awarded amount in FAO No. 276 of 2009 before the Tribunal. His statement is taken on record.

12. The Tribunal is directed to release the awarded amount to claimant-injured-Raj Kumari strictly as per the terms and conditions contained in the impugned award through payee's account cheque.

13. Registry is directed to release the awarded amount in FAO No. 272 of 2008 in favour of claimant-injured-Dinesh Kumar strictly as per the terms and conditions contained in the impugned award through payee's account cheque. Registry is further directed to release the statutory amount to the appellant in FAO No. 276 of 2009 through cross cheque.

14. Both the appeals are disposed of, as indicated hereinabove.

15. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

FAO No.308 of 2008 with
FAO No.353 of 2008.
Decided on: 05.06.2015.

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1. FAO No.308 of 2008:

Partap Chand and another ...Appellants

VERSUS

Harinder Kumar and another ...Respondents.

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2. FAO No.353 of 2008:

The New India Assurance Company ...Appellant

VERSUS

Harinder Kumar and others ...Respondents.

Motor Vehicle Act, 1988- Section 149- Driving Licence of the driver had expired on 13.6.2004 – it was renewed w.e.f. 24.8.2004- accident had taken place on 12.8.2004- held, that licence is valid from the date of renewal – driver did not possess any valid driving licence on the date of accident and the owner had committed breach of the terms and conditions of the licence by employing a driver having no valid driving licence- therefore, insurance company was rightly held liable to pay compensation with a right to recovery. (Para- 6 to 10)

Motor Vehicle Act, 1988- Section 171- Interest is to be awarded from the date of the award and not from the date of Claim Petition. (Para-5)

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

Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512

FAO No.308 of 2008:

For the Appellants: Mr.N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate.

For the Respondents: Mr.Vivek Thakur, Advocate, for respondent No.1.
Mr.B.M. Chauhan, Advocate, for respondent No.2.

FAO No.353 of 2008:

For the Appellants: Mr.B.M. Chauhan, Advocate.
For the Respondents: Mr.Vivek Thakur, Advocate, for respondent No.1.
Mr.N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are directed against the award, dated 1st April, 2008, passed by the Motor Accident Claims Tribunal, Chamba, (for short, the Tribunal), in Claim Petition No.31 of 2007, titled Harinder Kumar vs. Partap Chand and others, whereby compensation to the tune of Rs.8,93,230/-, with interest at the rate of 9%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimant-injured, and the insurer was saddled with the liability, with right of recovery, (for short, the impugned award).

2. The owner-insured has questioned the impugned award by the medium of FAO No.308 of 2008 on the ground that the Tribunal has fallen in error in granting the right of recovery in favour of the insurer.

3. The insurer has challenged the impugned award by way of FAO No.353 of 2008 on the ground that the amount awarded is excessive and the amount was to be satisfied by the owner/insured, without asking the insurer to indemnify at the first instance.

4. The claimant-injured has not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to him.

5. Before dealing with the contentions raised by the learned counsel for the insured and the insurer, I deem it proper to hold that the Tribunal has fallen in error in awarding interest from the date of the claim petition under the Heads – 'Loss of amenities of life' 'attendant charges' and 'loss of future income'. In terms of the decisions of the Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others,** reported in **AIR 1995 SC 755, Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** in an injury case, the interest under these heads is to be awarded from the date of the award and not from the date of Claim Petition. Accordingly, the impugned award needs to be modified to that extent.

6. Coming to the appeal filed by the owner/insured, admittedly, the driver of the offending vehicle though was having a driving licence at the time of accident, which occurred on 12th August, 2004, but that had lost its life on 13th June, 2004 and the same came to be renewed only w.e.f. 24th August, 2004.

7. The Apex Court in **Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512,** has held that the licence was not valid in case it was not renewed on the date of its expiry and renewed from a subsequent date. It is apt to reproduce paragraphs 13 and 19 of the said decision hereunder:

"13. The question as to whether the owner of a vehicle had taken care to inform himself as to whether the driver entrusted to drive the vehicle was having a licence or not is essentially a question fact. However, in this case, it stands admitted that as on the date of accident, namely, on 27.1.1996, the driver did not hold any licence. Furthermore, it is beyond dispute that he had a licence only for one year and for about 3 years thereafter, he failed and neglected to renew his licence. His licence was renewed only on and from 7.2.1996.

....

19. The principle laid down in Kusum Rai (supra) has been reiterated in Ishwar Chandra & Ors. v. Oriental Insurance Co. Ltd. & Ors. [(2007) 10 SCC 650], referring to sub-section (1) of Section 15 of the Act, this Court stated the law, thus :

> *"9. From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28-4-1995. As on the said date, the renewal application had not been filed, the driver did not have a valid licence on the date when the vehicle met with the accident.""*

8. Therefore, the driver of the offending vehicle cannot be said to be having a valid and effective driving licence at the relevant point of time and, therefore, the Tribunal has rightly held that the owner had committed breach. In the given circumstances, it can safely be held that the owner has committed the breach for the simple reason that the driver of the offending vehicle was not having any licence, what to speak of valid and effective driving licence, at the relevant point of time. Accordingly, the point raised by the owner-insured is turned down.

9. Coming to FAO No.353 of 2008, filed by the insurer, I wonder why the insurer has filed this appeal. The appeal is devoid of any force for the following reasons. It is beaten law of the land that the insurer has to satisfy the third party claim, and in case the insured commits any breach, the insurer has a right of recovery.

10. I accordingly hold that the Tribunal has rightly granted the right of recovery to the insurer.

11. The second contention raised by the learned counsel for insurer that the amount awarded by the Tribunal is excessive is devoid of any force and needs to be repelled for the reason that the injured suffered 60% permanent disability, remained in hospital and is dependant upon attendant, which facts have been proved by the claimant-injured by leading cogent evidence. The said injury has shattered the physical frame of the claimant-injured and has rendered him a burden on his family forever. Due to the injury sustained by the claimant, his marital prospects have been marred and he cannot get a suitable match for marriage.

12. Having said so, the amount awarded is not excessive in any way, rather is meager. But unfortunately, the claimant has not filed any appeal for enhancement, therefore, the amount of compensation awarded by the Tribunal is upheld, by modifying the rate of interest, as discussed above.

13. Accordingly, the appeal filed by the insurer i.e. FAO No.353 of 2008 is dismissed. The appeal filed by the insured is allowed to the extent that the interest, as awarded by the Tribunal, on the amount awarded under the heads – 'Loss of amenities of life' 'attendant charges' and 'loss of future income', shall be payable from the date of the impugned award.

14. The impugned award is accordingly modified. The Registry is directed to release the amount in favour of the claimant-injured strictly in terms of the impugned award and the excess amount, if any, deposited by the insurer be released in its favour through payees' account cheque. The insurer is at liberty to recover the award amount from the insured.

15. Having glance of the above discussion, FAO No.308 of 2008 is allowed, as indicated above, and FAO No.353 of 2008 is dismissed. A copy of this judgment be placed on the record of connected appeal.

****

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

FAO No. 450 of 2007 a/w FAOs
No. 106, 107 of 2010 &128 of 2011
Reserved on: 29.05.2015
Decided on: 05.06.2015

1. FAO No. 450 of 2007

Partap Singh Bhagnal ...Appellant.
Versus
Smt. Ramkali & others ...Respondents.

.....

2. FAO No. 106 of 2010

Partap Singh Bhagnal ...Appellant.
Versus
Aman Verma & others ...Respondents.

.....

3. FAO No. 107 of 2010

Partap Singh Bhagnal ...Appellant.
Versus
Ramesh Verma & others ...Respondents.

.....

4. FAO No. 128 of 2011

United India Insurance Company Ltd. ...Appellant.
Versus
Sh. Balwinder Singh & others ...Respondents.

Motor Vehicle Act, 1988- Section 147- The cover note recorded the date of issue as 21.1.2005 but the effective date of commencement of insurance was recorded as 22.1.2005- accident had taken place on 21.1.2005 at about 3:45 P.M- Insurance Company had never questioned the cover note till the date of accident – held that the date of commencement mentioned in the cover note is the date from which insurer is liable- policy document is to be construed strictly- since insurer was liable only from 22.1.2005, therefore, he is not liable for the accident which had taken place on 21.1.2005. (Para-8 to 28)

Cases referred:

National Insurance Company Limited versus Abhaysing Pratapsing Waghela and others, (2008) 9 Supreme Court Cases 133
Balbir Kaur and others versus New India Assurance Company Limited and others, (2009) 13 Supreme Court Cases 370
New India Assurance Company, Bangalore versus Kareemunnisa, (2009) 16 SCC 241
Oriental Insurance Company Limited versus Porselvi and another, (2009) 15 SCC 116
National Insurance Co. Ltd. versus Sobina Iakai (Smt) and others, with National Insurance Co. Ltd. versus Kerolin P. Marak (Smt) and others, (2007) 7 Supreme Court Cases 786
J. Kalaivani and others versus K. Sivashankar and another, (2007) 7 SCC 792
Vikram Greentech India Limited and another versus New India Assurance Company Limited, (2009) 5 Supreme Court Cases 599

FAO No. 450 of 2007

For the appellant: Mr. Karan Singh Kanwar, Advocate.
For the respondents: Nemo for respondents No. 1, 2 and 4.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 3.

.....

FAO No. 106 of 2010

For the appellant: Mr. I.N. Mehta, Advocate.
For the respondents: Mr. Rupinder Singh, Advocate, for respondent No. 1.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

.....

FAO No. 107 of 2010

For the appellant: Mr. I.N. Mehta, Advocate.
For the respondents: Mr. Rupinder Singh, Advocate, for respondents No. 1 to 3.
Mr. Ashwani K. Sharma, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAO No. 128 of 2011

For the appellant: Mr. Ashwani K. Sharma, Advocate.
For the respondents: Nemo for respondents No. 1 and 3.
Mr. Karan Singh Kanwar, Advocate, for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

A vehicular traffic accident, which was caused by the driver, namely Pheru Ram @ Vijay Kumar, while driving vehicle, i.e. Tata Sumo, bearing registration No. HP-16-0037, rashly and negligently on 21.01.2005, at about 3.45 P.M. at place Bharoli near Pulwahal, P.S. Rajgarh, in which two persons, namely Beeru Bahadur and Reeta Verma, sustained injuries and succumbed to the injuries and one Balwinder Singh and a minor child, Aman Verma, sustained injuries, has given birth to the appeals in hand, thus, I deem it proper to determine all these appeals by this judgment.

2. The legal representatives/dependents of the deceased have filed two claim petitions, being M.A.C. Petition No. 22 FTC/2 of 2005/06, titled as Smt. Ramkali and

another versus Sh. Partap Singh Bhagnal and others (subject matter of FAO No. 450 of 2007), before the Motor Accident Claims Tribunal, Fast Track Court, Solan, H.P. (for short "the Tribunal-I") and MAC Petition No. 07-MAC/2 of 2006, titled as Ramesh Verma and others versus Sh. Partap Singh and others (subject matter of FAO No. 107 of 2010), before Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal-II"), for grant of compensation, as per the break-ups given in the respective claim petitions.

3. Claimants-injured have also filed claim petitions, being MAC Petition No. 04-MAC/2 of 2006, titled as Aman Verma versus Sh. Partap Singh and others (subject matter of FAO No. 106 of 2010), before Tribunal-II and M.A.C. Petition No. 8-S/2 of 2008, titled as Sh. Balwinder Singh versus Sh. Kuldeep Chauhan and others (subject matter of FAO No. 128 of 2011), before MACT-II, Solan, District Solan, H.P. (for short "the Tribunal-III") for grant of compensation, as per the break-ups given in the respective claim petitions.

4. The owner-insured, the driver and the insurer have resisted the claim petitions on the grounds taken in the respective memo of objections.

5. Issues were framed in all the four claim petitions. The parties led evidence in support of their respective cases in all the four claim petitions.

6. The Tribunals in three claim petitions, subject matter of **FAOs No. 450 of 2007, 106 and 107 of 2010,** after scanning the evidence, vide separate awards of different dates, held that the insurance contract was not in force on the date of the accident and saddled the insured-owner with liability.

7. The claimants, the driver and the insurer have not questioned the said impugned awards, thus, have attained finality so far it relate to them.

8. Only the insured-owner has questioned these impugned awards by the medium of FAOs No. 450 of 2007, 106 & 107 of 2010 on the ground that the insurance policy was in force, rather effective, on the date of the accident and the Tribunals have fallen in an error in saddling him with liability.

9. Tribunal-III in M.A.C. Petition No. 8-S/2 of 2008, subject matter of **FAO No. 128 of 2011,** held that the insurance policy was effective at the relevant point of time and directed the insurer to satisfy the award.

10. The owner-insured, the driver and the claimants have not questioned the said impugned award on any count, thus, has attained finality so far it relates to them.

11. The insurer has questioned the said impugned award on the ground that the Tribunal-III has fallen in an error in saddling it with liability for the simple reason that the insurance policy was not in force at the relevant point of time, i.e. the date of accident.

12. Neither the claimants nor the respondents in the claim petitions, i.e. the driver, the owner-insured and the insurer have questioned the adequacy of compensation or the factum of rashness or negligence. Thus, the findings returned by the Tribunals on the said issues have attained finality.

13. The only question to be answered in these appeals is - whether the insurance contract was effective on the date of the accident, i.e. 21.01.2005?

14. Learned counsel for the owner-insured argued that the cover note, Exhibit RD-1 in M.A.C. Petition No. 22 FTC/2 of 2005/06,, has been issued before the date of the accident, as in the bottom of the cover note, the date of issue has been recorded as '21-1-

2005', however the effective date of commencement of the insurance has been wrongly recorded as '22-1-2005'.

15. The argument, though attractive, is devoid of any force, for the following reasons:

16. The cover note, Exhibit RD-1, contains the date of commencement and expiry of insurance. It is apt to reproduce relevant portion of the cover note herein:

" .....

3. Effective date of commencement of Insurance for the purpose of the Act	*Time 00-01 AM Date 22-1-2005*
4. Date of Expiry of Insurance	*Date 21-1-2006*

....."

17. While going through the cover note, one comes to an inescapable conclusion that the cover note contains the date from which the insurance contract was effective. The owner-insured has not questioned the same till the accident occurred or till today. The same effective date of the insurance is recorded in the cover note as well as the insurance policy.

18. The parties are covered by promises, terms and conditions contained in the insurance agreement that includes the cover note and the insurance policy.

19. The Apex Court in a case titled as **National Insurance Company Limited versus Abhaysing Pratapsing Waghela and others,** titled as **(2008) 9 Supreme Court Cases 133,** held that if cover note is issued, the cover note contains the date of commencement, is the date from which the insurer is liable. It is apt to reproduce paras 12, 17 and 22 of the judgment herein:

> *"12. The Motor Vehicles Act, 1988 (for short, "the Act") was enacted to consolidate and amend the law relating to motor vehicles. Chapter XI of the Act provides for insurance of motor vehicles against third party risks. Section 145 of the Act is the definition section; clause (b) whereof defines 'certificate of insurance' to mean:*
>
> > *"145. (b) ..... a certificate issued by an authorized insurer in pursuance of sub-section (3) of Section 147 and includes a cover note complying with such requirements as may be prescribed, and where more than one certificate has been issued in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be;*
> >
> > * * *"
>
> *Clause (d) of Section 145 defines 'policy of insurance' to include 'certificate of insurance'.*
>
> *13. to 16. .....*
>
> *17. Indisputably, the first respondent is a third party in relation to the contract of insurance which had been*

entered into by and between the appellant and the owner of the vehicle in question. We have noticed hereinbefore that a document was produced before the Tribunal. Even according to the appellant, although it was only a Motor Input Advice cum Receipt, it contained the Cover Note No. 279106. We, therefore, have to suppose that a Cover Note had, in fact, been issued. If a cover note had been issued which in terms of clause (b) of sub-Section 1 of Section 145 of the Act would come within the purview of definition of certificate of insurance; it also would come within the purview of the definition of a insurance policy. If a cover note is issued, it remains valid till it is cancelled. Indisputably, the insurance policy was cancelled only after the accident took place. A finding of fact, therefore, has been arrived at that prior to the deposit of the premium of insurance in cash by the owner of the vehicle, the cover note was not cancelled.

18. to 21. .....

22. Yet again in Deddappa v. National Insurance Co. Ltd., (2008) 2 SCC 595 : (2008) 1 SCC (Cri) 517, having regard to the provisions contained in Section 54(v) of the Insurance Act, 1938, in the fact situation obtaining therein, it was opined : (SCC p. 600, para 20)

"20. A contract is based on reciprocal promise. Reciprocal promises by the parties are condition precedents for a valid contract. A contract furthermore must be for consideration. (Emphasis added)"

20. The Apex Court has discussed the same issue in the case titled as **Balbir Kaur and others versus New India Assurance Company Limited and others,** reported in **(2009) 13 Supreme Court Cases 370.** It is apt to reproduce para 11 of the judgment herein:

"11. For the purpose of this case, we would assume that an insurance policy, in law, could be issued from a future date. A policy, however, which is issued from a future date must be with the consent of the holder of the policy. The insurance company cannot issue a policy unilaterally from a future date without the consent of the holder of a policy. Even the said circular letter had not been produced and/ or no material was placed as to why the policy was issued from a later date. It is, however, not necessary for us to delve deep into the matter in view of the limited notice issued by this Court. Respondent No. 3, however, owner of the vehicle has not questioned that part of the order passed by the High Court. He, therefore, accepted the judgment of the High Court. Accordingly, liability to pay the awarded amount by him is not in question."

21. The Apex Court in a case titled as **New India Assurance Company, Bangalore versus Kareemunnisa,** reported in **(2009) 16 Supreme Court Cases 241,** wherein the insurance policy was effective w.e.f. 22.09.1986 at 1.10 P.M., but the accident

occurred at 11.30 A.M. on the same day, held that the insurer was not liable. It is apt to reproduce para 3 of the judgment herein:

> *"3. The policy of insurance gives the effective date of commencement as "22-9-1986 .... 1.10 p.m.". Thereafter is printed, "(BOTH DAYS INCLUSIVE)". Relying upon what is in brackets, the Tribunal and the court below came to the conclusion that the Insurance Company was liable even though the accident in question had occurred at 11.30 a.m. on the same day i.e. before the issuance of the policy. The point in question would appear to be covered by the judgment of this Court in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, where it has been held that the insurer cannot be held liable when the time of insurance of the policy is mentioned thereon and the accident has occurred before that time."*

22. The Apex Court in another case titled as **Oriental Insurance Company Limited versus Porselvi and another,** reported in **(2009) 15 Supreme Court Cases 116,** wherein the cover note clearly indicated that the insurance policy was valid from 29.5.1996 to 28.5.1997, though it was issued on 28.5.1996, effect of which was not taken into consideration by the High Court, remanded the case for fresh consideration. It is apt to reproduce paras 4 and 5 of the judgment herein:

> *"4. Learned Counsel for the appellant brought to our notice the cover note which clearly indicates that the policy was valid from 29-5-1996 to 28-5-1997 though it was issued on 28-5-1996. A copy of the policy was brought on record. Relevant portion thereof reads as follows:*
>
> *"Effective date of commencement of insurance for the purpose of the Act, from (sic) o'clock on (date) 29-5-1996 to midnight of 28-5-1997."*
>
> *5. A three Judge Bench of this Court in New India Assurance Co. Ltd. v. Sita Bai, (1999) 7 SCC 575 : 1999 SCC (Cri) 1322, inter alia observed as follows:*
>
> > *"6. The correctness and applicability of the judgment in Ram Dayal case {New India Assuirance Co. Ltd. v. Ram Dayal, (1990) 2 SCC 680 : 1990 SCC (Cri) 432} came up for consideration before this Court subsequently in a number of cases. In New India Assurance Co. v. Bhagwati Devi, (1998) 6 SCC 534, a three-Judge Bench of this Court relied upon the view taken in National Insurance Co. Ltd. v. Jikubhai Nathuji Dabhi, (1997) 1 SCC 66, wherein it had been held that if there is a special contract, mentioning in the policy the time when it was bought, the insurance policy would be operative from that time and not from the previous midnight as was the case in Ram Dayal case where no time from which the insurance policy was to become effective had been mentioned. It was held that should there be no contract to the contrary, an insurance policy becomes operative from the*

> *previous midnight, when bought during the day following, but in cases where there is a mention of the specific time for the purchase of the policy, then a special contract comes into being and the policy becomes effective from the time mentioned in the cover note/the policy itself. The judgment in Jikubhai case has been subsequently followed in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, by a three-Judge Bench of this Court also."*

23. Applying the test to the instant case, the cover note is on the file, which provides that the insurance policy is valid w.e.f. 22.01.2005 at 00.01 A.M. to 21.01.2006. Thus, the insurance contract was not effective at the time of the accident.

24. The Apex Court in the cases titled as **National Insurance Co. Ltd. versus Sobina Iakai (Smt) and others, with National Insurance Co. Ltd. versus Kerolin P. Marak (Smt) and others,** reported in **(2007) 7 Supreme Court Cases 786,** and **J. Kalaivani and others versus K. Sivashankar and another,** reported in **(2007) 7 Supreme Court Cases 792,** laid down the same principle of law. It is apt to reproduce paras 15 to 19 of the judgment in **Sobina Iakai's case (supra)** herein:

> *"14. This Court had an occasion to examine the similar controversy in the case of New India Insurance Company v. Ram Dayal, (1990) 2 SCC 680. In this case, this Court held that in absence of any specific time mentioned in the policy, the contract would be operative from the mid- night of the day by operations of the provisions of the General Clauses Act but in view of the special contract mentioned in the insurance policy, the effectiveness of the policy would start from the time and date indicated in the policy.*
>
> *15. A three-judge Bench of this Court in National Insurance Co. Ltd. v. Jikhubhai Nathuji Dabhi, (1997) 1 SCC 66, has held that in the absence of any specific time mentioned in that behalf, the contract would be operative from the mid-night of the day by operation of provisions of the General Clauses Act. But in view of the special contract mentioned in the insurance policy, it would be operative from the time and date the insurance policy was taken. In that case, the insurance policy was taken at 4.00 p.m. on 25-10-1983 and the accident had occurred earlier thereto. This Court held (at SCC p. 67, para 3) that "the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant Company."*
>
> *16. Another three-Judge Bench of this Court in Oriental Insurance Co. Ltd. v. Sunita Rathi, (1998) 1 SCC 365, dealt with similar facts. In this case, the accident occurred at 2.20 p.m. and the cover note was obtained only thereafter at 2.55 p.m. The Court observed that the policy would be effective from the time and date mentioned in the policy.*

> *17. In New India Assurance Co. vs. Bhagwati Devi, [(1998 (6) SCC 534], this Court observed that, in absence of any specific time and date, the insurance policy becomes operative from the previous midnight. But when the specific time and date is mentioned, then the insurance policy becomes effective from that point of time. This Court in New India Assurance Co. Ltd. v. Sita Bai, (1999) 7 SCC 575, and National Insurance Co. Ltd. v. Chinto Devi, (2000) 7 SCC 50, has taken the same view.*
>
> *18. In J. Kalaivani v. K. Sivashankar, (2007) 7 SCC 792 : JT 2001 (10) SC 396, this Court has reiterated clear enunciation of law. The Court observed that it is the obligation of the Court to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry of the policy. A very large number of cases have come to our notice where insurance policies are taken immediately after the accidents to get compensation in a clandestine manner.*
>
> *19. In order to curb this widespread mischief of getting insurance policies after the accidents, it is absolutely imperative to clearly hold that the effectiveness of the insurance policy would start from the time and date specifically incorporated in the policy and not from an earlier point of time."*

25. It would also be profitable to reproduce paras 3 to 6 of the judgment in **K. Kalaivani's case (supra)** herein:

> *"3. The vehicle involved in the accident was in fact covered by a policy of insurance issued by the same insurance company on 8-2-1995 which was to expire by the midnight of 7-2-1996. It was the ill luck of the claimants that the accident took place at 4.30 a. m. on 8-2-1996 which is only four and a half hours after the expiry of the erstwhile policy. On the succeeding day the owner of the vehicle went to the insurance company and got another policy issued in respect of the same vehicle, but which the company specifically indicated the time of commencement of the policy as 10 a. m. on 8-2-1995.*
>
> *4. The question posed before us is whether the policy issued by the insurance company on 8.2.1998 can be regarded as renewal of the earlier policy.*
>
> *5. Three decisions have been placed before us. In New India Assurance Co. Ltd. v. Ram Dayal, (1990) S SCC 680 : 1990 SCC (Cri) 432, it was held that in the absence of any specific time mentioned in that behalf, the contract of insurance would be operative from the midnight of the day by operation of the provisions of the General clauses Act, 1897. In National Insurance co. Ltd. v. Jijubhai Nathuji Dabhi, 1997 (1) SCC 66, a three judge bench of this Court*

approved the legal position adopted in the said decision. However, learned judges observed thus: (SCC p. 67, para 3)

> *"But in view of the special contract mentioned in the insurance policy, namely it would be operative from 4.00 p. m. on 25-10-1983 and the accident had occurred earlier thereto, the insurance coverage would not enable the claimant to seek recovery of the amount from the appellant company".*

This question was again considered by another three-Judge Bench of this Court in New India Assurance v. Bhagwati Devi, (1998) 8 SCC 534, and after following the dictum in the earlier decision that bench has stated thus:(SCC p. 535, para 2)

> *"The principle deduced is thus clear that should there be no contract go contrary, an insurance policy becomes operative from the previous midnight, when bought during the day following. However, in case there is mention of a specific time for its purchase then a special contract to the contrary comes into being and the policy would be effective from the mentioned time. The law on this aspect has been put to rest by this Court. There is, this, nothing further for us to deliberate upon".*

6. Therefore, the position has become now well neigh settled. The court has to look into the contract of insurance to discern whether any particular time has been specified for commencement or expiry, as the case may be, of the policy of insurance. The copies of the erstwhile policy as well as the present policy have been produced for. our perusal, the authenticity of which has not been questioned before us. The erstwhile policy shows that it expired by midnight of 7-2-1996 by specific terms incorporated in the policy. The next policy has clearly indicated that it had commenced only at 10.00 a. m. on 8-2-1996. The interregnum created the void in respect of the vehicle vis-a-vis the insurance company. The unavoidable consequence of it is that the insurance company cannot now be mulcted with the liability in respect of the award granted by the tribunal."

26. Keeping in view the mandate of Chapter XI of the Motor Vehicles Act, 1988 (for short "the MV Act"), the owner-insured is required to get his vehicle insured. The insurance agreement is a contract between the owner-insured and the insurer. In view of the terms and conditions contained in the insurance policy read with the mandate of the said Chapter, the insurer has to indemnify the owner-insured, provided the owner-insured is not in breach, if pleaded and proved by the insurer. Thus, the policy document is an important document, which governs the parties, is to be construed strictly.

27. The Apex Court in a case titled as **Vikram Greentech India Limited and another versus New India Assurance Company Limited,** reported in **(2009) 5 Supreme**

Court Cases 599, laid down the same principle. It is apt to reproduce paras 16 to 18 of the judgment herein:

> *"16. An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself. In a contract of insurance, there is requirement of uberimma fides i.e. good faith on the part of the insured. Except that, in other respects, there is no difference between a contract of insurance and any other contract.*
>
> *17. The four essentials of a contract of insurance are, (i) the definition of the risk, (ii) the duration of the risk, (iii) the premium and (iv) the amount of insurance. Since upon issuance of insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the insurance policy, its terms have to be strictly construed to determine the extent of liability of the insurer.*
>
> *18. The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties. The insured cannot claim anything more than what is covered by the insurance policy. (General Assurance Society Ltd. v. Chandmull Jain, AIR 1966 SC 1644; Oriental Insurance Co. Ltd. v. Sony Cheriyan, (1999) 6 SCC 451, and United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal, (2004) 8 SCC 644)"*

28. Having said so, the insurance policy was not in existence at the time of the accident and the insurer is not liable to satisfy the award and came to be rightly exonerated by the Tribunals-I and II in the claim petitions, subject matters of FAOs No. 450 of 2007, 106 & 107 of 2010, Tribunal-III has fallen in an error in saddling it with liability.

29. Viewed thus, the appeals filed by the owner-insured, i.e. FAOs No. 450 of 2007, 106 & 107 of 2010 merits to be dismissed and the appeal filed by the insurer, i.e. FAO No. 128 of 2011 is to be allowed and the owner-insured has to satisfy all the impugned awards.

30. Having glance of the above discussion, FAOs No. 450 of 2007, 106 & 107 of 2010 are dismissed, the impugned awards in FAOs No. 450 of 2007, 106 & 107 of 2010 are upheld, FAO No. 128 of 2011 is allowed and the impugned award in FAO No. 128 of 2011 is modified, as indicated hereinabove.

31. The owner-insured is directed to deposit the awarded amount in FAO No. 128 of 2011 before the Registry within eight weeks. Thereafter, the awarded amount in all the claim petitions be released in favour of the claimants strictly as per the terms and conditions contained in the impugned awards.

32. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

FAO No.317 of 2008 with FAO No.354 of 2008.
Decided on: 05.06.2015.

1. FAO No.317 of 2008:

Sanjokta Devi and others ...Appellants

VERSUS

Himachal Road Transport Corporation and another ...Respondents.

2. FAO No.354 of 2008:

Himachal Road Transport Corporation ...Appellant

VERSUS

Sanjokta Devi and others ...Respondents.

Motor Vehicle Act, 1988- Section 166- Deceased was working as a trained Electrician- therefore, his income can be taken as Rs. 6,000/- p.m. - 50% of the amount was to be deducted towards personal expenses of the deceased- age of the deceased is to be taken into consideration while determining the multiplier- deceased was aged 28 years and multiplier of '13' is applicable- hence, compensation of Rs.4,68,000/- awarded under the head loss of dependency. (Para-6 to 12)

Cases referred:

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121

Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120

Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

FAO No.317 of 2008:

For the Appellants: Mr.V.S. Chauhan, Advocate.

For the Respondents: Mr. N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate, for respondent No.1.
Mr.L.N. Sharma, Advocate, for respondent No.2.

FAO No.354 of 2008:

For the Appellants: Mr. N.K. Thakur, Senior Advocate, with Mr.Rohit Bharoll, Advocate.

For the Respondents: Mr.V.S. Chauhan, Advocate, for respondents No.1 and 3.
Mr.L.N. Sharma, Advocate, for respondent No.4.
Respondent No.2 stands deleted.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are the outcome of award, dated 28th February, 2008, passed by the Motor Accident Claims Tribunal, Solan, (for short, the Tribunal), in Claim Petition No.1-S/2 of 2007, titled Sanjokta Devi and others vs. Himachal Road Transport Corporation and another, whereby compensation to the tune of Rs.4,04,000/-, with interest at the rate of 9%, from the date of filing of the Claim Petition till realization, was awarded in

favour of the claimants, and the owner-HRTC was saddled with the liability, (for short, the impugned award).

2. The claimants have questioned the impugned award by the medium of FAO No.317 of 2008 on the ground of adequacy of compensation, while the owner-HRTC has questioned the same by filing FAO No.354 of 2008 on the ground that the impugned award is excessive.

3. Therefore, the question needs to be answered in these appeals is – Whether the amount awarded by the Tribunal is just and appropriate?

4. After going through the impugned award and the record, I am of the view that the impugned award is inadequate for the following reasons.

5. The Tribunal, after taking into consideration the future earning prospects of the deceased, worked out the monthly income of the deceased as Rs.6,000/-. However, in my opinion, the Tribunal has fallen in error in coming to the conclusion that the claimants lost source of dependency to the tune of Rs.2,000/- per month, after making deductions towards his personal expenses and taking into account the fact that in near future he was to be married.

6. In today's scenario, even an unskilled labourer is earning not less than Rs.6,000/- per month. However, in the case of the deceased, he was a trained Electrician as has been proved on record. Therefore, it can safely be held that at the time of his death, he would have been earning Rs.6,000/- per month.

7. Applying the ratio of the decision of the Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 50% has to be deducted towards personal expenses of the deceased. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

8. Coming to the multiplier, the Tribunal, keeping in view the age of the deceased and that of the parents, has applied the multiplier of 15 for the first year and of 14 for the remaining period.

9. The Apex Court in its latest decision in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** has held that while applying the multiplier, only the age of the deceased has to be taken into consideration. It is apt to reproduce paragraphs 12 and 14 of the said decision hereunder:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of*

compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

10. Admittedly, at the time of accident, the age of the deceased was 28 years. Therefore, applying the ratio of the decision of the Apex Court in Munna Lal Jain's case (supra), I am of the opinion that multiplier of 13 is appropriate in the present case.

11. Accordingly, the claimants are awarded a sum of Rs.4,68,000/- (Rs.3,000 x 12 x 13) under the head loss of the source of dependency.

12. In addition to this, the Claimants are also held entitled to Rs.30,000/-, i.e. Rs.10,000/- each under the heads 'loss of love and affection', loss of estate' and 'funeral expenses'.

13. Therefore, the claimants are held entitled to Rs.4,98,000/- (Rs.4,68,000 + Rs.30,000), with interest as awarded by the Tribunal.

14. The owner-HRTC is directed to deposit the enhanced amount in the Registry of this Court within a period of six weeks from today and on deposit, the Registry is directed to release the amount in favour of the claimants strictly in terms of the impugned award and after proper identification.

15. FAO No.354 of 2008 filed by the HRTC is dismissed and the appeal filed by the claimants i.e. FAO No.317 of 2008 is allowed, as indicated above. A copy of this judgment be placed on the record of connected appeal.

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

Smt. Savitra Devi & another ...Appellants

Versus

Smt. Jaiwanti Devi & others ...Respondents

FAO No. 359 of 2007
Date of decision: 5.6.2015

Motor Vehicle Act, 1988- Section 166- Claimants pleaded that deceased was travelling in the vehicle along with apple plants but it was not pleaded that she had hired the vehicle – fare paid was also not specified- insurer had specifically pleaded that deceased was travelling in the vehicle as a gratuitous passenger – no plants were found at the place of the accident- therefore, plea of the Insurance Company that deceased was a gratuitous passenger has to be accepted as correct – held that the Insurance Company was rightly held liable to make the payment with right to recovery. (Para-9 to 11)

For the appellants : Mr. Sat Prakash, Advocate.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for the respondents No. 1(i) to (viii) and No. 2.
Mr. Deepak Bhasin, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

CMP (M) No. 532 of 2015

The appellants have moved this application for bringing on record the legal representatives of respondent No. 1, who has died during the pendency of this appeal.

2. It is a beaten law of land that the limitation period is not applicable to the claimants for filing claim petition in view of the amendment made in 1994 in the Motor Vehicles Act, 1988, whereby provisions of sub Section (3) of Section 166 of the Act came to be deleted.

3. Having said so, I deem it proper to grant this application. The legal representatives of deceased respondent No. 1 are ordered to be brought on record as party respondents in the claim petition and shall figure as respondents No. 1(i) to 1(vii). The Registry to carry out necessary corrections in the cause title. Learned Counsel for the appellants to file amended memo of parties. The application is disposed of.

FAO No. 359 of 2007

4. Heard.

5. Appellants-insured-owner and driver have questioned the award, dated 21st June, 2007, made by the Motor Accident Claims Tribunal-II, (Fast Track), Kullu, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No.17/05, whereby compensation to the tune of Rs.2,26,800/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimants-respondents No. 1 & 2 herein and against the appellants-driver and owner-insured (for short, the "impugned award"), on the grounds taken in the memo of appeal.

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

7. The owner-insured and driver have questioned the impugned award on the ground that the Tribunal has fallen in error in granting right of recovery to the insurer.

8. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly granted right of recovery to the insurer. The answer is in the affirmative for the following reasons:

9. The claimants in para-10 of the claim petition have specifically pleaded that deceased Bimla Devi was traveling in vehicle-Jeep bearing registration No. HP-66-0617 alongwith apple plants. But it is not pleaded whether she had hired the vehicle and what was the fare paid. The appellants-driver and owner have not denied the same, but stated that 'para-10 of the claim petition needs no reply'. Thus, it is an evasive denial.

10. The insurer has taken a specific plea that the deceased was traveling in the offending vehicle as a gratuitous passenger. The Tribunal, in paras 25 to 27 of the impugned award, has discussed and held that the deceased was not traveling in the

offending vehicle as owner of apple plants and no apple plants were seized on the spot. Thus, the driver and owner have failed to prove that the deceased was traveling in the offending vehicle as a owner of apple plants and was not a gratuitous passenger.

11. Having said so, the Tribunal has rightly made discussion in paras 25 to 27 of the impugned award and accordingly, it is held that the insurer has right of recovery.

12. Though, the amount awarded is meager, but the claimants have not questioned the same, is maintained.

13. Accordingly, the appeal is dismissed.

14. The Registry is directed to release the award amount in favour of claimants, strictly as per the terms and conditions, contained in the impugned award.

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 MANSOOR AHMAD MIR, C.J.

Secretary (Home) & others ...Appellants.
Versus
Smt. Shanti Devi & others ...Respondents.

FAO No. 299 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 166- Deceased was working in the police department- last salary drawn by him was Rs.7,500/--Rs.8,000/-- 1/4th of the amount was to be deducted towards personal expenses- deceased was aged 34 years and multiplier of '16' was applicable- thus, claimants are entitled for Rs. 9 lakh under the head 'loss of dependency'.

Cases referred:
Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellants: Mr. Vikram Thakur, Deputy Advocate General.
For the respondents: Mr. Anupinder Rohal, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 13.03.2008, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr (for short "the Tribunal") in M.A.C. Petition No. 66 of 2006, titled as Smt. Shanti Devi and others versus Secretary Home and others, whereby compensation to the tune of Rs.9,79,000/- with interest @ 9% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The claimants have not questioned the impugned award on any ground, thus, has attained finality so far it relates to them.

3. Appellants-respondents in the claim petition have questioned the impugned award, by the medium of this appeal, on the ground that the amount awarded is excessive.

4. I have gone through the claim petition, record and the evidence and am of the considered view that the claimants have proved by leading evidence that the driver, namely, Shri Prem Kumar, had driven the offending vehicle, i.e. motorcycle, bearing registration No. HP-25-0682, owned by H.P. Police Department, rashly and negligently on 13.09.2002, at about 3.20 P.M., on the way from Tapri to Purani Tapri and caused the accident, in which deceased-Mangat Ram sustained injuries and succumbed to the injuries.

5. Respondents in the claim petition have not led any evidence in rebuttal of the same and the evidence led by the claimants has remained unrebutted. Viewed thus, the Tribunal has rightly decided issue No. 1 in favour of the claimants and against the respondents-appellants herein. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

6. Before I deal with issue No. 2, I deem it proper to determine issue No. 3.

7. Respondents have failed to prove how the claim petition is not maintainable. The Tribunal has rightly held that the claimants are the victims of the vehicular accident, thus, the claim petition is maintainable. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

8. Mr. Vikram Thakur, learned Deputy Advocate General, argued that the amount awarded is excessive for the reason that the claimants have been paid all service benefits of the deceased, is to be deducted.

9. The argument is misconceived for the reason that claimant No. 1 has lost her husband, thus, has been deprived of her matrimonial home and claimants No. 2 to 5 have lost their father, have been deprived of love and affection of their father and source of dependency.

10. Admittedly, the deceased was working in the Police Department. The claimants have pleaded that the last salary drawn by the deceased was Rs.7,500/- - Rs. 8,000/-. Respondents have not denied the said factum.

11. The Tribunal, after taking the pleadings in view, deducted one third towards his personal expenses and came to the conclusion that the claimants have lost source of dependency to the tune of Rs.5,000/- per month. However, one fourth was to be deducted in view of the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** but, as the claimants have not questioned the same, it is accordingly maintained.

12. Admittedly, the age of the deceased was 34 years at the time of the accident. The Tribunal has applied the multiplier of '16', which is on the higher side. In view of the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "the MV Act") read with the ratio laid down by the Apex Court in the judgments (supra), multiplier of '15' was to be applied. Accordingly, I deem it proper to apply the multiplier of '15'.

13. Accordingly, the claimants are held entitled to Rs.5,000 x 12 x 15 = Rs.9,00,000/- under the head 'loss of dependency'. The Tribunal has rightly awarded Rs.10,000/- under the head 'loss of love and affection', Rs.5,000/- under the head 'funeral expenses', Rs. 2,000/- under the head 'taxi charges' and Rs.2,000/- as costs of petition.

14. Viewed thus, the claimants are held entitled to Rs.9,00,000/- + Rs.10,000/- + Rs. 5,000/- + Rs.2,000/- + Rs. 2,000/- = Rs. 9,19,000/-.

15. Having glance of the above discussions, the amount of compensation is reduced and the impugned award is modified, as indicated hereinabove.

16. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

17. The appeal is disposed of accordingly alongwith all pending applications.

18. Send down the record after placing copy of the judgment on the Tribunal's file.

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

The New India Assurance Co. Ltd. ...Appellant.
Versus
Sh. Roshan Lal & others ...Respondents.

FAO No. 273 of 2008
Decided on: 05.06.2015

Motor Vehicle Act, 1988- Section 149- Insurance Company pleaded that driver did not possess valid driving licence at the time of accident- unladen weight of the vehicle was 1670 kg. and laden weight of the vehicle was 2820 kg. – vehicle falls within the definition of light motor vehicle- driver possessed a driving licence to drive light motor vehicle- held, that Insurance Company was rightly held liable to pay compensation. (Para- 5 to 14)

Cases referred:
Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906
National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellant: Mr. Ratish Sharma, Advocate.
For the respondents: Mr. Neeraj Gupta, Advocate, for respondent No. 1.
Nemo for respondent No. 2.
Mr. Ajay Chandel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 25.02.2008, made by the Motor Accident Claims Tribunal, Kullu, H.P. (for short "the Tribunal") in Claim Petition No. 11 of 2007, titled as Roshan Lal versus Vishal Ranchan and others, whereby compensation to the tune of Rs. 89,000/- with interest @ 7% per annum from the date of the petition till its realization came to be awarded in favour of the claimant-injured (for short "the impugned award").

2. The claimant-injured, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. Mr. Ratish Sharma, learned counsel for the appellant, stated at the Bar that he has confined his attack to the impugned award only on the ground that the driver, namely Shri Uttam Singh, was driving offending vehicle, i.e. Tata Mobile No. HP-34 B-0436, which was a goods carriage and he was having a driving licence to drive a light motor vehicle and not goods carriage, thus, was not holding a valid and effective driving licence.

4. The argument of the learned counsel for the appellant is devoid of any force for the following reasons:

5. Admittedly, the offending vehicle was Tata 207DI Pick Up, the unladen weight of which is 1670 kg, and laden weight is 2820 kg, as per the registration certificate, Ext. RW-1/A, which falls within the definition of light motor vehicle.

6. I deem it proper to reproduce the definitions of “driving licence”, “light motor vehicle”, “private service vehicle” and “transport vehicle” as contained in Sections 2 (10), 2 (21), 2(35) and 2 (47), respectively, of the Motor Vehicles Act, 1988 (for short "the MV Act") herein:

> *“2. .....*
>
> *(10) “driving licence” means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than a learner, a motor vehicle or a motor vehicle of any specified class or description.*
>
> *xxx xxx xxx*
>
> (21) *“light motor vehicle” means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed 7,500 kilograms.*
>
> *xxx xxx xxx*
>
> *(35) “public service vehicle” means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage, and stage carriage.*
>
> *xxx xxx xxx*
>
> *(47) “transport vehicle” means a public service vehicle, a goods carriage , an educational institution bus or a private service vehicle.”*

7. Section 2 (21) of the MV Act provides that a "light motor vehicle" means a transport vehicle or omnibus, the gross vehicle weight of either of which or a motor car or tractor or road roller the unladen weight of any of which, does not exceed 7500 kilograms. Section 2 (35) of the MV Act gives the definition of a "public service vehicle", which means any vehicle, which is used or allowed to be used for the carriage of passengers for hire or reward and includes a maxicab, a motorcab, contract carriage and stage carriage. It does not include light motor vehicle (LMV). Section 2 (47) of the MV Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. The purpose of mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors.,** reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles*

which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', ' medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."

9. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section 2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. to 13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

10. Viewed thus, the driver of the offending vehicle was having a valid and effective driving licence.

11. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

12. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

> *"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is*

on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."

13. Having said so, I am of the considered view that the Tribunal has rightly saddled the insurer with liability.

14. Viewed thus, the appeal deserves to be dismissed and the impugned award is to be upheld. Accordingly, the appeal is dismissed and the impugned award is upheld.

15. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

16. Send down the record after placing copy of the judgment on the Tribunal's file.

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

United India Insurance Company Limited ...Appellant

VERSUS

Union of India and others ...Respondents.

FAO No.482 of 2007.
Reserved on: 29.05.2015.
Pronounced on: 05.06.2015.

Motor Vehicle Act, 1988- Section 166- A bridge was constructed by Union of India across Jankar Nallah- bridge was meant for crossing by one vehicle at a time- caution boards were

put on both side of the bridge to this effect- respondent/driver took the vehicle to the bridge when another vehicle was present on it- bridge could not bear the weight of two vehicles and collapsed- Union of India filed a petition seeking compensation of Rs. 8,11,536/-- Insurer had admitted in the reply that accident had taken place due to the negligence of the driver who took the vehicle to the bridge when another vehicle was crossing- therefore, MACT had rightly held that Insurance Company liable to pay compensation. (Para-13 to 22)

Cases referred:
United India Insurance Company vs. Thomas, I (1999) ACC 587 (DB),
Shivaji Dayanu Patil and another vs. Vatschala Uttam More (Smt), (1991) 3 SCC 530

For the Appellant:	Mr.Ashwani K. Sharma, Advocate.
For the Respondents:	Mr.Ashok Sharma, Assistant Solicitor General of India, for respondents No.1 to 3. Nemo for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Subject matter of this appeal is the award, dated 31st August, 2007, passed by the Motor Accident Claims Tribunal, Kullu, (for short, the Tribunal), in Claim Petition No.73 of 2005, titled Union of India and others vs. Pawan Kumar and others, whereby compensation to the tune of Rs.8,11,536/-, with interest at the rate of 6%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants-Union of India and the insurer (appellant herein) was saddled with the liability, (for short, the impugned award).

2. The insurer/appellant has questioned the impugned award on the ground that the driver of the offending truck had not driven the vehicle rashly and negligently and no damage was caused by the vehicle, which was insured with it. It was also submitted that the claimants have not been able to prove the amount spent for repairing the bridge/damaged property.

3. In order to determine these issues raised by the appellant-insurer, brief facts of the case are to be noticed.

4. The bridge across Jankar Nallah on Manali Sarchu road was constructed by the claimants-Union of India. The bridge was meant for crossing of only one vehicle at a particular time. Caution boards were also displayed on both sides of the bridge signifying the speed limit to be observed while crossing the bridge as also the fact that only one vehicle could go across the bridge at one point of time. It was averred that without paying any attention to the caution boards, truck bearing No.HP-38B-4647, being driven by Ramesh Chand (original respondent No.2), rashly and negligently, entered the bridge, despite the fact that there was another truck bearing registration No.HP-38B-6447, being driven by one Bhola Singh, was in the mid of crossing the bridge in question. Since the bridge was not in a position to bear the weight of both the vehicles crossing simultaneously, it gave way, and both the vehicles fell off the bridge, damaging the bridge in totality. FIR No.40 of 2004 was registered at Police Station, Keylong Lahaul and Spiti, on 3rd June, 2004.

5. Thus, the claimants-Union of India preferred the claim petition before the Tribunal claiming compensation to the tune of Rs.8,11,536/- on the ground that the driver

of the offending truck had driven the same rashly and negligently causing the accident in which the bridge was totally damaged.

6. The owner/insured, the driver and the insurer have contested the Claim Petition by filing separate replies.

7. On the pleadings of the parties, the following issues were settled by the Tribunal:

> *"1. Whether the bridge, belonging to the petitioners, has been damaged due to rash and negligent driving of truck No.HP-38B-4647 by respondent No.2? OPP*
>
> *2. If issue No.1 is proved in affirmative, to what amount of compensation/damages, the petitioners are entitled to and from whom? OPP*
>
> *3. Whether the truck in question was being driven in contravention of the terms and conditions of the insurance policy? OPR-3.*
>
> *4. Whether respondent No.2 was not holding a valid and effective driving licence at the time of accident? OPR-3*
>
> *5. Relief."*

8. Parties adduced their evidence in support of their respective claims.

9. The Claimants-Union of India examined four witnesses in all i.e. PW-1 Hari Singh, PW-2 Guruvanandam, PW-3 Vijay Kumar and PW-4 A.K. Singh. Respondents i.e. the owner and the driver have examined Bhola Singh (driver of truck No.HP-38B-6447) as RW-1 and Nawang Norbu (Record Keeper, in the office of Deputy Commission, Keylong) as RW-2, while the insurer has opted not to lead any evidence.

10. The witnesses have deposed that the driver of the offending vehicle, namely, Ramesh Chand, had driven the offending vehicle rashly and negligently and caused the accident because the bridge was not in a position to withstand the weight of two trucks crossing simultaneously. The witnesses have also deposed that the truck which was being driven by Bhola Singh had entered the bridge prior in time, was ahead of the offending vehicle and thereafter, the offending truck, without allowing the truck going ahead of it, to cross the bridge, tried to cross the bridge simultaneously, as a result of which the bridge collapsed and both the vehicles fell down. Thus, the accident was because of sheer carelessness, rashness and negligence on the part of the driver of the offending vehicle.

11. The driver of the offending vehicle examined Bhola Singh as RW-1, who has stated that Ramesh Chand had driven the vehicle carelessly, rashly and negligently. He has also stated that he was cautioned by the police officials present at the Check Post that only one vehicle was allowed to cross the Bridge at one point of time. He further stated that had Ramesh Chand not entered on the bridge just after him and waited till he crossed the bridge, the accident would not have occurred.

12. Thus, RW-2 Bhola Singh has, in fact, deposed against the driver of the offending vehicle. It is clear from the statement of this witness that the accident had occurred due to the negligence on the part of the driver of the offending vehicle i.e. Ramesh Chand.

13. Moreover, the insurer-appellant, in the reply filed by it to the Claim Petition, has categorically admitted in paragraph 13 that the accident was the outcome of rash and negligent driving of respondent No.2. It was also pleaded that had he not ignored the cautionary board, the accident would have been averted. It is apt to reproduce paragraph 13 of the reply hereunder:

> *"The accident and damage to the property is caused only due to the negligence on the part of the respondent No.2 who ignored the cautionary board as admitted by the petitioner and the respondent No.3 is not entitled to make any kind of compensation to the petitioners."*

14. Having said so, the Tribunal has rightly returned the findings on Issue No.1.

15. Before issue No.2 is dealt with, I deem it proper to deal with issues No.3 and 4. Onus to prove these issues was on the insurer. The insurer has not led any evidence. However, a perusal of the statement of RW-2 Nawang Norbu, Record Keeper, office of the Deputy Commissioner, Keylong, District Lahaul & Spiti, who was examined by the owner and the driver of the offending vehicle, shows that the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. Accordingly, the findings of the Tribunal on issue No.4 are upheld.

16. As far as issue No.3 is concerned, it was for the insurer to plead and prove that the offending vehicle was being plied in contravention of the terms and conditions contained in the insurance policy, has failed to discharge the onus. The Tribunal has, therefore, rightly decided this issue against the insurer and in favour of the claimants and the owner/insured.

17. Now coming to issue No.2, the learned counsel for the appellant/insurer has argued that the State functionaries or the Union of India has not issued notifications, as required in terms of the provisions of the Motor Vehicles Act, 1988 (for short, the Act). Thus, it was contended that the accident had occurred due to the negligence of the State/Union of India and no negligence can be attributed to the driver of the offending vehicle. It was further submitted that keeping in view the strength of the bridge, the State ought to have posted an official in order to manage the traffic over it.

18. The argument, though attractive, is devoid of any force for the reason that RW-1 Bhola Singh has categorically stated that the accident was the outcome of rashness, negligence and carelessness of the driver Ramesh Chand. Even the insurer has admitted in paragraph 13 of the reply, reproduced above, that the accident had taken place due to the negligence of the driver of the offending vehicle.

19. The claimants have specifically pleaded in the Claim Petition as to what was the extent of damage to the bridge and the amount they have spent on its repairs. Assessment, qua cost of repairs, has been proved on record as Ext.PW-2/A and stands duly corroborated by PW-3 Vijay Kumar, Assistant Executive Engineer. No evidence, in rebuttal, was led by the insurer to demolish the said evidence.

20. The Tribunal has rightly made discussion in paragraphs 9 and 11 of the impugned award. The insurer has not led any evidence in rebuttal to prove that the assessment was not correctly made.

21. During the course of hearing, the learned counsel for the appellant has relied upon the decision of Kerala High Court in **United India Insurance Company vs. Thomas, I (1999) ACC 587 (DB),** which decision is based on the facts of that case and is not attracted to the facts of the present case, rather is against the appellant.

22. The Apex Court in **Shivaji Dayanu Patil and another vs. Vatschala Uttam More (Smt), (1991) 3 SCC 530,** has dilated on the scope of Section 110 of the Motor Vehicles Act, 1939 (old) corresponding to Section 166 of the Act, and the ratio laid down in this case is applicable to the case in hand.

23. It is apt to record herein that the owner and the driver have not questioned the impugned award on any count.

24. Thus, the only conclusion which can be drawn is that the insurer has to satisfy the award so far as it relates to third party since the factum of insurance is not in dispute.

25. Having a glance of the above discussion, I am of the opinion that the Tribunal has rightly awarded the compensation and no interference is required in the impugned award.

26. Accordingly, the impugned award is upheld and the appeal is dismissed.

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

Civil Revision No. 194 of 2003 and
Civil Revision No. 195 of 2003.
Judgment reserved on: 28.5.2015
Date of decision: June 15, 2015.

1. C.R. No. 194 of 2003

J.P.Chatrath ... Petitioner

Vs.

Khem Chand Chauhan and others ... Respondents

2. C.R. No. 195 of 2003

J.P. Chatrath ...Petitioner

Vs.

Khem Chand Chauhan and others ....Respondents.

Code of Civil Procedure, 1908- Order 1 Rule 10- Order 6 Rule 17- Plaintiff filed a Civil Suit for declaration that he is owner in possession of the suit land and in adverse possession of the area adjacent to the suit land- suit was partly decreed- it was claimed that sale deeds were made in favour of respondents No. 2 and 3 through an attorney of a dead person, which are null and void- land belongs to respondents No. 4 to 9 who have to be impleaded and necessary amendment has to be made in the plaint- held, that plea of adverse possession is not available to the plaintiff as the suit cannot be filed on the basis of adverse possession - adverse possession can be used as a shield and not a sword, therefore, application dismissed with cost of Rs. 20,000/-. (Para-10 and 11)

Cases referred:

Steel Authority of India Limited vs. Gupta Brother Steel Tubes Limited, (2009) 10 SCC 63

Abdul Rehman and another vs. Mohd. Ruldu and others, (2012) 11 SCC 341

Amit Kumar Shaw and another vs. Farida Khatoon and another, (2005) 11 SCC 403

Thomson Press (India) Limited vs. Nanak Builders and Investors Private Limited and others, (2013) 5 SCC 397

Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2005 SC 3353

State of Madhya Pradesh vs. Union of India and another, (2011) 12 SCC 268

J. Samuel and others vs. Gattu Mahesh and others, (2012) 2 SCC 300

S. Malla Reddy vs. Future Builders Cooperative Housing Society and Others, (2013) 9 SCC 349

Gurdwara Sahib versus Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669

For the petitioner : Mr. Bhupender Gupta, Senior Advocate, with Mr. Suneet Goel, Advocate.

For the respondents : Mr. G.D.Verma, Senior Advocate, with Mr. B.C. Verma, Advocate, for respondents No. 1 to 3 and 9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, J.

Both these revision petitions arise out of common order dated 5.5.2003 whereby the learned Court below dismissed the application filed by the petitioner/plaintiff under Order 1 Rule 10 C.P.C. giving rise to Civil Revision No. 194 of 2003 and simultaneously dismissed another application preferred by the petitioner under Order 6 Rule 17 CPC giving rise to Civil Revision No. 195 of 2003.

2. The plaintiff filed a suit for declaration that he is owner in possession of the suit land comprised in Khasra Nos. 1698/399 and 1687/362 after having purchased the same from Smt. Parkashwati. He further claimed that he is in adverse possession of an area measuring 22 sq. metres which is adjoining the aforesaid land and comprised in Khasra No. 395/1.

3. The learned trial Court decreed the suit partly to the extent that the plaintiff was declared as owner in possession of the land purchased by him i.e. Khasra Nos. 1698/399 measuring 75 sq. metres and Khasra No. 1687/362 measuring 206 sq. metres. Insofar as the claim regarding adjoining land of 22 sq. metres as comprised in Khasra No. 395/1 is concerned, the same was dismissed.

4. In the application filed under Order 1 Rule 10 CPC, being Civil Misc. Application No. 25 of 2003, it was averred that the sales made in favour of respondents No. 2 and 3 were made through an attorney of a dead person and in Civil Suit No. 222/1 of 93 titled 'Avinash Chand vs. Khema Ram' decided on 26.9.1993, the sale deeds had been declared to be null and void. This fact came to the knowledge of the plaintiff during the pendency of the suit. Since the sale deeds in favour of respondents/ defendants No. 2 and 3 were declared null and void, they are not owners of the suit land and as the land now belongs to respondents No.4 to 9, they are required to be impleaded as respondents. The land referred to in this application is the one comprised in Khasra No. 395/1 i.e. land over which the plaintiff is claiming adverse possession.

5. Simultaneously, the plaintiff moved another application under Order 6 Rule 17 CPC for amendment of the plaint whereby he intended to add para 14-A, which reads thus:

> *"That Khasra No. 395 was transferred in the name defendants as claimed by them as Khasra No. 2386/395 measuring 150 square metres, 2387/395 measuring 22 square metres in the name of Smt. Madhu Thapa and 2388/395 measuring 154 sq.metres in the name of Khevan Ram per separate Tarteemas as carved out per old sale deeds declared as null and void as judgment dated 16.9.1993 in case No. 222/93 and which registered sale deeds are in possession of the defendants and said Tarteema will displayed further in mutation No. 1132 dated 29.12.1993 and the sale deeds dated 13.1.1994 wherein the plaintiff was not a party and in the said suit even the possession of the plaintiff qua the land in suit was not mentioned and no demarcation with respect to the said tarteema was ever got effective except the demarcation whereby 22 sq. metres was found in possession of plaintiff*

as Khasra No. 395/1 and which was never challenged and had become final and possession of which land since the date of purchase dated 4.12.1975 to 13.1.1994 etc. and till today is open, continuous and is as of site as owner and within the knowledge of owner Smt. Prakashwati as per successors Shri Vipin Chand, Avinash Chand and others being under fixed boundaries covered from all sides and the said possession as such having ripened into ownership, the defendants has no right, title and interest in the same. The possession at the spot of the said land was defined on 4.12.1975 at the time of registration of sale deed where the same was purchased from Smt. Prakashwati and whereby the construction was raised on the said land measuring 28 sq. meters and which presently had been found to be in excess by 22 sq. meters.

That the said possession been within the forwall and fencing and in actual physical possession of the plaintiff, the defendants are estopped to challenge the same and Smt. Parkashwati till her death in January, 1990 and from 4.12.1975 onwards had never challenged the same and had always treated plaintiff to be owner in possession of said land where the residential house was constructed by the plaintiff as per approved municipal plan and thus the defendants are estopped by their acts, conduct and deeds to challenge this position and have waved their right wavier comes into play on the part of the defendants. They are estopped and the plaintiff is entitled to be declared as owner on the said land. The defendants as such are liable to be restrained from interfering in the said land and from claiming and asserting any rights therein."

6. Now, a perusal of the proposed amendment would show that the same is again confined to Khasra No. 395/1 over which the plaintiff is claiming adverse possession.

7. As observed earlier, both these applications were dismissed by the learned Court below and the said order has been assailed by way of present revision petitions.

8. Learned counsel for the petitioner has relied upon the judgments of the Hon'ble Supreme Court in ***Steel Authority of India Limited*** vs**.** ***Gupta Brother Steel Tubes Limited (2009) 10 SCC 63*** *and* ***Abdul Rehman and another*** vs**.** ***Mohd. Ruldu and others (2012) 11 SCC 341*** to contend that the amendment can be allowed at any stage. He has further relied upon the judgments of the Hon'ble Supreme Court in ***Amit Kumar Shaw and another*** vs. ***Farida Khatoon and another (2005) 11 SCC 403*** and ***Thomson Press (India) Limited*** vs**.** ***Nanak Builders and Investors Private Limited and others (2013) 5 SCC 397*** to contend that transferee pendente lite ought to be impleaded as a party.

9. While on the other hand, learned counsel for the respondents has placed reliance upon the judgments of the Hon'ble Supreme Court in ***Salem Advocate Bar Association, Tamil Nadu*** vs. ***Union of India, AIR 2005 SC 3353, State of Madhya Pradesh*** vs**.** ***Union of India and another (2011) 12 SCC 268, J. Samuel and others*** vs**.** ***Gattu Mahesh and others (2012) 2 SCC 300*** and ***S. Malla Reddy*** vs. ***Future Builders Cooperative Housing Society and Others (2013) 9 SCC 349*** to contend that even Order 6 Rule 17 now provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. He has further contended that the application filed under Order 1 Rule 10 CPC is not only gross abuse of the process of law but has been filed only with the intention to delay the matter.

10. I have given my thoughtful consideration to the rival submission of learned counsel for the parties and find that neither of the applications i.e. application under Order

6 Rule 17 CPC nor the application under Order 1 Rule 10 CPC are maintainable in view of the fact that the plea of adverse possession itself is not available to the plaintiff because a suit for declaration on the basis of adverse possession cannot be maintained as this claim can only be agitated by way of defence and can only be used as a '*shield'* and not a '*sword*' in terms of the judgment of the Hon'ble Supreme Court in ***Gurdwara Sahib*** *versus* ***Gram Panchayat Village Sirthala and another (2014) 1 SCC 669*** wherein it was held as under:

> *"8. There cannot be any quarrel to this extent that the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defence."*

11. Once the suit itself is not maintainable then these applications seeking impleadment and amendment automatically become redundant. Consequently, both revision petitions are dismissed with costs assessed at Rs.20,000/- each.

12. The plaintiff/petitioner has been successful in dragging on this litigation for nearly two and half decades and, therefore, it is high time that the matter is concluded at the earliest. Accordingly, the learned Court below is requested to decide the case at the earliest and in no event later than **30th September, 2015.**

13. The parties through their counsel are directed to appear before the Court below on **25.6.2015.** The Registry is directed to transmit the records of the case forthwith to the Court below so as to reach well before the date fixed. Both these revisions are 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. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

CWP No. 8953/2013 alongwith
CWP No.3106/2014 and 2815 of 2015
Reserved on : 4.6.2015
Decided on: 15.6.2015

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1. CWP No. 8953/2013

Joga Singh and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

2. CWP No. 3106/2014

Vinod Kumar and others. …Petitioners.

Versus

State of Himachal Pradesh and others. …Respondents.

3. CWP No.2815/2015

Santosh Kumari. …Petitioner

Versus

State of Himachal Pradesh and others. …Respondents.

Constitution of India, 1950- Article 226- Government had framed Himachal Pradesh Vidya Upasak Yojna, 1998 to provide teaching man power in Government Primary Schools located in remote/backward/difficult/tribal areas as regular teachers were not willing to serve in

those areas- Vidya Upasaks were to be initially recruited for a period of one year and their services could be extended after evaluating their performances- services of those teachers who had passed a written test and had successfully completed one year condensed teacher training course specifically prepared for them were to be regularized after a period of five years subject to the condition that they passed 10+2 examination and had qualified written test and interview conducted by H.P. Subordinate Service Selection Board- appointment letters were issued on the basis of combined merit list- services of the candidates were counted from the date of the regular appointment and not from the date of initial appointment- further, they were also not held entitled for pension- petitioners were appointed in the year 2000 and their appointment continued till 2007- their services were to be counted from the date of the initial appointment- pension rules were amended in the year 2003 and their appointment was prior to the amendment- hence, they were wrongly deprived of the pension- petition allowed and their services were ordered to be counted from 2000 for the purpose of pension and annual increments etc. (Para-7 to 14)

For the Petitioners: Mr. Adarsh. K. Vashista, Advocate.
For the Respondents: Mr. P.M. Negi, Dy. A.G.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge:

Since common questions of law and facts are involved in all these petitions, the same were taken up together for hearing and are being disposed of by a common judgment.

2. State has framed the Himachal Pradesh Vidya Upasak Yojna, 1998 (hereinafter referred to as the "***Vidya Upasak Yojna***" in short). The rationale for formulation of the ***Vidya Upasak Yojna*** was to provide teaching man power in Government Primary Schools, which were located in remote/backward/difficult/tribal areas. The trained teachers available in the urban and other developed areas were not willing to serve in the remote places as a result of which most of the schools in such areas were without teachers. In the remote and inaccessible areas of the State, the Department of Primary Education faced many problems like teacher absenteeism, poor scholastic standards leading to irregular functioning of primary schools and increased drop-out rate. In order to effectively counter the problem, the solution was sought in an innovative way, i.e. by recruiting voluntary teachers through the Volunteer Teacher Scheme launched by the Government of Himachal Pradesh in 1985, which was subsequently modified in 1991. However, due to relatively poor qualification of the VT's, the general standard of teaching came down resulting in undermining the basic objective of providing qualitative education in the State. In order to find a permanent and realistic solution to the problems being encountered in the realization of the objectives and to meet the growing demand for qualified teachers in the State, the ***"Vidya Upasak Yojna***" was proposed for implementation in the primary schools in the State. According to "***Vidya Upasak Yojna***", all the vacant post of teachers in Government Primary Schools, which were located in remote/backward/difficult/tribal areas were to be filled by appointing ***Vidya Upasaks*** in accordance with the laid down procedure. The ***Vidya Upasaks*** were to be initially recruited for a period of one year after following the procedure. The period of appointment could be extended after evaluating the performance of the appointees and approval by the Director Primary Education. The services of Vidya Upasaks, who had passed the written test, were to be utilized in the Government Primary Schools and the services of those candidates were to be regularized after completion of five

years of continuous service required under Chapter-VIII of Education Code amended from time to time, that too, after successful completion of one year condensed teacher training course specifically prepared for them. The regularization of Vidya Upasaks was also subject to the condition that those who were matriculates, were required to improve their educational qualification essentially upto the level of 10+2 as per NCTE norms within a period of five years. The selection was to be made through H.P. Subordinate Service Selection Board, Hamirpur on the basis of written test and interview. The minimum educational qualifications prescribed for Vidya Upasaks was matriculation examination with a minimum of 45% marks in the aggregate for general category and 40% for candidates of reserved categories. The objectives of the Vidya Upasak Yojna was also to achieve the goals set out in the H.P. Compulsory Primary Education Act, 1997, which was enforced with effect from 1.4.1998 to enforce the Universalisation of Primary Education in remote and socio-economically backward villages. The ***Vidya Upasaks*** were entitled to honorarium of Rs. 2,500/- per month. The number of vacancies was notified as per clause 10 of the ***Vidya Upasak Yojna***. The candidates were required to appear in the written test consisting of 85 marks. The written test was of objective type. Thereafter, the candidates were to be called for interview restricted to three times the number of vacancies in the Sub-Division. 15 marks were to be awarded in interview. After interview, a combined merit list was to be prepared Sub Division-wise after adding the marks obtained by the candidates in the written test and interview. The combined merit list (Sub-Division-wise) of every district was to be supplied by the Secretary, H.P. Subordinate Services Selection Board, Hamirpur to the District Primary Education Officers of the respective districts for making appointments in each of the Sub-Division in the district. The reservation was also to be provided as per the norms laid down by the State Government. The candidates were also required to attend the one year condensed teacher training course. The norms for absorption as regular primary teacher were provided under clause 16 of the ***Vidya Upasak Yojna***.

3. In sequel to ***Vidya Upasak Yojna***, H.P. Subordinate Services Selection Board Hamirpur issued an advertisement whereby the applications were invited on or before 28.4.2009. Petitioners and similarly situate persons participated in the selection process. They sat in the written test and they also appeared in the interview. Petitioners, on the basis of the combined merit list, were issued appointment letters vide office order dated 19.9.2000. Petitioners have also obtained one year condensed teacher training course, as required under the ***Vidya Upasak Yojna*** and the conditions enumerated in the appointment letters. Petitioners were regularized/absorbed vide office order 31.10.2007 and 22.11.2007 and were placed in the pay scale of Rs. 4550-7200.

4. Mr. Adarsh K. Vashishta, learned counsel for the petitioner, has vehemently argued that the respondents have not counted the services rendered by the petitioners from their initial date of appointment towards pension and increments.

5. Mr. P.M. Negi, learned Deputy Advocate General, has strenuously argued that since the petitioners have been regularized after 15.5.2003, they would be covered under the Contributory Pension Scheme notified on 17.8.2006, which would be deemed to have come into force with effect from 15.5.2003.

6. We have heard the learned counsel for the parties and have gone through the record carefully.

7. The State Government has framed a ***Vidya Upasak Yojna*** in order to achieve total eradication of illiteracy as per the goals laid down in the National Policy on Education, 1986 and to achieve the goals set out in the H.P. Compulsory Primary Education Act, 1997 and also to achieve 100% enrolment of children in the age group of 6-11 years in

Government Primary Schools in Himachal Pradesh. The minimum essential qualification was prescribed under clause 7 of the Vidya Upasak Yojna. The selection was to be made through H.P. Subordinate Services Selection Board, Hamirpur on the basis of written test consisting of 85 marks and interview of 15 marks. The H.P. Subordinate Services Selection Board, Hamirpur commenced the selection process, which led to the appointment of the petitioners in the year 2000. Petitioners have also undertaken initially training of 21 days and thereafter completed one year condensed teacher training course. They were regularized/absorbed, as noticed hereinabove, on 22.11.2007.

8. The State Government has amended the Central Civil Services (Pension) (Himachal Pradesh First Amendment) Rules, 2003 whereby after clause (h) of rule 2 of the Central Civil Services (Pension) Rules, 1972, the following new clause (i) has been inserted:

> **"(i) All appointments made in the State Government of Himachal Pradesh on or after the date of the publication of the notification in Rajpatra, Himachal Pradesh."**

9. According to the plain language of newly added clause (i) of rule 2, the persons appointed in the State of Himachal Pradesh on or after 15.5.2003 shall not be entitled to pension as per Central Civil Services (Pension) Rules, 1972. According to Mr. P.M. Negi, learned Deputy Advocate General, they would be covered under Contributory Pension Scheme as per notification dated 17.8.2006.

10. Petitioners have been appointed after undergoing the rigours of selection process in the year 2000. They were qualified as per the norms laid down in the ***Vidya Upasak Yojna***. They successfully completed one year condensed teacher training course, which led to their regularization/absorption vide letters dated 31.10.2007 and 22.11.2007. There is no break in their service from the year 2000 till the date of their regularization/absorption. It is specifically provided in the ***Vidya Upasak Yojna*** and as per the terms and conditions enumerated in the appointment letters that they would be considered for regularization/absorption after five years of continuous service, including one year condensed teacher training course starting from the date of joining and successful completion of training and passing of subsequent examination after the training. However, there was a rider that the candidates, who were only matriculate, were required to pass 10+2 examinations within five years after the appointment as Vidya Upasak. Petitioners were to be regularized/absorbed as regular primary teacher irrespective of vacant post in the regular scale. However, fact of the matter is that petitioners were appointed against regular post initially in the year 2000 and at the time of their absorption/regularization also, posts were lying vacant.

11. According to rule 13 of the Central Civil Services (Pension) Rules, 1972, qualifying service of a Government servant shall commence from the date he takes charge of the post to which he is first appointed either substantively or in an officiating or temporary capacity provided that officiating or temporary service is followed without interruption by substantive appointment in the same or another service or post. In the instant case, petitioners have been appointed by the State Government as per the norms laid down though initially for a period of one year, but their appointments were continued from the year 2000 followed by their appointments on substantive post on 31.10.2007 and 22.11.2007. The service on contract can also be counted under rule 17, which is subsequently followed by substantive appointment in a pensionable establishment. The status of the petitioners was better of than the persons appointed merely on contract basis since they have continuously worked for a period of 7 years without any obstruction and obtained essential qualification of one year condensed teacher training course.

12. We are of the considered view that the petitioners have been appointed before 15.5.2003 and are entitled to pension under the Central Civil Services (Pension) Rules, 1972. There is no merit in the contention of Mr. P.M. Negi, learned Deputy Advocate General that the appointments of the petitioners would be reckoned from the date of their regularization/absorption on 31.10.2007 and 22.11.2007. There is not even a single day break in the service of the petitioners and they have fulfilled all the conditions stipulated in the ***Vidya Upasak Yojna*** as well as in their appointments letters. Respondent-State is a welfare State. The services rendered by the petitioners from the years 2000 to 2007 cannot be obliterated or rendered otiose.

13. Mr. Adarsh K. Vashista has vehemently argued that though the petitioners were appointed on honorarium, but they have been discharging the same and similar duties, which were discharged by the regularly appointed teachers. Rather the petitioners were posted in remote/backward/difficult/tribal areas where the regularly appointed Junior Basic Trained Teachers were reluctant to serve and there was large scale absenteeism which has deteriorated the educational standard. Petitioners werert6 not entitled to the regular pay scale at par with regularly appointees but they are entitled at least to count this period from the years 2000 to 2007 towards annual increments as well as qualifying service for pension. Action of the respondents of not counting the period from 2000 to 2007 for the purpose of pensionary benefits and annual increments is violative of Articles 14 and 16 of the Constitution of India. It is made clear that the petitioners are entitled to count this period towards pensionary benefits as well as annual increments.

14. Accordingly, in view of the analysis and discussion made hereinabove, all the petitions are allowed. The period from 2000 to 31.10.2007 and 22.11.2007, respectively shall be counted as qualifying service for the purpose of pension under the Central Civil Service (Pension) Rules, 1972. This period shall also be counted for the purpose of annual increments. Pending application(s), if any, also stands disposed of. No costs.

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

Mast Ram .....Appellant.

Vs.

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 107 of 2013
Reserved on: 03.06.2015
Date of decision: 15.6. 2015

Indian Penal Code, 1860- Sections 376 and 506- Prosecutrix was found to be pregnant- she disclosed that her pregnancy was due to forcible sexual intercourse by accused within a period of 1 ½ years- a panchayat was conveyed in which compromise was effected, however, mother of the prosecutrix filed a complaint against the accused before Panchayat which was forwarded to the police where FIR was registered- prosecutrix made improvement in her statement while appearing in the Court- there are variations in her statement recorded on 11.7.2012 and 12.7.2012 under Section 161 of Cr.P.C and the statement made in the Court- it was admitted that prosecutrix and her family members went to the Clinic in the vehicle of the accused after the incident was disclosed by the prosecutrix - family would have never boarded the vehicle if the incident was narrated by the prosecutrix- witness of the compromise turned hostile- prosecutrix stated that she was raped in the house- it was not

believable that accused would have raped the prosecutrix in the house in the presence of all the members of the family- version of the prosecutrix did not inspire confidence- held, that in these circumstances, accused acquitted. (Para-25 to 29)

For the appellant : Mr. Vikas Rathore, Advocate.
For the respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.

This appeal is instituted against the judgment and order, dated 15.03.2013/19.03.2013, rendered by the learned Additional Sessions Judge, Fast Track Court, Hamirpur, H.P., whereby the appellant-accused, who was charged with and tried for the offence punishable under Sections 376 & 506 of the Indian Penal Code, was convicted and sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of Rs.50,000/- for the offence punishable under Section 376 of the Indian Penal Code and in default of payment of fine, he was further ordered to undergo simple imprisonment for a term of one year. He was also sentenced to undergo simple imprisonment for a term of one year and to pay a fine of Rs.1,000/- for the offence punishable under Section 506 of the Indian Penal Code and in default of payment of fine to further undergo simple imprisonment for a term of one month.

2. Case of the prosecution, in a nut-shell, is that the prosecutrix was a student of 10+1 at Government Senior Secondary School Chabutra, District Hamirpur, H.P. On 02.07.2012, she was brought for medical check up at Thakur Surgical and Maternity Nursing Home, Hamirpur, H.P. by her relatives. She was found three months pregnant. She disclosed that her conception was due to forcible sexual intercourse by the accused for over a period of 1 ½ years. She was admitted at Thakur Surgical and Maternity Nursing Home, Hamirpur on 03.07.2012 and her MTP (abortion) was conducted on 05.07.2012. Father of the prosecutrix Ajit Singh, convened a Panchayat meeting at his house on 05.07.2012 in the presence of accused and his wife and the compromise was effected. On 07.07.2012, Shakuntla Devi, mother of the prosecutrix filed a complaint against the accused before the Gram Panchayat, Chabutra for initiating legal action again him. The complaint was forwarded by the Gram Panchayat to the police on 11.07.2012. Thereafter, FIR No. 66/12, dated 11.07.2012 was registered against the accused. Police also preserved the clothes of the prosecutrix which she was wearing at the time of abortion. The date of birth certificate of the prosecutrix was procured from the office of Panchayat Secretary, Gram Panchayat Chabutra. The vaginal slides, swabs and pubic hair preserved during the medical examination were sent for forensic examination to FSL, Junga. The matter was investigated and the challan was put up in the Court after completion of all the codal formalities.

3. The prosecution has examined number of witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case of the prosecution. The accused was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

4. Mr. Vikas Rathore, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant.

5. Mr. Ramesh Thakur, Assistant Advocate General has supported the judgment and order, dated 15.03.2013/19.03.2013.

6. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

7. PW-1, Dr. Tanu Priya, has issued MLC Ex. PW1/A. According to her opinion, as per physical examination, sexual intercourse had taken place and the possibility of recent abortion could not be ruled out.

8. PW-2 is the prosecutrix. She was studying in 10+1 at GSSS Chabutra. Accused was related to her as paternal uncle. The grand daughter of the accused was also the student of 10+1 at GSSS Chabutra and was her classmate. Her name was Manisha. About 1 ½ years back, she had gone to her house to meet her. She was not at home at that time. Accused was at home. He took her in a room, shut the same and said that he wanted to establish physical relations with her. Despite her resistance, he committed sexual intercourse against her wishes and without her consent. Accused used to give her Rs.100/- and sweets (*meethai*). Accused also threatened her to defame in the society in case she disclosed his acts to anyone. In the month of June-July, 2012, she had sensation of vomiting and giddiness. She disclosed the problem to her mother. Her mother sent her along with Seema, Anu Bala and Saroti to a private hospital, i.e., Thakur Clinic at Hamirpur. On 03.07.2012, they came to the hospital for medical check up. She was found pregnant. The doctor also disclosed that due to the pregnancy, there was threat to her life. On returning back to her home, she told the aforesaid fact to her mother. On the next day, she was sent alongwith her relatives to the hospital, where her abortion was conducted. She remained hospitalized for two days. Thereafter, her mother filed an application before the local Gram Panchayat. She deposed in her cross-examination that she did not know the name of the village where accused resides. It took 15 minutes on foot from her house to reach the house of the accused. It took half an hour to reach GSSS Chabutra from her house on foot. Police recorded her statement 2-3 times. While making statement to the police, she had also disclosed that the accused used to give her Rs.100/-(the witness was confronted with her statements, dated 11.07.2012 and 12.07.2012 under Section 161 Cr. P.C., wherein it was not so recorded). While making statement to the police, she had also disclosed that she had gone to the house of the accused to meet his grand daughter Manisha (the witness was confronted with her statements, dated 11.07.2012 and 12.07.2012 made under Section 161 Cr. P.C., wherein it was not so recorded). She also admitted that the accused was married and his son was also married and they live together in the same house. She also admitted that the accused had two grand daughters, who also live with him in the same house. On 03.07.2012, when she came for her medical check up at Thakur Clinic, the fact of pregnancy was detected and disclosed to her and other persons accompanying her. On returning home, she had told the aforesaid fact to her mother. She also told her mother that she had become pregnant due to sexual relations with the accused. She also admitted that on being discharged from Thakur Clinic, they returned back to home in the vehicle of the accused. She also admitted that the accused drives a taxi. She also admitted that on 03.07.2012, her mother did not come to the Clinic at Hamirpur. Her mother came to the clinic on 04.07.2012. Her father also came to the Clinic, but she did not remember the date.

9. PW-3, Smt. Shakuntla Kumari, is the mother of prosecutrix. According to her, the age of the prosecutrix was 15 years. She sent her daughter alongwith Seema, Anu Bala and Saroti Devi for medical check up to Thakur Clinic at Hamirpur. On 03.07.2012, after medical check up, her daughter returned home and told that she was pregnant. She was advised abortion because there was threat to her life. She conceived because of forcible sexual relations with the accused for the last 1 ½ -2 years. On 05.07.2012, she was sent for termination of the pregnancy to Thakur Clinic, Hamirpur. Her daughter returned after the abortion on the same day in the evening. Thereafter, she reported the matter to Pradhan,

Gram Panchayat Chabutra by filing a complaint Ex.PW3/A. The complaint was forwarded by the Panchayat to Police Station, Sujanpur. Her daughter got identified the places where she had been raped by the accused. Thereafter, they came to Government Hospital at Sujanpur. The medical check up of her daughter was conducted at Sujanpur Hospital. According to her, no compromise took place before the Panchayat with the accused. She was cross-examined by the learned Public Prosecutrix. She also admitted that her husband entered into a compromise with the accused before Gram Panchayat, Chabutra. She did not remember the date on which the compromise took place with the accused. She did not know the person who scribed the compromise. She has admitted that the day her daughter went for her medical check up at Thakur Clinic Hamirpur, she travelled to and fro in the Taxi of the accused. She never went to Thakur Nursing Home. Her husband also never went to Thakur Clinic when abortion of her daughter took place. Her husband came to the village 3-4 days after the abortion of her daughter.

10. PW-4, Mis. Poonam, is the sister of prosecutrix. According to her, the age of the prosecutrix was 16 years and she was student of 10+1 at GSSS Chabutra. She was brought to Thakur Clinic at Hamirpur on 02.07.2012. She was pregnant. On 03.07.2012, she was again taken to Thakur Clinic, where the abortion was conducted. She returned back from the Clinic on 05.07.2012.

11. PW-5, Smt. Saroti Devi, deposed that on 02.07.2012, they brought the prosecutrix to Thakur Hospital, Hamirpur. She was also accompanied by Seema Devi and Anu Bala. After medical check up of prosecutrix, she was found to be pregnant. They were also told that there was a threat to the life of the prosecutrix and in order to save her, termination of pregnancy was necessary. Thereafter, they inquired from the prosecutrix about the person who was responsible for the pregnancy. The prosecutrix disclosed the name of the accused. On the next day morning, they again came to Thakur Hospital at Hamirpur. The prosecutrix was admitted in the hospital. On 05.07.2012, before the prosecutrix was discharged from the hospital, they called the accused alongwith the vehicle to verify the facts disclosed by the prosecutrix. The accused admitted his fault and gave Rs.6000/- to meet the expenses of the abortion. They returned home from the Clinic in the vehicle of the accused on 05.07.2012. In her cross-examination, she stated that she had told the police that the accused had paid a sum of Rs.6000/- as the medical expenses incurred for abortion (the witness was confronted with her statement Mark-C, wherein this fact was not so recorded). In her statement, she had not disclosed that the accused was asked by her regarding his involvement on 05.07.2012 at Thakur Clinic Hamirpur. The prosecutrix was discharged from the Clinic on 05.07.2012 at 7:00 p.m. Mother of the prosecutrix was also present and they returned together to the village in the same vehicle.

12. PW-6, Puran Chand, deposed that he went to the house of Ajit Singh alongwith Vidhya Devi, Ward Member. The other two ward members, i.e., Joginder and Raman also reached the house of Ajit Singh. The wife of the accused Champa Devi and Ajit Singh were also present. The parties had written a compromise which was presented for attestation. The wife of the accused had agreed to bear the expenses of the medical treatment etc. He proved compromise Ex. PW6/A. The accused at first instance had admitted, but thereafter he refused regarding his involvement. He was declared hostile and was cross-examined by the learned Public Prosecutor. He denied the suggestion that when he reached the house of Ajit Singh on 05.07.2012, accused Mast Ram was also present there. He also denied that after Ajit Singh narrated him the matter, he enquired from the accused about his involvement, on which he admitted his fault, voluntarily stated that the accused had left the house before he reached there. He also denied that the compromise Ex. PW6/A was arrived at in his presence and thereafter, it was prepared and the signatures of

the persons present there and the accused were obtained on the same. He also denied the suggestion that Ajit Singh had told him that the accused had been raping his daughter for last 1 ½ years. In his cross-examination by the learned defence counsel, he admitted that when he went to the house of Ajit Singh on 05.07.2012, he did not meet either the prosecutrix or her mother. He did not know who had scribed the compromise Ex. PW6/A.

13. PW-7, Joginder Singh, deposed that Ajit Singh produced a written compromise Ex.PW6/A, which he signed as a Ward Member. He did not enquire before signing the compromise Ex. PW6/A either from Ajit Singh or other persons present there. He signed the compromise since it had been prepared and already signed by other persons. In his cross-examination by the learned Public Prosecutor, he admitted that on 05.07.2012, when they reached the house of Ajit Singh, he disclosed that the accused had been doing wrong act with his daughter, the prosecutrix for the last 1 ½ years. He also admitted that Up Pradhan Puran Chand inquired about the incident from the accused, to which he admitted his fault. In his cross-examination by the learned defence counsel, he stated that he had no conversation with the accused.

14. PW-8, Dr. Shobna Thakur, deposed that on 02.07.2012, the prosecutrix was brought to her. She found her three months pregnant. On the next day, i.e., 03.07.2012, the prosecutrix was again brought to her in a critical condition by her *Bua.* She was admitted in the hospital on 03.07.2012 and abortion was conducted on 05.07.2012.

15. PW-9, Santosh Kumar deposed that he went to the house of Ajit Singh and found that some persons of the village had gathered there. Accused Mast Ram was also present there. The wife of the accused was also present. He alongwith others inquired from the accused regarding the allegations made by Ajit Singh, on which, he admitted his involvement.

16. PW-10, Mohinder Singh, Panchayat Secretary, deposed that on 11.07.2012, a complaint Ex. PW3/A alongwith a compromise Ex. PW6/A was received. He issued the date of birth certificate as per Ex. PW10/C. He also produced the original birth register for the year 1996. The date of birth of the prosecutrix was recorded as 07.08.1996. The entry was made on the basis of information given by Ashok Kumar, Up Pradhan. In his cross-examination, he has admitted that there were no signatures of Ashok Kumar, Up Pradhan on the register, volunteered that there were signatures of Rattan Chand, who was relative of the prosecutrix. There was no copy of the compromise Ex. PW6/A in the Panchayat record, since the same was not retained.

17. PW-11, Ajit Singh, is the father of the prosecutrix. He deposed that on 04.07.2012, he was at his work place, where he received a telephone call from his wife that his daughter was unwell and was admitted at Thakur Nursing Home at Hamirpur. He went to Thakur Nursing Home at Hamirpur. After meeting his daughter, he also met the doctor, who told him that in order to save the life of the prosecutrix, her abortion is required. His daughter disclosed to him that accused had been raping her for the last 1-1½ years at his home and Jhangri jungle. He had been paying her Rs.100/-. On 05.07.2012, he convened the Panchayat. In his cross-examination, he has stated that while making statement to the police, he had not disclosed that his daughter told him of being raped by the accused for the last 1-1 ½ years. In his statement to the police, he had disclosed that during the meeting in the presence of the Panchayat Members and other persons, the accused has admitted his guilt and fault (he was confronted with his statement Mark-F, wherein it was not so recorded). In his statement to the police, he had told that the accused had borne the expenses of the abortion (he was confronted with his statement mark-F, wherein it was not so recorded).

18. PW-12, Sh. Raman Kumar, was the witness to compromise Ex. PW6/A. He was also declared hostile. He denied the suggestion during cross-examination by the learned Public Prosecutor that the accused was present during the meeting and had signed Ex. PW6/A in his presence. He also denied that the accused had admitted his fault and guilt for raping the daughter of Ajit Singh. However, he admitted that on 11.07.2012, Shakuntla Devi, mother of the prosecutrix filed a complaint alongwith compromise to the Panchayat, which was forwarded to Police Station Sujanpur. He accompanied the police alongwith Joginder Singh and prosecutrix to the house of accused, where the prosecutrix identified the room, in which she had been raped. He also admitted that on 14.07.2012, he remained associated with the police. The prosecutrix produced her clothes, i.e., Salwar and Kameej, which were taken into possession by the police vide seizure memo Ex. PW2/A. He further admitted that the clothes were sealed in a cloth parcel by affixing six seals of impression H. He also admitted that on 14.07.2012, the accused led the police party to Jhangri *jungle* and identified the spot.

19. PW-13, Dr. Raj Kumar, has examined the accused and issued MLC Ex. PW13/B. PW-14, Constable Pawan Kumar is a formal witness. PW-15, Dr. Rakesh Sharma, Radiologist, has undertaken the ultrasound examination of the prosecutrix. PW-16, HHC Amarjit, PW-17, LC Reena Kumari and PW-18, Constable Lekh Raj are formal witnesses.

20. PW-19, HC Ranjit Singh, deposed that he was posted as MHC, Police Station Sujanpur since 2011 onwards. On 11.07.2012, HHC Amarjit Singh deposited the case property with him and he made the entries regarding the deposit of case property at Sr. No. 52/12 in the *malkhana* register vide Ex. PW19/A. On 12.07.2012, LC Reema deposited the case property with him and he made the entries regarding the same at Sr. No. 53/12 vide Ex. PW19/B. On 14.07.2012, ASI Hakam Singh deposited the case property with him and it was deposited in the *Malkhana* register at Sr. No. 54/12 vide Ex. PW-19/C. On 25.07.2012, the abovementioned sealed parcels were handed over to Constable Lekh Raj for depositing the same at State Forensic Science Laboratory, Junga vide RC No. 82/12.

21. PW-20, Dr. Sunita Galoda, issued MLC Ex. PW20/C. According to her opinion, sexual intercourse had taken place and there were signs of recent abortion. According to PW-21, Kuldeep Chand, accused Mast Ram and his wife were present when they visited the house of Ajit Singh. Ajit Singh and Mast Ram agreed and entered into a compromise, wherein it was settled that the accused will bear the expenses of her marriage.

22. PW-22, ASI Hakam Singh, deposed that on the basis of the complaint, he registered FIR No. 66 of 2012, dated 11.07.2012, Ex. PW22/A. Thereafter, he immediately went to the house of the prosecutrix. He recorded the statements of Nikki Devi, Poonam, Kusum & Tripta Devi under Section 161, Cr. P.C. On 14.07.2012, he went to Village Chabutra to the house of the prosecutrix, where she produced her clothes, which were taken into possession vide seizure memo Ex. PW-2/A. On 11.07.2012, the prosecutrix was sent for medical examination to CHC Sujanpur. Accused was also sent for medical examination to CHC, Sujanpur.

23. PW-23, SI Parkash Chand, deposed that on 12.07.2012, at about 8:30 a.m., he left Police Station and went to village Dhardu. On reaching, he associated Shakuntla Devi, Tripta Devi, Puran Chand, Joginder Kumar and Raman Kumar. They went to Jhangri *jungle*. The prosecutrix identified the place where she was raped by the accused. Spot map Ex. PW23/A was prepared. Thereafter, the prosecutrix took the police party to the house of the accused at village Chabutra and got identified the room where she had been raped by the accused and spot map Ex. PW23/B was prepared. Statements of the witnesses were recorded. Statement of the prosecutrix was recorded under Section 164, Cr. P.C. on

16.07.2012. On 20.07.2012, he took into possession the medical record regarding abortion of the prosecutrix. He also obtained the date of birth certificate of the prosecutrix from the Panchayat Secretary.

24. The accused has produced DW-1, Ms. Manisha Kumari as defence witness. According to her, she was student of 10+1 at Govt. Sr. Sec. School, Chabutra. She took admission in this School on 10.04.2012. Prior to this, she was studying in Govt. Sr. Sec. School, Rail, Tehsil Nadaun, District Hamirpur, H.P. She deposed that family of the accused comprised of his mother, wife, son, daughter-in-law and two grand daughters. Prosecutrix was also studying in her class. She knew her since she joined the School on 10.04.2012. In her cross-examination, she denied the suggestion that she was knowing the prosecutrix since 2006 onwards and they were good friends. Accused also examined DW-2, Sh. K.C. Katoch and DW-3, Sh. Beer Singh. They deposed about the admission of Manisha Kumari.

25. According to the prosecutrix (PW-2), she had gone to the house of accused to see her classmate. She was not at home. The accused was at home. He took her in his room, shut the same and said that he wanted to establish physical relations with her. Accused forced her to lie on the bed and despite her resistance, he committed sexual intercourse against her wishes and without her consent. He also threatened her to do away with her life in case she disclosed the incident anywhere. Thereafter also, whenever accused got time and opportunity, he continued to have sexual intercourse with her. He used to give her Rs.100/-. She went to Thakur Clinic on 02.07.2012 for medical check up. She was found pregnant. She came back and narrated the incident to her mother. She was again sent to hospital, where her abortion was conducted. She did not know the name of the village where the accused resides. Police recorded her statement 2-3 times. She disclosed that the accused used to give her Rs.100/- (she was confronted with her statements dated 11.07.2012 and 12.07.2012 made under Section 161, Cr. P.C. wherein it was not so recorded). She also disclosed that she had gone to the house of the accused to meet his grand daughter Manisha (she was confronted with her statements dated 11.07.2012 and 12.07.2012 under Section 161 Cr. P.C. wherein it was not so recorded). She also admitted that accused Mast Ram was married and his son was also married and they live together in the same house. She also admitted in her cross-examination that when she was discharged from Thakur Clinic, they returned back home in the vehicle of the accused. She has made improvements in her statement while appearing in the Court and there is variance in her statements recorded under Section 161 Cr. P.C. on 11.07.2012 and 12.07.2012 and the statement made in the Court. Case of the prosecution is that the prosecutrix had gone to the house of the accused to meet his grand daughter, but it was not so stated in her statement made on 11.07.2012 and 12.07.2012. It was also her case that she was given Rs.100/- every time by the accused, but it was not stated in her statement recorded under Section 161 Cr. P.C. recorded on 11.07.2012 and 12.07.2012. She went to the hospital on 02.07.2012 and when she came back, she narrated the incident to her mother. Thereafter, she again went to the hospital on 03.07.2012 and was admitted in Thakur Clinic, Hamirpur. When she was discharged, she came back in the vehicle of the accused. It is not believable that when the entire family knew that the accused had committed rape on the prosecutrix, why would she come back in the vehicle owned and driven by the accused. Similarly, PW-3, Smt. Shakuntla Kumari, mother of the prosecutrix in her cross-examination has admitted that the day her daughter went for her medical check up at Thakur Clinic Hamirpur, she travelled to and fro in the Taxi of the accused Mast Ram. PW-5, Smt. Saroti Devi, who accompanied the prosecutrix to Thakur Clinic, Hamirpur, has also admitted that they returned home from Clinic in the vehicle of the accused on 05.07.2012. She further admitted in her cross-examination that the prosecutrix was discharged from the Clinic on 05.07.2012 at 7:00 a.m. Mother of the prosecutrix was also present and they returned home in the vehicle owned by

the accused. The family after knowing the fact that the accused had committed rape on prosecutrix would not have gone to the Clinic and come back in the vehicle of the accused. They would have never boarded the vehicle owned and driven by the accused after the incident has been narrated by the prosecutrix to her mother, as noticed by us hereinabove.

26. Case of the prosecution is also that a compromise was also arrived at vide Ex. PW6/A, whereby the accused has admitted his guilt. According to PW-3, Shakuntla Kumari, no compromise had taken place before the Panchayat with the accused. She was declared hostile. She did not know the person who scribed the compromise. She also admitted that the compromise did not take place in her presence. PW-5, Smt. Saroti Devi, deposed that on 05.07.2012 before the prosecutrix was discharged, they called the accused alongwith the vehicle and enquired about the facts disclosed by the prosecutrix. According to her, the accused admitted his fault and gave Rs.6000/- to meet the expenses of the abortion. However, in her cross-examination, she was confronted with her statement Mark-C, wherein it was not so stated.

27. The other witness qua the compromise Ex. PW6/A, Sh. Puran Chand was also declared hostile. In his cross-examination by the learned Public Prosecutor, he denied the suggestion that after Ajit Singh narrated him the matter, he enquired from the accused present there about his involvement on which he admitted his fault. He did not know, who has written the compromise Ex. PW6/A. Similarly, PW-7, Sh. Joginder Singh was also declared hostile. There is variance in the statements of PW-6, Sh. Puran Chand, Up Pradhan, Gram Panchayat Chabutra and PW-7, Sh. Joginder Singh, Ward Member, Gram Panchayat Chabutra. PW-11, Sh. Ajit Singh, father of the prosecutrix, in his cross-examination has admitted that while making statement to the police, he had not disclosed that his daughter told him of being raped by the accused for the last 1-1 ½ years. In his statement to the police, he had disclosed that the accused during the meeting in the presence of the Panchayat Members and other persons, admitted his guilt and fault (he was confronted with his statement Mark-F wherein it was not so recorded). In his statement to the police, he had told that the accused had borne the expenses of the abortion (he was confronted with his statement Mark-F, wherein it was not so recorded).

28. The case of the prosecution is that the prosecutrix was raped in the house of accused and in forest. The accused was married. His son was also married. He was living with his family, i.e., wife, son and daughter-in-law and two grown up grand daughters. It is not believable that the accused could rape the prosecutrix in the presence of all the members of his family, as alleged by the prosecutrix.

29. The alleged compromise, Ex. PW6/A is doubtful. We reiterate that if the accused was involved, the family of the prosecutrix would have never gone in his vehicle for medical check up on 3rd July, 2012 and 5th July, 2012. The relations would have become immediately bitter when the prosecutrix had told her mother about the alleged involvement of the accused. The version of the prosecutrix does not inspire confidence. There is variance in the statements of the witnesses recorded in the Court and previous statements recorded under Section 161 Cr. P.C. The contradictions made are major in nature. Consequently, the prosecution has failed to prove the case against the accused beyond reasonable doubt. The defence of the accused is also probablised that the family of the prosecutrix has to pay a sum of Rs.6,000/- and they refused to pay and the accused was implicated in this case. The prosecution has to prove the case beyond reasonable doubt and the accused has to prove his defence by probability.

30. Accordingly, in view of the observations and discussions made hereinabove, the appeal is allowed. The judgment and order, dated 15.03.2013/19.03.2013, are set aside.

The accused is acquitted of the charges framed against him. Fine amount, if already depositied, be refunded to the accused. He be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrants and send the same to the concerned Superintendent of Jail.

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

Parveena Devi ..... Petitioner.
Versus
State of H.P. and others. ....Respondents

CWP No. 1842 of 2015.
Date of decision: 15th June, 2015.

Constitution of India, 1950- Article 227- It was reported that closure report had been filed before the Magistrate- held, that petitioner should approach the Court of competent jurisdiction for the redressal of his grievances. (Para-2 and 3)

For the petitioner: Mr. Naresh Verma, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr. Romesh Verma, Additional Advocate Generals, & Mr.J.K. Verma, and Mr. Vikram Thakur Deputy Advocate Generals.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice*(Oral)*

Mr. Romesh Verma, learned Additional Advocate General stated at the Bar that the Investigating officer has filed the closure report before the Court of learned Judicial Magistrate 1st Class, Joginder Nagar on 14.5.2015.

2. This Court has already discussed the issue involved in case titled ***Raj Pal Singh* versus *Central Bureau of Investigation and others,*** CWP No. 2526 of 2015 decided on 30.5.2015. It is apt to reproduce para 27 of the said judgment herein:

> *"27.Applying the test to the instant case, it can be safely said that it is the domain of the Magistrate/Court of competent jurisdiction to pass appropriate orders, while examining the report filed by the Investigating Agency."*

3. Applying the test, the petitioner is at liberty to approach the Court of competent jurisdiction for the redressal of her grievances.

4. Accordingly, the petition is disposed of, as indicated hereinabove, alongwith pending applications, if any.

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

Roshan Lal ..... Appellant
Versus
State of Himachal Pradesh .....Respondent

Cr. Appeal No. 4132/2013
Reserved on: 5.6.2015
Decided on: 15.6.2015

N.D.P.S. Act, 1985- Section 20- The person who produced the case property in the Court was not examined- no evidence was led to prove as to when the case property was taken out from the Malkhana for production before the court- Malkhana register was not produced to verify this fact- entry was required to be made when the case property was taken out from the Malkhana for its production in the court and when it was returned to be deposited in the Malkhana after its production in the court- failure to do so would make it doubtful that the case property which was seized from the accused was sent to FSL, Junga and was produced before the court, or it was the case property of some other case- link evidence has not been established from the seizure of the case property till its production in the Court- accused acquitted. (Para-19)

For the appellant : Mr. Anoop Chitkara, Advocate.
For the respondent : Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal is instituted against Judgment dated 5.8.2013 rendered by learned Special Judge (III) Mandi, District Mandi, Himachal Pradesh in Session Trial No. 56/2010, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00 Lakh, and in default of payment of fine, to further undergo simple imprisonment for one year.

2. Case of the prosecution, in a nutshell, is that on 22.3.2010, SI Dharam Singh (PW-13) alongwith Constable Bansi Lal (PW-5), HHC Hukam Chand (PW-11), HHG Trilok Chand and HHG Praveen Kumar proceeded from Police Station Jogindernagar for Nakkabandi. At about 8.00 am, they were checking the vehicles at place near Galu. Dharam Dass also called ASI Bansi Lal (PW-7) from police station. At about 8.30 am, a private bus bearing registration No. HP-32-5117 came from Mandi, which was going towards Palampur. HHC Hukam Chand signalled the bus to stop. SI Dharam Dass entered the bus from front door and ASI Bansi Lal from back door. They asked the passengers to get their luggage checked. Accused was found standing near front door of the bus and carrying one rucksack (Pithu bag) of blue and red colour. Accused was asked to get the bag checked. The accused opened the zip of the bag and inside the bag, one more pink coloured bag was found, on which words 'Dharwal Garments' were printed, which contained substance in the shape of sticks. Accused was asked to alight from the bus. Driver of the bus Hoshiar Singh and conductor Kashmir Singh as well as ASI Bansi Lal were associated as witnesses. Constable

Bansi Lal was sent for balance and weights. Contraband was weighed and found to be 2.7 kg. Charas was put back in the pink coloured bag and then put into said rucksack and parcelled in a cloth by putting 10 seals of seal 'D'. NCB form in triplicate, Ext. PW-13/A was prepared. Seal impression of seal 'D' was embossed on NCB form. Case property was taken into possession vide recovery memo Ext. PW-7/B. Rukka Ext. PW-13/B was prepared. Rukka was sent to the police Station through Constable Hukam Chand. Thereafter FIR Ext. PW-12/A was registered. Contraband was produced before the Inspector/SHO Smt. Shakuntla (PW-12) alongwith sample seal. She resealed the same with seal 'K' at four places. She filled in the relevant columns of NCB form and prepared reseal memo Ext. PW-12/D. Case property alongwith sample seals 'D' and 'K', NCB form in triplicate was deposited by PW-12 with HC Mangat Ram, who made entry in the Malkhana Register. Extract of Malkhana Register is Ext. PW-1/A. Case property alongwith sample seals and NCB form was sent to the Forensic Science Laboratory Junga through HHG Jagdish Chand. He deposited the case property and obtained receipt and handed it over to PW-1. Report of the FSL Junga is Ext. PX. Matter was investigated. Challan was put up in the Court after completing all the codal formalities. Accused was convicted and sentenced as noticed by us herein above.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court convicted and sentenced the accused as noticed above. Hence, this appeal.

4. Mr. Anoop Chitkara, Advocate has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, Assistant Advocate General, has supported the judgment of conviction dated 5.8.2013.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Mangat Ram deposed that on 22.3.2010 Inspector Shakuntla deposited with him one parcel sealed with seal impression 'D' at 10 places and seal 'K' at four places. The parcel was stated to be containing Charas. He made entry in the Malkhara Register. Extract of Malkhana Register is Ext. PW-1/A. On 23.3.2010, he forwarded the case property to FSL Junga through Jagdish Chand vide receipt No. 52/2010. Samples seals were also sent alongwith case property. Copy of RC is Ext. PW-1/B. Jagdish Chand after depositing the case property returned RC alongwith receipt to him.

8. PW-2 Hoshiar Singh deposed that at about 8.15 am, a bus was stopped by the police. Police checked the bus. He did not know what was recovered because he was on the driver seat. He did not identify the accused. He could not narrate whether the accused was travelling in the bus or not. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that two police officers entered the bus, one from front door and other from the back door. He denied that accused was sitting on the seat ahead of first gate of the bus and carrying a pithu on his back, red and blue in colour. He denied the suggestion that search of the bag of the accused, another pink coloured bag was found. He denied the suggestion that it contained any charas. He identified signatures mark 'X'. He also denied that suggestion about resealing of contraband. He also denied that parcel alongwith sample seals alongwith NCB form was taken into possession in his presence and in the presence of Kashmir Singh. However, in his cross-examination, he has admitted that police told him that they wanted to search the bus and luggage of passengers.

9. PW-3 Jagdish Chand deposed that on 23.3.2010, a sealed parcel with 10 seals of 'D' as well as 4 seals 'K' was handed over to him by Mangat Ram for depositing that

parcel alongwith sample seals alongwith NCB form with FSL Junga vide RC No. 52/2010. The case property was carried by him and deposited with FSL Junga on 25.3.2010. Receipt was also obtained.

10. PW-4 Suresh Kumar is a formal witness.

11 PW-5 Bansi Lal also deposed the manner in which accused was nabbed, search, seizure and sealing process was completed at the spot on 22.3.2010.

12. PW-6 Parmod Kumar is a formal witness.

13. PW-7 ASI Bansi Lal also deposed the manner in which accused was apprehended, search, seizure and sealing process was completed on 22.3.2010.

14. PW-8, Tej Singh, PW-9 Lachhman Dass and PW-10 Roshan Lal, are formal witnesses.

15. PW-11 Hukam Chand also testified the manner in which accused was nabbed, contraband was recovered, seized and sealed. Case property was deposited vide memo Ext. PW-7/B. Rukka was prepared. He carried the same to the police station. In his cross-examination, he has admitted that they have associated the driver and conductor of the bus as independent witnesses and no other independent witness was called on the spot.

16. PW-12 Smt. Shakuntla deposed that on 23.3.2010, HHC Hukam Chand deposited a parcel sent by SI Dharam Chand at 10.15am. FIR Ext. PW-12/A was registered. On the same day, i.e. 3.25 pm, SI Dharam Singh handed over a parcel containing 2.7 kg charas. Parcel was sealed with 10 seals of 'D' alongwith sample seals and NCB form. She resealed the parcel with seal 'K' at four places. She filled the relevant columns of NCB form and prepared reseal memo vide Ext. PW-12/D.

17. PW-13 Dharam Singh has deposed the manner in which accused was apprehended at 8.00 am on 22.3.2010 and contraband was recovered, search and seizure process was completed at the spot. He handed over the case property to PW-12. Case property was produced while recording his statement. It was produced before the Court by HHG Mohan Singh of Police Station Jogindernagar.

18. PW-2 Hoshiar Singh has not at all supported the case of the prosecution. According to him, no contraband was recovered in his presence. He has also denied seizure and sealing process completed at the spot. Though he has identified his signatures at mark 'X'.

19. Case property was deposited by PW-12 Shakuntla with PW-1 HC Mangat Ram. On 22.3.2010, he made entry in the Malkhana Register. He proved Malkhana Register Ext. PW-1/A. Case property was sent to FSL Junga through HC Jagdish Chand vide RC No. 52/2010. He has deposited it on 25.3.2010. Case property was produced in the Court while recording statement of PW-13 Dharam Singh. Mohan Singh, who has produced the case property, has not been examined. Prosecution has not led any evidence when the case property was taken out from the Malkhana to be produced before the Court. Malkhana Register has not been produced to verify this fact. Entry was required to be made when the case property was taken out from Malkhana, for its production in the Court. Similarly, entry was also required to be made when the case property was returned to be deposited in the Malkhana after its production in the Court. There is no DDR also when the case property was taken out from the Malkhana. Every time, the case property is deposited and taken out, entries are required to be made in the Malkhana Register which is prescribed in form (Form-19) of Punjab Police Rules. It is, thus, doubtful that the case property, which was seized and

sent to FSL Junga and produced before the Court was the same, which was recovered from the accused, or it was the case property of some other case. Prosecution has not proved the entire link from the time of seizure of contraband till its production in the Court.

20. Accordingly, the present appeal is allowed. Judgment dated 5.8.2013 rendered by learned Special Judge (III) Mandi, District Mandi, Himachal Pradesh in Session Trial No. 56/2010, is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. The accused is ordered to be released forthwith, if not wanted by the police in any other case. Fine amount, if any deposited by the accused, be also refunded to him. Registry is directed to prepare the release warrant of the accused and send the same to the concerned Superintendent of Jail immediately.

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

Cr. Appeal No. 4199 of 2013 a/w
Criminal Appeal No. 37 of 2014
Reserved on: 04.06.2015
Date of decision: 15.6. 2015

Cr. Appeal No. 4199 of 2013

Ruchi Kant and others .....Appellants.

Vs.

State of Himachal Pradesh .....Respondent.

Criminal Appeal No. 37 of 2014

Smt. Sukhdei .....Appellant.

Vs.

Smt. Raj Kumari and others .....Respondents.

Indian Penal Code, 1860- Sections 364, 302, 201 read with Section 34- Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- PW-1 informed the police that accused had kidnapped her husband after beating him- search was made to locate her husband but he could not found- the slippers of her husband were found on the next day near the house of the accused- accused had enmity with the deceased as deceased had purchased the land which accused intended to purchase – accused had beaten the complainant and her son- accused 'A' was arrested and he made a disclosure statement on which body parts of the deceased and darat were recovered- PW-1, PW-2 and PW-3 had not made any efforts to search the deceased, even though they were accompanied by many persons- PW-33 admitted the overwriting on the disclosure statement- motive for the commission of crime was not established and no material was brought by the prosecution on record to show that deceased was killed simply because he happened to be member of scheduled caste category- Medical Officer stated that cause of death could not ascertained due to advance decomposition of the body- witnesses were closely related to each other and their statements did not inspire confidence- held, that in these circumstances, prosecution version was not proved- accused acquitted. (Para-34 to 55)

Cases referred:

Masumsha Hasanasha Musalman Vs. State of Maharashtra (2000) 3 SCC 557
Dinesh alias Buddha Vs. State of Rajasthan (2006)3 Supreme Court Cases 771
Ramdas and others Vs. State of Maharashtra (2007) 2 Supreme Court Cases 170

For the appellants : Mr. Satyen Vaidya, Advocate, for the appellants in Cr. Appeal No. 4199 of 2013.
Mr. Ajay Thakur, Advocate, vice Mr. Lakshay Thakur, Advocate, for the appellant in Cr. Appeal No. 37 of 2014.

For the respondent(s): Mr. Ramesh Thakur, Assistant Advocate General, for the respondent-State in both the appeals.
None for respondents No. 1 and 2 in Criminal Appeal No. 37 of 2014.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Since both the appeals have arisen out of the common judgment, dated 24.08.2013/26.08.2013, the same were taken up together for hearing and are being disposed of by this common judgment.

2. These appeals are instituted against the judgment dated 24.08.2013/ 26.08.2013, rendered by the learned Special Judge, Hamirpur, H.P. in Sessions Trial No. 24 of 2012, whereby the appellants in Cr. Appeal No. 4199 of 2013 alongwith Raj Kumari and Asha Devi were charged with and tried for the offence punishable under Sections 364, 302, 201 read with Section 34 of the Indian Penal Code and Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. Accused Raj Kumari and Asha Devi were acquitted, however, accused Ruchi Kant, Subhash Chand and Anil Kumar were convicted and sentenced to imprisonment for life and a fine of Rs.20,000/- each was also imposed for the offence punishable under Section 302 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for one year. They were also sentenced to undergo rigorous imprisonment for 7 years and a fine of Rs.10,000/- each was also imposed for the offence punishable under Section 364 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months. They were also sentenced to undergo rigorous imprisonment for five years and to pay fine of Rs.5,000/- each for the offence punishable under Section 201 of the Indian Penal Code and in default of payment of fine, they were further ordered to undergo simple imprisonment for three months. They were also sentenced to undergo imprisonment for life and to pay a fine of Rs.10,000/- each for the offence punishable under Section 3(2)(v) of the SC & ST Act and in default of payment of fine, they were further ordered to undergo simple imprisonment for six months.

3. Case of the prosecution, in a nut-shell, is that on 11.08.2011, complainant Smt. Sukhdei (PW-1), wife of Shri Ramesh Chand, resident of Village and Post Office, Badoh, Tehsil and Police Station, Bhoranj, telephonically informed the police at Police Station, Bhoranj that accused Ruchi Kant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi have kidnapped her husband after giving beatings to him. On this information, *rapat* Ex. PW38/A was entered in the Police Station and SI Desh Raj (PW 38) went to the spot where complainant Smt. Sukhdei (PW-1) got recorded her statement under Section 154 Cr. P.C. Ex. PW1/A. FIR Ex. PW37/A was registered. During investigation, every effort was made to locate Ramesh Chand, but he could not be located either alive or dead due to rainy season and growing of crop. Thereafter, Dy. SP Headquarters searched at the spot and on his supervision separate teams were constituted to trace Ramesh Chand. On the next day in the morning, slippers of the husband of complainant were located at a distance of 40-50 feet away from the house of accused and the complainant (PW-1) identified those slippers. The investigating officer (PW-38) took into possession those slippers Ex. P1. He also clicked the

photograph Mark-C and lifted the samples of blood from the spot with the help of cotton in a match-box and sealed it in a cloth parcel and took the same into possession vide memo Ex. PW8/A. On April, 2011, deceased Ramesh Chand purchased 15 Marlas land from one Roshan Lal, which was situated adjacent to the house of deceased Ramesh Chand and the boundary of land of accused was also adjoining to this land. Accused wanted to purchase the said land and due to that reason accused developed some enmity with the complainant party. The accused persons had quarreled and beaten the complainant (PW-1) and her son Purshotam (PW-18) and FIR No. 66, dated 16.04.2011 Ex. PW41/A under Sections 341, 323, 325 &506 read with Section 34 of the Indian Penal Code regarding this incident was registered at Police Station Bhoranj. On 11.08.2011, deceased Ramesh Chand had gone to his routine work to Jahu in the morning and come back for taking his lunch and thereafter, he again left for his shop at about 2:30/3:00 p.m. When at about 7:30 p.m., deceased Ramesh Chand did not return from the shop as usual, complainant came out to her courtyard and waited for him. In the meantime, she heard the cries of her husband from the side of house of accused Subhash Chand. At about 7:45 p.m., when Miss Baby (PW-5) was cooking meal in her kitchen, she heard the sound of gate of house of accused Subhash Chand and then she peeped through window of her house and saw that the accused persons were beating Ramesh Chand with kicks and blows. When Baby (PW-5) was peeping through the window, accused Subhash Chand and Anil Kumar had seen her and thereafter they started taking Ramesh Chand towards verandah. Thereafter, Baby (PW-5) went to her cousin sister Pushpa Devi (PW-3) and narrated about the incident, on which she also came out and saw giving beating to Ramesh Chand by the accused persons. Pushpa Devi (PW-3) tried to make a call to Dina Nath, but the call could not be matured and then she made a call on landline phone to Rekha Devi (PW-2) at about 8:00 p.m. and informed her that the accused persons were beating Ramesh Chand and on this, PW-2 went to the house of complainant and told about this incident to her. Thereafter, Baby (PW-5) and Pushpa Devi (PW-3) came to the courtyard of PW-5 and saw that Ramesh Chand was being taken by accused Subhash Chand, Ruchi Kant and Anil Kumar towards Khad, while accused Raj Kumari and Asha Devi were following them at some distance. On seeing this, Pushpa Devi (PW-3) asked the accused persons as to why they had beaten up Ramesh Chand. When complainant (PW-1) was still in the courtyard, at the same moment Rekha Devi (PW-2) came to her house and disclosed that accused persons were giving beating to Ramesh Chand. Complainant Sukhdei started weeping loudly and called Dina Nath and thereafter Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi & Rekha Devi came to her house and then went towards the house of accused. When they reached in the house of accused, neither Ramesh Chand nor accused were present there and some blood stains were present on the gate, wall and courtyard of the house of accused Subhash Chand as well as on the path leading towards the Khad (rivulet). Accused were arrested. Accused Anil Kumar made disclosure statement Ex. PW9/A. Thereafter body parts of deceased Ramesh Chand were recovered. The recovery of drat was also effected. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

4. The prosecution has examined number of witnesses to support its case. The accused were also examined under Section 313 of the Cr. P.C. They pleaded innocence. The appellants/accused in Cr. Appeal No. 4199 of 2013 were convicted and sentenced, as stated hereinabove. Hence, these appeals.

5. Smt. Sukhdei, complainant has also filed an appeal bearing Cr. Appeal No. 37 of 2014 against the acquittal of Raj Kumari and Asha Devi.

6. Mr. Satyen Vaidya, learned counsel for the appellants in Cr. Appeal No. 4199 of 2013 has vehemently argued that the prosecution has failed to prove the case against the accused persons.

7. Mr. Ramesh Thakur, learned Assistant Advocate General, has supported the judgment, dated 24.08.2013/26.08.2013.

8. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

9. PW-1, Smt. Sukhdei, deposed that her husband was working as a Carpenter at Jahu. On 11.08.2011, he had gone for his routine work to Jahu in the morning and came back to house for taking lunch and thereafter, he again left for the shop at about 2:30/3:00 p.m. When at about 7:30 p.m., he did not return from the shop, she came out to her courtyard and waited for his arrival. In the meantime, she heard cries of her husband coming from the side of house of accused Subhash. She was in the courtyard, in the meantime, Rekha Devi, wife of Prem Chand came to her house and she told her that the family of Subhash Chand was beating her husband Ramesh Chand. She started weeping loudly and called Dina Nath. Thereafter, Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi, Rekha Devi all came to her house and then they went towards the house of Subhash Chand. Some blood stains were found on the gate and wall of the house as well as in the courtyard of the accused. There were blood stains on the passage leading towards the Khad/Jahu. Pushpa Devi and Baby, who were already present there, disclosed them that accused Ruchikant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi had beaten up Ramesh Chand and taken him towards Khad. She telephonically informed the police. Police arrived on the spot after some time. Police inquired from her and recorded her statement Ex. PW1/A. Police clicked the photographs of the blood lying on the spot and also took the blood into possession. The police as well as villagers searched for her husband, but he could not be traced. On the next day in the morning, the sleepers of her husband were located at a distance of 40-50 feet away from the house of accused. She identified the sleepers of her husband. Police took into possession that sleepers after taking photographs of the same vide memo Ex. PW1/8. They had purchased 15 Marlas of land from one Roshan Lal in the month of April, 2011, which was quite adjacent to their house and the boundary of the land of the accused persons adjoins to that land and accused persons wanted to purchase that land and due to that reason, they had developed some enmity with them. According to her, the accused persons had quarreled and beaten up her and her son due to enmity after the purchase of land and the case regarding this beating was registered against the accused. In her cross-examination, she deposed that distance of her house from the house of Subhash was about 250-300 metres by road, but through fields it was lesser. The house of Rekha was situated after 2-3 houses of her house. The house of Baby was not on back side of the house of Subhash. However, between both these two houses, there was a passage. She has admitted that Rekha was the daughter of maternal uncle of Baby. She also admitted that Pushpa and Baby were first cousins. Purshotam was her son. She could not say after how much time of reaching Rekha to her house, she went to the house of Subhash. She could not tell that she visited there after half an hour or one hour. Baby and Pushpa were in their courtyard and when they reached the house of Subhash, Baby, Pushpa and their family members had also reached there. She did not remember whether she had told the police that Santosh Kumari and Pushpa Devi had also come to her house alongwith Dina Nath etc. (she was confronted with her statement Ex.PW1/A, where names of these ladies were not stated). She had told the police that when they reached the house of accused Subhash, he and his family members were not present (she was confronted with her statement Ex. PW1/A, in which it was not stated). She had also told the police that Pushpa

Devi and Baby were already present there who had told her that the accused had beaten her husband and taken him towards Khad (she was confronted with her statement Ex. PW1/A in which, no such fact was recorded). However, according to her, this fact was stated by her in her supplementary statement. She had not told the police that Subhash Chand wanted to purchase 15 Marlas of land. She had told the police that accused Ruchikant and Anil Kumar had threatened to kill her entire family whenever they got an opportunity (she was confronted with her statement Ex. PW1/A where this fact is not so recorded).

10. PW-2, Smt. Rekha Devi deposed that on 11.08.2011, she went to her kitchen. In the meantime, she received a telephone call on her landline from Pushpa Devi and she disclosed her that accused persons, namely, Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were beating Ramesh Chand. She went to the house of Ramesh Chand, where wife of Ramesh Chand was present in the courtyard. She told her that she got a telephone call from Pushpa Devi, who disclosed that the accused persons were beating Ramesh Chand. On this, PW-1, Smt. Sukhdei started weeping loudly and on hearing her cries, one Dina Nath, Braham Dass, Gian Chand and two three other ladies of the locality gathered there. Thereafter, they all went to the house of accused Subhash Chand, where they saw blood stains on the wall of the house of accused, gate and in the courtyard. Thereafter, they went to the house of Pushpa and Baby, who informed them that the accused persons after giving beatings to Ramesh Chand, took him towards downward Khad. There was none in the house of the accused except one person having beard sitting in the verandah. PW-1 informed the police telephonically and they all searched for Ramesh Chand in the fields but could not trace him. Thereafter, police came to the spot and recorded the statement of PW-1. Police took into possession the sample of blood from the spot. The accused persons had beaten Ramesh Chand due to some previous enmity regarding purchase of land and earlier also the accused persons had beaten up the family members of deceased Ramesh Chand. During search, police recovered sleepers Ex. P1 from the spot at a distance of 40-50 feet away from the house of accused. In her cross-examination, she admitted that Baby was her cousin being the daughter of sister of her father. She also admitted that their house was situated at higher level, whereas house of accused was at lower level. She did not know at what time, she reached the house of Sukhdei. She stated that it might have taken 20-25 minutes to reach them to the house of accused from the house of Sukhdei. She also admitted that as long as she remained in the house of Subhash, Pushpa and Baby did not come there. She also admitted that sometimes, Subhash Chand and his family members throw wastes of their house in their land despite their protest a number of times and because of this, there had been altercations between them. She had told the police that Pushpa Devi disclosed her on phone that accused Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were beating Ramesh Chand (she was confronted with her statement Mark-DA, where the names of family members of accused Subhash Chand were not recorded). She had also told the police that they all went to the house of accused Pushpa and Baby, who informed them that accused persons after beating Ramesh Chand, took him towards Khad (she was confronted with statement Mark-DA, where it is not so recorded). They had gone towards the Khad to search for Ramesh Chand. Other persons were also with them. By that time, police had not reached the spot. At that time, Sukhdei was also with them, when they had gone towards Khad to search Ramesh Chand. They had not searched the deceased Ramesh Chand on the next day of the occurrence.

11. PW-3, Smt. Pushpa Devi deposed that on 11.08.2011 at about 7:45 p.m., she was cooking food in her kitchen. In the meantime, her cousin sister Baby came to her and told that Subhash Chand and his family members were beating Ramesh Chand. On this, she came out of her kitchen and saw that Ramesh Chand was crying and requesting for his

rescue in the gate of the house of accused Subhash Chand. All the accused persons namely Subhash Chand, Ruchikant, Anil Kumar, Raj Kumari and Asha Devi were giving beatings to Ramesh Chand. She tried to make a telephone call at the house of Ramesh Chand, but the call did not mature. On this, she told about the incident to Smt. Rekha Devi on her landline telephone. Thereafter, she and Baby went to the house of accused persons, where Ramesh Chand was lifted by the accused Subhash Cnand, Ruchikant and Anil and went towards Khad side. Accused Raj Kumari and Asha Devi also followed them. She asked accused Raj Kumari as to why she had beaten up Ramesh Chand. After 10-15 minutes, wife of Ramesh Chand alongwith other persons reached on the spot. They all searched for Ramesh Chand, but he could not be traced. In her cross-examination, she deposed that Rekha Devi is not related to her. House of Baby was at a lower level from the house of Subhash and in between the house of Subhash and Baby, there was a mango tree. She did not go to the house of Rekha Devi. She also did not go to the house of Subhash Chand, but she had made a call to Rekha Devi. She also deposed that earlier, she tried to inform Sukhdei, but call to her could not mature. The fact that she and Baby went to the house of accused persons and saw that Ramesh Chand was lifted by the accused Subhash Chand, Ruchikant and Anil, who took him towards Khad, was told by her to the police (she was confronted with statement Mark-DB, where it is not so recorded). She had told the police that her cousin Baby came to her and told that Subhash Chand and his family members were beating Ramesh Chand (she was confronted with her statement Mark-DB, in which names of only three accused Subhash Chand, Anil and Ruchikant are mentioned). She talked to Rekha on telephone about 15 minutes and thereafter, she came to the house of Baby. She did not remember for how long she remained in the house of Baby, but she remained there for quite long. Thereafter, she came back to her house and stayed at her house during the night. She had not gone to the Khad to search Ramesh Chand alongwith other persons. She could not remember the colour of the clothes worn by Ramesh Chand.

12. PW-4, Nazeer Deen, has deposed that on 10.08.2011, he had gone to the house of accused Subhash Chand. He took dinner and went to sleep in the night. On the next day, Subhash Chand and his family members had to go to appear before the Panchayat. They proposed him to accompany them. At 7:00 p.m., they came to the house of Subhash Chand. They sat in the upper storey verandah of the house of Subhash Chand. In the meantime, he heard some cries from the passage which was leading along the house of accused. He could not identify the persons who were crying. After some time, police arrived there. Some villagers had also reached on the spot. He heard some noise when he was in the bath room. Thereafter, nothing has happened. He was declared hostile and was cross-examined by the learned Public Prosecutor. He admitted that when the person was going along the passage leading in front of the house of accused, Subhash Chand said to him why he usually abused him while passing through the passage. He denied the suggestion that thereafter accused Ruchikant and Anil Kumar chased him. He also denied that when the said person tried to stand, accused Anil Kumar kicked him and gave blows to him. He also denied that thereafter Ruchikant and Anil Kumar lifted that person and took him to passage leading downward. He admitted that his statement was recorded before the Judicial Magistrate 1st Class, Court No. II, Hamirpur. He admitted his signatures on Ex. PW4/B. He admitted that whatever he deposed that was recorded by the Magistrate in his statement Ex.PW4/C, volunteered that when he was brought to the Court, police had asked him to make the statement in the manner which was recorded by the police, otherwise he may be in trouble. He admitted that after writing his statement Ex. PW4/C, the same was read over to him by the Magistrate and he signed each page as correct. In his cross-examination, by the learned defence counsel, he admitted that till the arrival of police, entire family of the accused was inside the house. He also admitted that from 13.08.2011 onwards, police kept on asking him to make the statement according to their wish.

13. PW-5, Ms. Baby deposed that on 11.08.2011 at about 7:45 p.m, she was cooking meals in her kitchen. In the meantime, she heard the sound of gate of Subhash Chand. She peeped through window of her house and saw that Ramesh Chand was being beaten up by accused persons, namely, Subhash Chand, Ruchikant and Anil Kumar. Accused Raj Kumari and her daughter in law Asha Devi were also standing there. They were beating Ramesh Chand by giving kick and fist blows. When she was peeping through the window, Subhash Chand and Anil Kumar saw her looking towards them. Thereafter, they started taking Ramesh Chand towards verandah. She went to her cousin sister Pushpa Devi and narrated about the beating being given to Ramesh Chand by the accused persons, on which she also came out and saw the beatings being given by accused persons. Pushpa Devi tried to make phone call to Dina Nath, resident of Badoh, but the call could not mature. Then, Pushpa Devi made a telephone call on the landline phone of Rekha Devi and informed her regarding the beatings. Thereafter, she and Pushpa Devi came to her courtyard and saw that Ramesh Chand was being taken away by accused Subhash Chand, Ruchikant and Anil Kumar towards Khad while accused Asha Devi and Raj Kumari were following them at some distance. After 15-20 minutes, Sukhdei alongwith other villagers came there. Sukhdei was crying. All the villagers searched for Ramesh Chand, but he could not be traced. In her cross-examination, she told the police that when the accused were beating Ramesh Chand, accused Asha Devi was also there (she was confronted with statement Mark-DC, in which name of accused Asha Devi was not stated). She also deposed that she had not told the police that Pusshpa Devi tried to call Dina Nath. She has admitted that their house was at a lower level as compared to the house of accused Subhash Chand. She has narrated the incident to her father, volunteered that after hearing the incident, his BP arose and after taking medicine, he went to sleep.

14. PW-6, Sh. Surjit Kumar is not a material witness. PW-7, Sh. Ishwar Dass, deposed that on 12.08.2011, during investigation, police recovered black colour Chappal (sleepers). The wife of Ramesh Chand identified the sleepers to be that of her husband. These were taken into possession vide memo Ex. PW1/B.

15. PW-8, Sh. Nanak Chand, deposed that on 11.08.2011 at about 9:00 p.m., he received a telephone call from her sister, who informed him that Ramesh Chand was beaten up by Subhash Chand and his family members had kidnapped him. He hired a vehicle and reached at the spot at about 9:15 p.m. Police and other villagers were on the spot. There were blood stains on the gate and on the passage leading towards Khad. Police clicked the photographs and lifted samples of blood with the help of cotton from the spot in the match box and sealed in a cloth parcel and taken into possession vide memo Ex. PW8/A.

16. PW-9, Sh. Onkar Singh, deposed that accused Anil Kumar made a disclosure statement vide Ex.PW9/A, vide which he disclosed that he could get recover the parts of body of deceased Ramesh Chand from Jauh/Chanth Khad. Thereafter, accused led the police party to Jauh/Chanth Khad and reached there at 5:30 p.m. Accused pointed out the spot and got recovered the trunk (*Dhad*) of the dead body underneath the boulders. Police took into possession the trunk vide memo Ex. PW9/B. On 16.08.2011, he and Rakesh Kumar were present at Jauh Khad in the evening. Police brought Anil Kumar accused in custody there, where accused Anil Kumar disclosed during interrogation that he could get recover the parts of the body from the place where he had hidden them. Police recorded the statement of accused vide Ex. PW9/C. Thereafter, the accused led the police to the spot and got recovered both feet and one half arm of the dead body of Ramesh Chand, which were taken into possession by the police vide memo Ex. PW9/D. On 20.08.2011, police recovered fingers of the deceased Ramesh Chand from the bushes in putrid condition. On 21.08.2011,

accused Anil Kumar got recovered one drat, which was taken into possession vide memo Ex. PW9/G.

17. PW-10, Sh. Majid Mohammad, deposed that Nazeer Mohammad was his brother-in-law. He visited his house on 12.08.2011 alongwith one person whose name he came to know as Subhash Chand later on. They stayed in his house and left his house on 13.08.2011. Subhash Chand had left a bag there containing his clothes in his house. During investigation on 18.08.2011, police visited his house and he handed over the bag containing clothes of Subhash Chand to the police. Police sealed the clothes of Subhash Chand in a cloth parcel and taken into possession vide memo Ex. PW4/A.

18. PW-11, Smt. Parkasho Devi, deposed that she and her daughter-in-law were cutting maize crop in her field. They felt some foul smell from the side of *maind*. She saw the object and observed some round type bones, on which, she called one Jiwan Kumar. She suspected that this object could be the bones of dead body of a human being as recently one Ramesh Chand was missing.

19. PW-12, Smt. Neelam Kumari deposed that police has taken into possession the bones of neck and head of human being vide Ex. PW12/A. PW-13, Sh. Dalip Kumar, deposed that during investigation, accused Anil Kumar made disclosure statement that he could get the *drat* recovered from the spot. His statement was recorded vide Ex. PW 13/A. Thereafter, accused Anil Kumar led the police party to Chanth Khad and got recovered the *drat* Ex. P5

20. PW-14, Sh. Harbans Lal, deposed that during August, 2011, he was posted at Police Station Bhoranj. He alongwith other police officials and HHGs. were deputed for the security of the house of deceased Ramesh Chand at village Badoh. He remained there for about 15-20 days. When he was on duty, he found a sim lying in the passage downward to the house of deceased Ramesh Chand. He was not aware of the owner of sim, so he used the said sim in his mobile. There was forty eight rupees balance. The number of the sim was 98174-74972. Later on, he came to know through Police Station Bhoranj that the sim belonged to deceased Ramesh Chand. In his cross-examination, he deposed that the sim was found at a distance of 10-20 yards from the house of Ramesh Chand. He did not tell to his senior police officials and Home Guards about the sim. He admitted that if something is found on the way, then it becomes his duty to deposit the same with the Police Station.

21. PW-15, Sh. Kuldip Kumar, is a formal witness. PW-16, Sh. Roshan Lal, deposed that he sold the land to Ramesh Chand through registered sale deed during the month of February, 2011 and mutation was sanctioned in the month of April, 2011. When he sold this land to Ramesh Chand, accused Subhash Chand and his family members, whose land was also situated near the aforesaid land, asked him that he also wanted to purchase that land and why did he sell land to Ramesh Chand. He told him that this land was situated near the house of Ramesh Chand, therefore, he sold it to him. In his cross-examination, he deposed that he came to know about the missing of Ramesh Chand on 11.08.2011. He did not go to the house of Ramesh Chand, because he was advised rest because of his surgical operation. He was called by the police to Police Station Bhoranj after 2-3 months of missing of Ramesh Chand. Subhash Chand had never offered for the purchase of said land before he sold the same to Ramesh Chand.

22. PW-17, Sh. Gurdev Singh, deposed that on 12.08.2011, at about 5:30 p.m., he reached Barthin and accused Subhash met him on the Chowk and he handed over the bag alongwith suite. PW-18, Shri Purshotam Dhiman is the son of deceased Ramesh Chand. According to him, in April, 2011, they had purchased 15 marlas land from one Roshan Lal

of their village, which was situated near their house. The boundary of the land of Subhash Chand adjoins the aforesaid land. He also deposed that since they belong to Lohar caste, which falls within the category of scheduled caste, therefore, accused Subhash Chand used to call them Lohar and he wanted to purchase that land and since they had purchased this land, therefore he developed some ill will against them and quarreled with them in the month of April, 2011. A case was registered against the accused persons in Police Station Bhoranj. On 11.08.2011, when he was at Chandigarh, his mother telephoned him and informed that accused Subhash Chand and his family members had beaten his father and kidnapped him. He hired a vehicle and reached on the spot at about 2:30 a.m. on the next day. He saw some blood stains on the passage, on the gate and inside the gate of the house of accused Subhash Chand. Police, villagers and his relatives were present there. They all searched for his father, but he could not be traced. The sleepers of his father were found near the house of Vidyasagar and his mother identified the sleepers that of his father. On 14.09.2011, when he was present at Baddi, a phone call was received from his mother and she informed that head of his father was found in the field of Parkasho Devi at Dathwin village. On this, he alongwith his mother and uncle Besari Ram reached on the spot where her maternal brother Manoj Kumar was present alongnwith police and other Panchayat members. They found there some round shaped bones in decomposed condition. Police inspected the object and took photograph of the same and took the same into possession. Thereafter, the police took that object to R.H., Bilaspur for post mortem. In his cross-examination, he admitted that when he reached at the house of Subhash Chand at 2:30 a.m., his mother was present there. He did not know whether Pushpa, Rekha and Baby were present or not, volunteered that number of ladies were present there at that time. He also tried to search his father. He alongwith his cousin brother Manoj Kumar and his brother-in-law Ravinder had gone to search his father. They kept on searching him till morning, but he could not tell the exact time till when he searched him. He had stated to the police in his statement that since they belong to Lohar caste, which falls within the category of Scheduled Caste and Subhash Chand used to call them Lohar (he was confronted with his statement Mark-DG, in which it was not so recorded). He had told the police that he had seen the blood stains on the passage (he was confronted with his statement Mark-DG, in which it was not so recorded). He did not remember whether he had told the police that accused Subhash wanted to purchase the land which was purchased by them. He did not know whether police had called dog squad in the village.

23. PW-19, Dr. Anil Dhiman, deposed that on 01.09.2011, police of Police Station Bhoranj had moved an application Mark-V for taking blood sample of Purshotam Dhiman and Rattan Chand for DNA test. Accordingly, he took blood sample of the aforementioned persons, sealed it and handed over the same to the police for further test at FSL, Junga on the same day.

24. PW-20, Dr. N.K. Sankhyan, Medical Officer, deposed that on 16.08.2011, police of Police Station Bhoranj moved an application Mark-W for conducting post mortem examination on the body of deceased Ramesh Chand. It was also mentioned in the application that other parts of the body were also recovered by the police and therefore, it was requested that post mortem may be conducted on 17.08.2011. He conducted the post mortem examination on 17.08.2011 of deceased Ramesh Chand. The parts of the body were brought by SI Desh Raj and other police officials. According to him, the probable time that elapsed between injuries and death could not be ascertained. The probable time that elapsed between death and post mortem was 4 days and 2 weeks. He prepared the post mortem report Ex. PW20/C. On receipt of chemical report from Forensic Science Laboratory, Junga, Mark-AC, police produced the same before him for obtaining final opinion of cause of death of the deceased. After perusal of report his opinion was that the cause of death could not be

ascertained due to advance decomposition of the body. His opinion is Ex. PW-20/D. On receipt of report from FSL, Junga, dated 24.10.2011, Mark-AD, police again sought final opinion. He finally opined that the different parts of mutilated body whose post mortem was conducted on 17.08.2011 were of deceased Ramesh Chand, father of Sh. Purshotam Dhiman, as per DNA matching profile report. DNA cross-matching could not be possible for the parts of the body whose post mortem was conducted on 21.08.2011 and 15.09.2011 probably due to advance decomposition of the body. The deceased had neither consumed alcohol nor poison. The cause of death of deceased could not be ascertained due to advance decomposition of the dead body. His opinion is Ex. PW20/E. He gave his opinion again vide Ex. PW 20/F to the effect whether the injuries could be caused with drat Ex. P5. In his cross-examination, he has admitted that the police has not shown the weapon of offence to him on 17.08.2011.

25. PW-21, Sh. Hanumant Rai, has deposed that on 12.08.2011 an e-mail was received for CDR of Mobile no. 94180-82515 and the same was provided on 18.08.2011, which was Ex. PW21/A. PW-22, Devender Verma has proved the bill Ex. PW 22/A of Cell No. 98162-59154. PW-23, Sh. Rup Chand, has prepared Tatima Ex. PW23/A. PW-24, Ms. Kamlesh Kumari, has proved copy of notification Ex. PW24/B. PW-25, Sh. Kashmir Singh has proved photographs Ex. PW25/A-1 to Ex. PW25/A-34 and DVC is Ex. PW25/A-35 and DVD is Ex. PW25/A-36. PW-26, HC Jaswant Singh deposed that the case property was deposited with him by SI Desh Raj on 12.08.2011, Inspector/SHO Sohan Lal on 13.08.2011 and by HHC Suresh Kumar on 18.08.2011. SI Desh Raj again deposited the case property with him on 19.08.2011 and Inspector/SHO Sohan Lal also deposited the case property with him on 21.08.2011. On the same day, Constable Surinder Kumar deposited the case property with him. The case property was also deposited with him on 14.09.2011 by Inspector/SHO Sohan Lal and on 15.09.2011 by ASI Karan Singh. He sent the case property to FSL, Junga on 18.08.2011, 22.08.2011, 05.09.2011 and 16.09.2011 vide RC No. 131/11, 132/11, 133/11, 134/11, 143/11 and 156/11.

26. PW-27, Constable Navneet Kumar, deposed that on 18.08.2011, MHC Jaswant Singh handed over to him two sealed parcels duly sealed alongwith relevant documents for depositing the same with FSL, Junga, which he deposited there on 19.08.2011 and handed over the RC to MHC, Police Station Bhoranj.

27. PW-28, Constable Surinder Singh and PW-29, Constable Rakesh Kumar, have deposed that MHC Jaswant Singh sent sealed parcels through them to FSL Junga and Finger Print Bureau at Bharari. PW-30, Constable Vijay Kumar, deposed that on 16.09.2011, MHC Jaswant Singh handed over to him one container duly sealed with seal Kshetriya Parishad containing round shaped bones and head of human being for depositing the same at FSL, Junga, which he has deposited on 16.09.2011. PW-31 ASI Vinod Kumar, has deposed that he remained associated with investigation in this case and SHO Police Station Bhoranj during investigation of the case, took into possession the clothes of accused Ruchi Kant and Anil Kumar, which were handed over to ASI Rakesh Kumar vide seizure memo Ex. PW31/A.

28. PW-32, ASI Rakesh Kumar deposed that on 15.08.2011, accused Anil Kumar was in police custody at Police Station, Bhoranj. During interrogation, he disclosed that he had concealed the trunk of deceased Ramesh Kumar at Chanth Khad and he could get it recovered. His statement was recorded vide Ex. PW9/A. Thereafter, Anil Kumar led the police party towards Chanth Khad and on reaching there, he pointed out the spot. On removing the boulders, a trunk of the human being was recovered. The photographs were taken and the trunk was taken into possession vide recovery memo Ex. PW9/B. In his

cross-examination, he has admitted that the trunk was in a decomposed and mutilated condition.

29. PW-33, ASI Karan Singh, deposed that on 16.08.2011, when accused Anil Kumar was in police custody and was present at Joh. He disclosed in his presence as well as of Onkar Singh and Rakesh Kumar that he had concealed the parts of body of deceased Ramesh Chand at Chanth Khad, which spot was known to him and he could get the same recovered. His statement was recorded vide Ex. PW9/C. Thereafter, Anil Kumar led the police party and witnesses to Chanth Khad. After clicking the photographs of the same, the body parts were taken into possession vide recovery memo Ex. PW9/D.

30. PW-34, Manmohan Singh, who has signed Ex. PW13/A, was declared hostile. He was cross-examined by the learned Public Prosecutor. PW-35, Sh. Anjani Jaswal, is a formal witness. PW-36, Sh. Surya Parkash, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class, Karsog, District Mandi, H.P. proved the proceedings made vide Ex. PW36/A. He also proved Ex. PW4/B and Ex. PW4/C. PW-37, Sh. Jagdish Kumar is a formal witness.

31. PW-38, SI Desh Raj, deposed that on 11.08.2011, he received a phone call of Sukhdei, wife of Ramesh Chand in the Police Station, on which rapat No. 37-A, Ex. PW38/A was entered. He reached the spot. Statement of Sukhdei was recorded vide Ex. PW1/A. He conducted the investigation and took into possession the case property and deposited the same with MHC Police Station Bhoranj.

32. PW-39, Inspector Sohan Lal deposed that the statement of accused Anil Kumar was recorded under Section 27 of the Indian Evidence Act in the presence of witnesses Onkar Singh and Rakesh Kumar vide Ex. PW9/A. Thereafter, the accused alongwith police party and witnesses went to the spot from where a trunk of human being was recovered. The recovered trunk was taken into possession vide recovery memo Ex. PW9/B. A disclosure statement was made by accused Anil Kumar again on 16.08.2011 vide Ex. PW9/C and parts of the body were recovered vide Ex. PW9/B. Accused Anil Kumar also made a disclosure statement vide Ex. PW13/A that he could get the drat recovered from Chanth Khad. The drat was recovered vide Ex. PW9/G. The statement of Nazirdin was also recorded.

33. PW-40, Inspector Ramesh Chand, PW-41, MHC Raghujeet Singh, PW-42, SI Santokh Singh and PW-43, SI Des Raj are formal witnesses. PW-44, Inspector Sohan Lal deposed that he moved an application on 02.09.2011 to JMIC-II, Hamirpur vide Ex. PW44/A for recording the statement of Nazirdin under Section 164 Cr. P.C. On 07.09.2011, he moved an application Ex. PW44/B for issuance of caste certificate of deceased Ramesh Chand, on which caste certificate of deceased Ramesh Chand was issued by Patwari Halqua Deog vide Ex. PW44/C. He also moved an application Ex. PW44/F for post mortem of trunk of deceased Ramesh Chand.

34. PW-1, Sukhdei has testified that when her husband did not come at 7:30 p.m, she came out to her courtyard and waited for his arrival. She heard the cries of her husband from the side of house of accused Subhash. She was in the courtyard, at that time, Rekha Devi wife of Prem Chand came to her house and told that family of Subhash Chand was beating her husband Ramesh Chand. Then, she started weeping loudly and called Dina Nath. Thereafter, Dina Nath, Braham Dass, Gian Chand, Santosh Kumari, Pushpa Devi and Rekha Devi came to her house and then went towards the house of Subhash Chand. Pushpa Devi and Baby who were already present on the spot told them that accused Ruchikant, Anil Kumar, Subhash Chand, Raj Kumari and Asha Devi had beaten Ramesh

Chand and taken him towards Khad. According to her, in April, 2011, they had purchased 15 Marlas land from one Roshan Lal, which was quite adjacent to their house and the boundary of the land of the accused persons adjoins to that land and accused persons wanted to purchase that land and due to that reason, they had developed some enmity with them. In her cross-examination, she has admitted that Rekha was the daughter of maternal uncle of Baby. She also admitted that Pushpa and Baby were first cousins. Purshotam was her son. Witness Nanak was her brother and Ravi Kumar was her son-in-law. She visited the house of accused Subhash Chand, but did not know whether she visited there after half an hour or one hour. When they reached the house of Subhash Chand, Baby and Pushpa were already there. She had not gone to search for her husband, but her relatives had gone to search for her husband. She did not remember whether she had told the police that Santosh Kumari and Pushpa Devi had also come to her house alongwith Dina Nath (she was confronted with her statement Ex. PW1/A, where names of these ladies are not mentioned there). However, she volunteered that Pushpa Devi was not that Pushpa Devi who was a witness in this case. She had told the police that when they reached the house of accused Subhash, Subhash and his family members were not there (she was confronted with her statement Ex. PW1/A, in which it was not so recorded). She had also told the police that Pushpa Devi and Baby were already present there who had told her that the accused had beaten her husband and taken him towards Khad (she was confronted with her statement Ex. PW1/A, in which it is not so stated). She had told the police that accused Ruchikant and Anil Kumar had threatened to kill her entire family whenever they get an opportunity (she was confronted with her statement Ex. PW1/A, in which it was not so stated). She did not know whether her relatives searched her husband towards the Khad or not. She did not know whether police went towards the Khad to search her husband, however, volunteered that on that day about 40-50 police personnel were present there on the spot. There are improvements and variations in her statement recorded in the Court and the earlier statement recorded under Section 164 Cr. P.C., Ex. PW1/A. When she heard the cries of her husband, she would have rushed towards the house of accused. She did not know whether she visited the spot after half an hour or one hour. According to her, accused had taken her husband towards the Khad, but she did not know whether her relatives searched for her husband towards the Khad or not. She had not gone to search her husband, but her relatives had gone to search her husband. If she had reached in the house of Subhash Chand, what prevented her from searching her husband when she was accompanied by other persons also.

35. PW-2, Rekha Devi testified that she received a call from Pushpa Devi. She disclosed her that accused persons were beating Ramesh Chand. She went to the house of Ramesh Chand, where PW-1 was present in the courtyard. She told her that she got a telephonic call from Pushpa Devi, who disclosed her that the accused persons were beating Ramesh Chand. On this, PW-1 started weeping loudly and on hearing her cries, Dina Nath, Braham Dass, Gian Chand and two three other ladies of the locality gathered there. Thereafter, they all went to the house of accused Subhash Chand. PW-1, Sukhdei has also deposed that Pushpa Devi and Rekha Devi had come to their house, but PW-2 Rekha Devi deposed that Baby and Pushpa were present in their house when they went towards the house of accused. PW-2, Rekha Devi has also admitted that at times, there were altercations between her family members and family members of accused persons. The Khad was about 1 km. away from the house of the accused, but they had not searched the deceased Ramesh Chand on the next day of the occurrence. It was unusual conduct on the part of PW-1 Sukhdei and PW-2 Rekha Devi not to search for Ramesh Chand.

36. PW-3, Smt. Pushpa Devi deposed that she was cooking food in her kitchen on 11.08.2011 at about 7:45 p.m. In the meantime, her cousin sister Baby came to her and

told that Subhash Chand and his family members were beating Ramesh Chand. On this, she came out of her kitchen and saw Ramesh Chand was crying and requesting for his rescue in the gate of house of accused Subhash Chand. She narrated the incident to Smt. Rekha Devi on her landline telephone. Thereafter, she and Baby went to the house of accused persons where Ramesh Chand was lifted by accused Subhash Chand, Ruchikant and Anil and they went towards Khad side. PW-3, Pushpa Devi has categorically admitted that she never went to the house of Accused Subhash Chand, but had made a call to Rekha Devi. Even, she has not gone to the Khad to search Ramesh Chand along with other persons. She talked to Rekha about 15 minutes and thereafter, she came to the house of Baby. Father of the Baby was also present in the house.

37. PW-5, Baby deposed that she peeped through the window of her house and saw that Ramesh Chand was being beaten up by accused persons Subhash Chand, Ruchikant and Anil Kumar. Accused Raj Kumari and her daughter-in-law Asha Devi were also standing there. They were beating Ramesh Chand by giving kick and fist and blows. When she was peeping through the window, Subhash Chand and Anil Kumar saw her looking towards them. Thereafter, they started taking Ramesh Chand towards verandah. Thereafter, they went to the house of her cousin sister Pushpa Devi and she narrated about the beatings being given to Ramesh Chand by the accused person, on which she also came out and saw the beatings being given by accused persons. Thereafter, Pushpa tried to make phone call to Dina Nath, but the call could not mature. Then, Pushpa Devi made a telephone call on the landline phone of Rekha Devi and informed her regarding the beatings. Thereafter, she and Pushpa Devi came to her courtyard and saw that Ramesh Chand was being taken away by accused Subhash Chand, Ruchikant and Anil Kumar towards Khad while accused Asha Devi and Raj Kumari were following them at some distance. The father of Baby was present in the house. His statement has not been recorded. The explanation given by Baby is that after hearing about the incident, his blood pressure shot up and after taking medicine, he went to sleep. PW-1, Sukhdei in her cross-examination has deposed that she told the police that Pushpa Devi and Santosh Kumari had come to her house alongwith Dina Nath (she was confronted with her statement Ex. PW1/A, where names of these ladies were not mentioned).

38. According to the prosecution case, PW-4, Nazeer Deen has made a statement under Section 164 Cr. P.C. He was declared hostile while recording his statement in the Court. In his cross-examination by the learned Public Prosecutor, he has deposed that he was brought to the Court and the police has asked him to make the statement in the manner which was recorded by the police, otherwise he would be in trouble.

39. PW-36, Sh. Surya Parkash, Civil Judge (Junior Division)-cum-Judicial Magistrate 1st Class in his cross-examination has admitted that he has not seen in the police file as to where statements of the witnesses were recorded under Section 161 Cr. P.C. It did not come to his notice that witness Nazeer Deen remained in the police station from the date when his statement under Section 161 Cr. P.C. was recorded till he was produced before the Court. He also did not inquire from the police and from the witness that where from the witness was produced before him. However, the fact of the matter is that PW-4, Nazeer Deen remained in the police custody till his production before the Court. It casts doubt about the statement of PW-4 Nazeer Deen under section 164 of the Code of Criminal Procedure.

40. PW-7, Sh. Ishwar Dass has proved the memo Ex. PW1/B, whereby sleepers were taken into possession by the police. PW-9, Onkar Singh deposed that the accused Anil Kumar has made a disclosure statement vide Ex. PW9/A, Ex. PW9/B and Ex. PW9/C, on the basis of which the body parts were got recovered by him. There is overwriting on Ex. PW9/B as well as on Ex. PW9/C.

41. PW-33, ASI Karan Singh has admitted that there is overwriting in Ex. PW9/C. PW-39, Inspector Sohan Lal has also admitted that there is overwriting in Ex. PW9/C as well as Ex. PW9/D. The drat Ex. P5 was got recovered from the accused on the basis of disclosure statement Ex. PW13/A. PW-9, Sh. Onkar Singh, has admitted in his cross-examination that there was heavy rain from 12.08.2011 to 15.08.2011 and the flood had come in the Khad. 25-30 police officials used to come to the place of recovery on the aforesaid dates. PW-14, Sh. Harbans Lal has deposed the manner in which sim was recovered. His version does not inspire confidence. According to him, when he was on duty, he found a sim lying in the passage downward to the house of deceased Ramesh Chand.

42. The motive attributed to the cause of killing the deceased is the purchase of plot of land by the deceased family. According to PW-1, Smt. Sukhdei, they had purchased 15 marlas of land from PW-16, Sh. Roshan Lal. Accused were also interested in buying the same piece of land. This piece of land adjoins the property of the accused. PW-1, Smt. Sukhdei has categorically deposed in her cross-examination that there was some dispute with regard to the buying of piece of land from PW-16, Sh. Roshan Lal. According to PW-16, Sh. Roshan Lal, the accused has asked from him why he has sold the land to the family of deceased. He told them that since this land was situated near the house of deceased Ramesh Chand, therefore, he sold the same to him. In his cross-examination, he has admitted that Subhash Chand had never offered to purchase the land before they sold the land to Ramesh Chand.

43. The accused have also been charged under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. According to PW-18, Sh. Purshotam Dhiman, in April, 2011, they had purchased 15 Marlas land from one Roshan Lal of their village which was situated near their house. Accused Subhash Chand used to call them "***Lohar***" and he wanted to purchase that land and since they had purchased this land, therefore, he developed some ill will against them and quarreled with them in the month of April, 2011. A case was registered against the accused persons in Police Station Bhoranj. PW-24, Ms. Kamlesh Kumari deposed that on 23.10.2011, police moved an application for providing notification regarding SC & ST category. She prepared a photo copy of the notification and provided the same to the police at Police Station Bhoranj vide letter Ex. PW24/A.

44. PW-35, Sh. Anjani Jaswal, deposed that after adding the offence under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as 'the Act'), the case file was handed over to him for further investigation. He did not know when the offence under the Act was added.

45. PW-38, SI Desh Raj deposed that at the time of his investigation, the offence under the SC/ST Act was not added and it was added later on by the SHO PW-39. PW-39, Inspector Sohan Lal did not remember when the offence under the SC/ST Act was added. It has come in the statement of PW-38, SI Desh Raj that there was nothing against the accused during the investigation to book the accused under the SC/ST Act, but it was only later on when SHO has booked the accused under the SC/ST Act. The accused could be charged under the Act only if they have committed the offence against the victim only because of the reason that he belonged to Scheduled Caste category. There was absolutely no material on record that the deceased was killed since he happened to be the member of Scheduled Caste category.

46. We have gone through the statement of PW-18, Sh. Purshotam Dhiman closely. He has stated to the police in his statement that since they belong to Lohar caste, which falls within the category of Scheduled caste, therefore, accused Subhash Chand used

to call them Lohar (he was confronted with his statement Mark-DG in which it was not so recorded). There should be sufficient material on record at the time of framing of the charge under Section 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

47. Their Lordships of the Hon'ble Supreme Court in **Masumsha Hasanasha Musalman** Vs. **State of Maharashtra** (2000) 3 Supreme Court Cases 557 have held that to attract the provisions of Section 3(2)(v) of the Act, the sine qua non is that the victim should be a person who belongs to a Scheduled Caste or a Scheduled Tribe and that the offence under the Indian Penal Code is committed against him on the basis that such a person belongs to a Scheduled Caste or a Scheduled Tribe. In the absence of such ingredients, no offence under Section 3(2)(v) of the Act arises. Their Lordships have held as under:

> *"5. The trial Court accepted the evidence of Deubai (PW-4) and Manoj (PW-5). Manoj corroborated the evidence tendered by Deubai to the extent of having seen the appellant having a Jambiya in his hand when Deubai (PW-4) was following him and that he found something very suspicious so he followed both of them. That is how he witnessed the scuffle and the injuries caused by the appellant to the deceased. Deubai admitted in the course of her cross-examination that scuffle took place between the appellant and her husband and her husband fell on the ground, that for considerable time, the scuffle went on; that while on some occasions the appellant was on the ground, on some other occasions her husband was on the ground; that the appellant and the deceased were overpowering each other. PW-5 also stated that he saw that in front of the hospital of Dr. Kalwaghe the deceased coming and the appellant was following him with dagger and gave blows of dagger on the person of the deceased. The trial Court found from these circumstances that the appellant had no intention to kill the deceased and that after giving one blow, other injuries had been caused due to scuffle. This was amply supported by the evidence of the Medical Officer that injuries Nos. 2 and 4 to 10 could be caused in the scuffle, or injuries other than injury No. 1 could be caused due to obstruction by the deceased. Therefore, it could not be inferred that the appellant intended to inflict more injuries than injury No. 1. If this aspect is borne in mind, it would be clear that the appellant had given only one blow with the Jambiya resulting in his death and, therefore, the trial Court found that it would not be proper to convict the appellant under Section 302, I.P.C. The argument relating to private defence was straightway rejected for there were no injuries on the person of the appellant and the attack had been made by the appellant himself. The trial Court discarded the evidence relating to discovery of the weapon and jacket for the reasons set forth in the order. The trial Court also convicted the appellant for the offence arising under Section 3(2)(v) of the Act only on the basis that there was no controversy that the victim belonged to the scheduled caste and convicted him."*

In the instant case, the ingredients of Section 3(2)(v) of the Act were lacking from the very beginning and the prosecution has not led any evidence to prove this charge.

48. Their Lordships of the Hon'ble Supreme Court have reiterated the same principles in **Dinesh alias Buddha** Vs. **State of Rajasthan** (2006)3 Supreme Court Cases 771 and have held that sine qua non for Section 3(2)(v) is that the offence in question must have been committed against a person on the ground that such person is a member of SC/ST. Their Lordships have held as under:

> *"15. Sine qua non for application of Section 3(2)(v) is that an offence must have been committed against a person on the ground that such person is a member of Scheduled Castes and Scheduled Tribes. In the instant case no evidence has been led to establish this requirement. It is not case of the prosecution that the rape was committed on the victim since she was a member of Scheduled Caste. In the absence of evidence to that effect, Section 3(2)(v) has no application. Had Section 3(2)(v) of the Atrocities Act been applicable then by operation of law, the sentence would have been imprisonment for life and fine."*

49. Their Lordships of the Hon'ble Supreme Court **Ramdas and others** Vs. **State of Maharashtra** (2007) 2 Supreme Court Cases 170 have held that the mere fact that the victim happened to be a girl belonging to a Scheduled Caste does not attract the provisions of the Act. Their Lordships have held as under:

> *"11. At the outset we may observe that there is no evidence whatsoever to prove the commission of offence under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989. The mere fact that the victim happened to be a girl belonging to a scheduled caste does not attract the provisions of the Act. Apart from the fact that the prosecutrix belongs to the Pardhi community, there is no other evidence on record to prove any offence under the said enactment. The High Court has also not noticed any evidence to support the charge under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and was perhaps persuaded to affirm the conviction on the basis that the prsecutrix belongs to a scheduled caste community. The conviction of the appellants under Section 3(2)(v) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 must, therefore, be set aside."*

50. PW-20, Dr. N.K. Sankhyan, Medical Officer conducted the post mortem on the parts of the body collected by the police. His first opinion was that the cause of death could not be ascertained due to advance decomposition of the body. He has prepared post mortem reports Ex. PW20/A, Ex. PW20/B, Ex. PW20/C and Ex. PW20/D. His final opinion was also that the cause of death of the deceased could not be ascertained due to advance decomposition of the body. He was shown the weapon of offence, i.e., drat Ex. P5 on a subsequent date and not for the first time when he has conducted the post mortem on 17.08.2011. Police has collected various parts of the body. Firstly, the body parts were brought before Dr. N.K. Sankhyan on 16.08.2011 and secondly the body parts were received on 17.08.2011. PW-20, Dr. N.K. Sankhyan has not held any precipitant test for determining that all the parts belong to one person. He did not take any opinion regarding cause of death from specialist of anatomy. Thus, the opinion of Dr. N.K. Sankhyan remained that the cause of death could not be ascertained due to advance decomposition and mutilation of the body.

51. PW-32, ASI Rakesh Kumar has also admitted that the trunk was in a mutilated condition. PW-33, ASI Karan Singh has admitted that there is overwriting in Ex. PW9/C. PW-39, Inspector Sohan Lal has also admitted that there is overwriting in Ex. PW9/C as well as Ex. PW9/D. PW-9, Sh. Onkar Singh and PW-34 Manmohan Singh have also not supported the case of prosecution qua the recovery of drat. PW-34 Manmohan Singh was declared hostile. He has denied the suggestion that the person had disclosed before the police that he had concealed a drat in Chanth Khad and he could get the same recovered by giving demarcation. He also denied that police has recorded his statement.

52. Mr. Ramesh Thakur, learned Assistant Advocate General has vehemently argued that Anil Kumar has made an extra judicial confession before PW-6, Sh. Surjit Kumar. The statement of PW-6, Surjit Kumar cannot be believed. He was a planted witness. According to his version, he was working in the shop. Accused Anil Kumar came there. He inquired from the accused about his residence, on which he disclosed that he had to come from Bhareri side. On this, he inquired about the episode that took place at Bhareri side regarding missing of a person, on which accused Anil Kumar said that he had done his job. Thereafter, police had come to his shop for taking tea. After Anil Kumar left the shop, he disclosed the facts to the police. He did not remember the exact number of police officials sitting in his shop. He also did not remember whether the police officials to whom he disclosed the aforesaid facts were from the Police Station or from the Battalion. According to him, the police officials to whom he told the aforesaid facts, had not noted down the same in writing at that time. Moreover, extra judicial confession is not a substantive piece of evidence. What matters, is the statement of the witness made in the Court. According to the prosecution case, body parts of the deceased were recovered after a few days from the Khad. It is not believable that the parts of the body could still lying in the Khad, when there was heavy rain from 12.08.2011 to 15.08.2011 and the Khad was flooded. It is also the case of the prosecution that the deceased could not be traced and, therefore, Dy. SP has constituted as separate team to trace the deceased. However, the Dy. SP who had reached the spot and constituted a separate team for searching the deceased, has not been examined.

53. Most of the witnesses cited by the prosecution are closely related to each other. The statements of the closely related witnesses can be relied upon, but it must inspire confidence. In the present case, statement of these witnesses do not inspire confidence. Consequently, the prosecution has failed to prove the charges levelled against the accused beyond reasonable doubt.

54. Accordingly, in view of the observations and discussions made hereinabove, Criminal Appeal No. 4199 of 2013 is allowed and Criminal Appeal No. 37 of 2014 is dismissed. The judgment, dated 24.08.2013/26.08.2013, is set aside. The accused/appellants in Criminal Appeal No. 4199 of 2013 are acquitted of the charges framed against them. Fine amount, if already deposited, be refunded to the accused forthwith. They be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrants and send the same to the concerned Superintendent of Jail.

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

Himachal Pradesh Rajkiya Prathmik Anubandh Adhayapak Sangh. .....Petitioner

Versus

Sh. P.C. Dhiman and another .....Respondents.

COPC No. 456/2014.
Judgment reserved on 3rd June, 2015.
Date of decision: 16th June, 2015.

Contempt of Courts Act, 1971- Section 12 – It was stated that respondent could not have been complied with the direction issued by the Court as the direction issued in the judgment are contrary to the judgment delivered in LPA No.105 of 2012- held, that once judgment has

been upheld respondents are bound to obey the same or to seek clarification, if necessary-hence, respondents directed to comply with the direction within a period of 6 weeks.

(Para-4 to 8)

For the petitioner: Mr. Surender Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Additional Advocate General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

The petitioner has invoked the jurisdiction of this Court for drawing contempt against the respondents and for punishing them for the reasons taken in the contempt petition. It is specifically averred in the contempt petition that the respondents have not complied with the directions contained in the Judgment delivered by the learned Single Judge in CWP(T) No. 6037 of 2008 read with Division Bench Judgment delivered in LPA No.108 of 2012.

2. The respondents have filed the reply and have stated that they have complied with the directions contained in the aforesaid judgments, in letter and spirit.

3. Mr. Surender Sharma, Advocate, for the petitioner has argued that LPA No. 108 of 2012, came to be dismissed and the Division Bench has upheld the judgment passed by the learned Single Judge in CWP (T)No. 6037 of 2008 and passed the appropriate directions contained in para 18 of the said judgment whereby a batch of LPAs came to be disposed of in terms of the mandate of that judgment. It is apt to reproduce para 18 of the said judgment herein:

> *"18. In the above circumstances, the appeals and the writ petitions are disposed of as follows:*
>
> *The direction in the judgment in Rakesh Chand's case in CWP (T) No. 781 of 2008 for granting the running pay scale to the JBT teachers from the date of their initial appointment is set aside. However, it is held that the JBT teachers appointed on contract basis will be entitled to the initial of the pay scale attached to the post of JBT teachers and revised from time to time. It is also clarified that the principle that is applied in the case of the JBT teachers in equal force would apply to the School Lecturers appointed on contract basis.*
>
> *LPA No. 108 of 2012 is dismissed. All other appeals are partly allowed and the writ petitions are disposed of, so also the pending applications, if any."*

4. The judgment made by the Writ court in CWP (T) No. 781 of 2008 for granting the running pay scale to the JBT teachers from the date of their initial appointment was set aside in LPA No. 105 of 2010, and directions came to be passed, which governed the said writ petition and other writ petitions subject matter of that judgment. Further contended that the judgment earned by the Writ petitioner in CWP(T) No. 6037 of 2008, which was subject matter of LPA No. 108 of 2012 came to be dismissed and judgment of the writ Court stands upheld. The respondents have failed to comply with the writ Court judgment which stands upheld in LPA No. 108 of 2012, by the Division Bench.

5. The learned Advocate General argued that the directions contained in the writ Court judgment are contradictory with the judgment made in LPA No. 105 of 2012 and are not in tune with the directions passed in other writ petitions, details of which are given in para 18 of the judgment as quoted supra.

6. The argument advanced by the learned Advocate General though attractive, is devoid of any force, for the simple reason that LPA No. 108 of 2012 came to be dismissed, meaning thereby the judgment impugned in that LPA stands upheld and respondents had to comply with the judgment passed by the learned Single Bench in CWP(T) No. 6037 of 2008. It was for the State to seek appropriate remedy.

7. We have gone through the compliance report, is not in tune with the judgment made by the learned Single Judge in CWP(T) No. 6037 of 2008, upheld by the Division Bench in LPA No. 108 of 2012.

8. Accordingly, the respondents are directed to comply with the judgments referred to supra, within six weeks from today. In default, show-cause why Rule be not issued against them.

9. As a corollary, the Contempt petition stands disposed of.

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

LPA No.67 of 2014 & RSA No.75 of 2012.
Reserved on : 27.05.2015
Pronounced on: June 16, 2015.

LPA No.67 of 2014:

Jai Singh ...Appellant.
VERSUS
State of H.P. and others ...Respondents.

RSA No.75 of 2012:

Jai Singh ...Appellant.
VERSUS
Kaul Singh and another ...Respondents.

H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971- Section 54 - Consolidation proceedings concluded in the year 1997- a revision petition was filed in the year 2009 after 12 years- Divisional Commissioner ordered rectification in the revenue entries without considering the delay- litigation was also pending before Civil Court in which findings were recorded by Civil Court - such findings are binding on the revenue Court – Divisional Commissioner had upset those findings ignoring the fact that matter was pending before the Civil Court- in these circumstances, order was rightly quashed by the Writ Court. (Para-9 to 16)

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he is owner in possession of the suit land - defendants were stacking construction material and laying pipeline without his permission- defendants had not laid any claim over the suit land and the suit was decreed by the trial Court- High Court should not interfere with the concurrent findings of the fact recorded by the Court- no substantial question of law arose – appeal dismissed. (Para-31 to 38)

Cases referred:

Rajinder Singh vs. State of Jammu and Kashmir & others, 2008 AIR SCW 5157

Anathula Sudhakar vs. P. Buchi Reddy (Dead) By L.Rs. and others, 2008 AIR SCW 2692
Kashmir Singh vs. Harnam Singh & Anr., 2008 AIR SCW 2417
Gurdev Kaur & Ors. vs. Kaki & Ors., 2006 AIR SCW 2404

LPA No.67 of 2014:

For the Appellant:	Mr.Lalit K. Sharma, Advocate.
For the Respondents:	Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma & Mr.Anup Rattan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 and 2. Mr.G.R. Palsara, Advocate, for respondent No.3.

RSA No.75 of 2012:

For the Appellant:	Mr.H.S. Rangra, Advocate.
For the Respondents:	Mr.G.R. Palsara, Advocate, for respondent No.1. Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.
LPA No.67 of 2014:

This appeal is directed against the judgment and order, dated 20th June, 2013, passed by a learned Single Judge of this Court, in writ petition, being CWP No.5080 of 2010, titled Kaul Singh versus State of H.P. and others, whereby the order made by the Divisional Commissioner, Mandi, exercising the powers under Section 54 of the H.P. Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, (for short, the Act), in Revision Petition No.913/2009, titled Jai Singh vs. Kaul Singh, came to be set aside, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the writ petitioner Kaul Singh, (respondent No.3 herein), invoked the jurisdiction of the Writ Court by the medium of the writ petition, questioning the order made by the Divisional Commissioner (respondent No.2 herein), whereby the Revision Petition filed by the appellant/writ respondent was allowed.

3. It is apt to reproduce operative portion of the order passed by the Divisional Commissioner, hereunder:

> *"In view of the observations made above, the revision petition is accepted to the extent that Kh.No.443 land measuring 0-04-11 bigha be allotted to the petitioner and 1/4 share from Khasra No.439, 440, 441, 442 and 462 kita 5 total land measuring 0-17-06 i.e. 0-04-07 bigha be allotted to the respondent. A Copy of this order be sent to the Tehsildar Sadar, District Mandi for compliance. ……"*

4. Against this order of the Divisional Commissioner, the writ petitioner Kaul Singh filed the writ petition, which was allowed by the learned Single Judge vide the impugned judgment and the order of the Divisional Commissioner was set aside.

5. Feeling aggrieved, writ respondent No.3 Jai Singh has filed the instant appeal against the impugned judgment passed by the learned Single Judge.

6. Admittedly, the consolidation proceedings were started in the year 1992-93 and concluded in the year 1997. The appellant Jai Singh invoked the jurisdiction of the Revenue Authorities after a lapse of around 12 years, i.e. in the year 2009 by filing a revision

petition. Without considering the factum of delay and laches and other aspects of the case, the Divisional Commissioner ordered rectification in the revenue entries in terms of the order reproduced supra.

7. The question is - Whether the Divisional Commissioner, exercising powers under the Act, was competent to make the order, which was barred by delay and laches? The answer is in the negative for the following reasons.

8. The Writ Court has examined the entire record while discussing the said issue and has rightly held that the Divisional Commissioner has fallen in error and has committed grave injustice while allowing the Revision Petition for the reason that the revision petitioner (appellant herein) has remained in deep slumber and has not questioned the proceedings concluded in the year 1997 for a considerable long period and what were the reasons for not questioning the same have not been spelled out in the revision petition. He has not been able to carve out a case for condonation of delay not to speak of sufficient cause.

9. Limitation period is not prescribed for exercising the revisional jurisdiction, but it can be exercised "at any stage". The Apex Court right from 1950 has discussed what does words "at any stage" mean in catena of judgments, which have been discussed by the learned Single Judge in paragraphs No.14 to 18 of the impugned judgment. Ratio laid down in those decisions has been applied by the learned Single Court and has rightly allowed the writ petition.

10. It is worthwhile to mention here that Kaul Singh had filed a Civil Suit seeking the relief of permanent prohibitory and mandatory injunction against the appellant Jai Singh and one Bhup Singh qua the property in dispute. Jai Singh and Bhup Singh (defendants) resisted the suit by filing written statements. The suit was decreed partly against Jai Singh, who challenged the same before the District Judge, Mandi, which also came to be dismissed, constraining Jai Singh to assail the said judgment by filing Regular Second Appeal in terms of Section 100 of the Code of Civil Procedure (for short, CPC).

11. Findings of the Civil Court are binding on the Revenue Court and the Revenue Court has no jurisdiction to sit over the findings recorded by the Civil Court. It is also well settled principle of law that revenue records confer no title on the party and substantive rights of the contesting parties, qua title and of ownership, can be determined only by a competent civil Court.

12. The Apex Court in **Rajinder Singh vs. State of Jammu and Kashmir & others, 2008 AIR SCW 5157,** has laid down the same principle. It is apt to reproduce paragraph 17 of the said decision hereunder:

> *"17. It is well settled that Revenue Records confer no title on the party. It has been recently held by this Court in Suraj Bhan and Ors. v. Financial Commissioner and Ors., that such entries are relevant only for "fiscal purpose" and substantive rights of title and of ownership of contesting claimants can be decided only by a competent civil Court in appropriate proceedings."*

13. In the instant case, the Divisional Commissioner, while exercising powers under the Act, has virtually upset the judgment and decree passed by the Civil Court, ignoring the fact that a civil suit was already pending between the parties qua the same property before the Civil Court.

14. Another aspect of the case, which cannot be ignored, is that defendants Jai Singh and Bhup Singh had filed joint written statement before the Court of Civil Judge

(Junior Division), Court No.4, Mandi, wherein it has been admitted that some raw material had been stacked by the son of Jai Singh over the land in dispute, but with the permission and consent of the plaintiff. It is apt to reproduce relevant portion of paragraph 2 of the written statement hereunder:

> *".....No raw material for construction of house is being collected on khasra No.443 by replying defendant No.1 as alleged and therefore question of any request and alleged threatening with dire consequences does not arise at all. However, it is submitted that some raw material has been stacked by son of replying defendant No.1 namely Davinder Singh on some part of land owned by plaintiff with permission and consent of plaintiff which will be removed by him after rainy season....."* *Emphasis added.*

15. Keeping in view the pleadings contained in paragraph 2 of the written statement, reproduced above, the defendants i.e. Jai Singh and Bhup Singh, had admitted virtually the claim of the plaintiff Kaul Singh and have also stated that the son of defendant No.1 Jai Singh has stacked the raw material only with the consent of the plaintiff Kaul Singh, which would be removed shortly. Thus, it does not lie in the mouth of the appellant Jai Singh to lay claim before the Revenue Authority.

16. Having said so, we are of the view that the writ Court has rightly quashed the order made by the Divisional Commissioner.

17. We accordingly hold that there is no merit in the appeal filed by the appellant and the same is dismissed and the impugned judgment is upheld.

RSA No.75 of 2012:

18. Original defendant No.1 Jai Singh has filed the instant appeal under Section 100 of the Code of Civil Procedure, (for short, the CPC), against the judgment, dated 22nd September, 2011, passed by the District Judge, Mandi, in Civil Appeal No.145 of 2009, titled Jai Singh vs. Kaul Singh and another, whereby the judgment and decree, dated 23rd March, 2009, passed by the Civil Judge (Junior Division), Court No.4, Mandi, decreeing the suit of the plaintiff Kaul Singh (respondent No.1 herein), came to be affirmed.

19. Brief facts of the case, necessary to dispose of this appeal, are summarized as under:

20. The plaintiff filed a suit for permanent prohibitory and mandatory injunction on the ground that, despite the fact that the plaintiff was recorded as owner in possession of the land comprised in Khasra Nos.438, 443, 448, 455, 461, 619, 622, 638 and 640, measuring 5-18-11 bighas, situated in Mauja Panjehti, Tehsil Sadar, District Mandi, H.P., the defendants were stacking construction material in Khasra No.443 and also laid pipe line in khasra No.448, without his permission.

21. The defendants resisted the suit by filing the written statement.

22. The issues were struck and the parties led their evidence.

23. The learned trial Court, after appreciating the rival contentions of the parties, decreed the suit partly and defendant No.1 (appellant herein) was restrained not to stack any raw material over the suit land comprised in Khasra No.443, which findings of the learned trial Court came to be upheld by the learned District Judge, on appeal filed by defendant Jai Singh.

24. Feeling aggrieved, the defendant filed the instant Regular Second Appeal.

25. The appeal was admitted by this Court on 2nd May, 2013, on the following substantial questions of law:

> *"1. Whether learned lower Appellate Court has erred in dismissing the application under Order 41 Rule 27 CPC filed by the appellant before him?*
>
> *2. Whether the Courts below have erred in granting decree of permanent prohibitory injunction in favour of respondent No.1 as the land in question during the pendency of the litigation has been allotted to appellant in consolidation but that order has been stayed in writ petition filed by respondent No.1?"*

26. Appellant had filed an application under Order 41 Rule 27 of the CPC for placing on record the order, dated 17.2.2010, made by the Divisional Commissioner in Revision Petition No.913 of 2009, whereby the revision petition filed by the appellant was allowed, came to be stayed by the Writ Court and was, thus, under eclipse, (subject matter of the Letters Patent Appeal supra).

27. The civil suit was filed by the plaintiff Kaul Singh in the year 2006 and was decreed vide judgment and decree, dated 23rd March, 2009 and the Divisional Commissioner has passed the order in the Revision Petition on 17th February, 2010.

28. The Apex Court in **Rajinder Singh vs. State of Jammu and Kashmir & Ors, 2008 AIR SCW 5157** has held that when appropriate proceedings are drawn in a competent Civil Court for the determination of substantive rights of ownership, the observations made in the orders of Revenue Authorities shall not come in the way of the parties. It is apt to reproduce paragraphs 19 and 20 as under:

> *"19. The present appeal, therefore, deserves to be disposed of by leaving all the parties to take appropriate proceedings in accordance with law in a competent civil Court so far as substantive rights of ownership, title or inheritance are concerned. In view of the fact, however, that certain observations have been made and questions have been considered with regard to rights of sons and daughters in the property of father under the Hindu Succession Act as also under the Jammu and Kashmir Hindu Succession Act, we clarify that all those observations which were not relevant in view of the limited question before the Revenue Authorities, would have no effect in the proceedings before the Civil Court if such proceedings have been initiated in a competent Court.*
>
> *20. We, therefore, dispose of this appeal by granting liberty to the parties to take appropriate proceedings in a competent Civil Court by making it clear that the observations made in the orders of Revenue Authorities as also by the High Court will not come in the way of the parties in a suit as and when proceedings have been initiated for the purpose of determination of substantive rights of ownership."*

29. It is worthwhile to mention here that the plaintiff Kaul Singh had already questioned the said order of the Divisional Commissioner by the medium of writ petition, which was stayed vide order dated 20th October, 2010, thus, was under eclipse. Therefore, the District Judge has rightly dismissed the application moved under Order 41 Rule 27 CPC. The said order of the Divisional Commissioner stands quashed by the Writ Court, vide judgment dated 20th June, 2013.

30. Thus, substantial question of law No.1 is replied accordingly.

31. Coming to substantial question No.2, the same is dependant upon question No.1 and in view of the quashment of the order made by the Divisional Commissioner, as discussed hereinabove, this question also loses efficacy and is replied accordingly.

32. However, we have gone through the plaint, written statement, evidence, oral as well as documentary, and have also perused the judgment made by the District Judge and are of the considered view that no substantial question of law, as formulated, is involved in the present appeal.

33. The plaintiff in paragraph 1 of the plaint has laid claim that defendants Jai Singh and Bhup Singh, without any reason, are causing interference with his possession and have also stacked material. Defendants, in their joint written statement, have not laid any claim viz.a viz. the property in dispute and the learned trial Court accordingly passed the decree in favour of the plaintiff, which came to be affirmed by the District Judge. A reference has already been made to the relevant portion of the written statement of the defendants while dealing with the Letters Patent Appeal (supra) and the same is not being reproduced for the sake of brevity.

34. The Apex Court in series of cases has laid down the principle as to what question can be said to be substantial question of law. The Apex Court in **Anathula Sudhakar vs. P. Buchi Reddy (Dead) By L.Rs. and others, 2008 AIR SCW 2692,** has held that in the absence of pleadings and issue, no question of law relating to it could be formulated in second appeal. It was further observed that the question which has not been considered in the suit, cannot be gone into in second appeal. It is apt to reproduce paragraph 25 of the said decision hereunder:

> *"25. The High Court, in the absence of pleadings and issues, formulated in a second appeal arising from a suit for bare injunction, questions of law unrelated to the pleadings and issues, presumably because some evidence was led and some arguments were advanced on those aspects. The only averment in the plaint that plaintiffs were the owners of the suit property having purchased the same under sale deeds dated 9.12.1968, did not enable the court, much less a High Court in second appeal, to hold a roving enquiry into an oral gift and its validity or validation of ostensible title under section 41 of TP Act. No amount of evidence or arguments can be looked into or considered in the absence of pleadings and issues, is a proposition that is too well settled."*

35. It is also well settled proposition of law that the High Court under Section 100 of the CPC can interfere with the concurrent findings recorded by the Courts below only in case the said findings are perverse and arbitrary and are based upon non-appreciation of pleadings and evidence on record.

36. The Apex Court in **Kashmir Singh vs. Harnam Singh & Anr., 2008 AIR SCW 2417,** has held that as a general rule, the High Court should not interfere with concurrent findings of the Courts below. However, the Apex Court has also pointed out certain well recognized exceptions, where concurrent findings can be interfered with in a regular second appeal. It is apt to reproduce paragraph 17, as under:

> *"17. The general rule is that High Court will not interfere with concurrent findings of the Courts below. But it is not an absolute rule. Some of the well recognized exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to 'decision based on no evidence', it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."*

37. The Apex Court in **Gurdev Kaur & Ors. vs. Kaki & Ors., 2006 AIR SCW 2404,** while dealing with the scope of Section 100 of the CPC, has held, in paragraphs 68 and 69, as under:

> *"68. The analysis of cases decided by the Privy Council and this Court prior to 1976 clearly indicated the scope of interference u/s. 100 of the Code of Civil Procedure by this Court. Even prior to amendment, the consistent position has been that the Courts should not interfere with the concurrent findings of facts.*
>
> *69. Now, after 1976 Amendment, the scope of Sec. 100 has been drastically curtailed and narrowed down. The High Courts would have jurisdiction of interfering u/s. 100 of the Code of Civil Procedure only in a case where substantial questions of law are involved and those questions have been clearly formulated in the memorandum of appeal. At the time of admission of the second appeal, it is the bounden duty and obligation of the High Court to formulate substantial questions of law and then only the High Court is permitted to proceed with the case to decide those questions of law. The language used in the amended section specifically incorporates the words as "substantial question of law" which is indicative of the legislative intention. It must be clearly understood that the legislative intention was very clear that legislature never wanted second appeal to become "third trial on facts" or "one more dice in the gamble". The effect of the amendment mainly, according to the amended section, was:*
>
> *(i) The High Court would be justified in admitting the second appeal only when a substantial question of law is involved;*
>
> *(ii) The substantial question of law to precisely state such question;*
>
> *(iii) A duty has been cast on the High Court to formulate substantial question of law before hearing the appeal;*
>
> *(iv) Another part of the Section is that the appeal shall be heard only on that question."*

38. The learned counsel for the appellant, during the course of hearing, was not in a position to point out as to how the concurrent findings recorded by both the Courts below are not based upon correct appreciation of pleadings and evidence on record. Moreover, as discussed hereinabove, the defendants have virtually not denied the claim of the plaintiff, is an admission in the eyes of law, which fact has weighed with the Courts below in granting the decree in favour of the plaintiff. The Courts below have not committed any illegality and have returned findings on question of fact read with the pleadings of the parties. Therefore, the findings recorded by both the Courts below are well reasoned and no ground has been made out for setting aside the same.

39. Having said so, we hold that there is no merit in the second appeal and the same is dismissed.

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

Dharam Pal & another. ....Revisionists

versus

Amar Nath & others. ....Non-revisionists.

Civil Revision No. 26 of 2015
Decided on: 17.6.2015.

Code of Civil Procedure, 1908- Section 115- Learned Counsel for the revisionists stated that he did not want to continue with the Revision Petition- hence, petition is dismissed as withdrawn.

For the revisionist : Mr. Dheeraj K. Vashishta, Advocate.
For the non-revisionists: Mr. Neeraj Gupta, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the revisionists submitted that he has been instructed by the revisionists that they do not want to continue with the present revision petition and the same may be dismissed as withdrawn. In view of the submission of learned Advocate appearing on behalf of the revisionists present revision petition is dismissed as withdrawn. No order as to costs. Pending applications if any also stand disposed of.

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

NTPC Limited .....Appellant.
Versus
Sh. Jitender and others. .....Respondents.

CMP(M) No. 274 of 2015 in
RFA No. 80 of 2014
Decided on: 17th June, 2015

Code of Civil Procedure, 1908- Order 22 Rule 3- One of the petitioners in an appeal had expired during the pendency of the reference petition- this fact was not brought to the notice of the Court and the award was passed in ignorance of the death- held, that death of the petitioner and non-substitution of his legal representatives in Reference Petition does not affect the same – legal representatives are entitled to receive compensation, therefore, they are ordered to be brought on record. (Para-2 to 4)

Cases referred:
Collector Land Acquisition NHPC versus Khewa Ram and others, Latest HLJ 2007 (HP) 270

For the appellant: Mr. Neeraj Gupta, Advocate.
For the respondents: Mr. Sandeep Sharma, Advocate vice counsel for respondents No. 1 to 3, 5, 6 and proposed LRs 4(a) to 4(c).
Mr. D.S. Nainta, Addl. A.G with Mr. Pushpinder Jaswal, Dy. A.G for respondents No. 7 and 8.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Respondent No. 4, Shri Des Raj (one of the petitioner in the trial Court) in the main appeal has expired on 04.12.2008 i.e. during the pendency of the reference petition in the trial Court. The factum of his death was neither brought to the notice of the trial Court either by the surviving petitioners or legal representatives of the said respondent nor any steps for his substitution taken. To the contrary, the reference petition filed by said Sh.

Des Raj and his brothers S/Sh. Jitender, Prakash Chand, Diwakar, Gian Chand and Tipender came to be decided along with batch of petitions vide award dated 13.12.2013, under challenge in the present appeal, without taking notice of his death and substitution of his legal representatives.

2. The question for adjudication as arisen in this application is as to what is the impact of death of deceased respondent Des Raj and non-substitution of his legal representatives in these proceedings. The law in this regard is no more *res-integra* as this Court in **Collector Land Acquisition NHPC** versus **Khewa Ram and others, Latest HLJ 2007 (HP) 270**, after taking into consideration the provisions contained under the Land Acquisition Act and also under Order 22 of the Code of Civil Procedure, has held that a reference petition under Section 18 has to be answered by the Court and in case the claimant does not appear despite notice, he do so at his own risk. In the event of the sole claimant died during the course of proceedings and the Court unaware of his death answered the reference on the basis of the material available on record, in an appeal either filed by his legal representatives or the acquiring authority, the award has to be set aside and the proceedings deemed to have been abated, of course subject to the consideration of the question of setting aside the abatement on condonation of delay, however, only by the reference Court and not by the appellate Court. In a case where there are more claimants or where more than one petition (a batch of petitions) decided by a common award, death of one of the claimants or sole claimant during the course of proceedings in the trial Court do not render the award passed on common evidence led by all the parties a nullity and the legal representatives can even be brought on record during the pendency of the appeal also. The relevant portion of the judgment supra reads as follows:

> "13. The question that next arises is as to what happens if the claimant has died during the proceedings. This can also happen under various circumstances, some of which are being dealt with hereunder:
>
> a. In case there is only one claimant in an isolated case of land acquisition and the claimant dies, then obviously if the court is unaware about the death of the claimant, it will proceed to decide the reference on the material placed on record before it. In such a case, if either the legal representatives of the claimant or the acquiring authority files an appeal, then the award of the District Judge will have to be set aside and the reference proceedings deemed to have been abated. The questions whether abatement should be set aside and whether the delay, if any, should be condoned are questions to be decided by the District Judge alone and not by the appellate court.
>
> b. However even in the aforesaid situation, the award cannot be said to be nullity since the reference court is bound by law to answer the reference. In case none of the parties is aggrieved, the legal representatives can execute the award in accordance with law.
>
> c. In cases where there are more than one claimants and each is owner of a separate share, then the death of one of the claimants can never render the award to be a nullity. The award is answered in favour of all the claimants. Therefore, in an appeal filed either by the claimants or by the acquiring authority, the legal

representatives of the deceased claimant can be brought on record even during the course of the appeal and it is not necessary to refer the matter back to the reference court.

d. Where there are more than one petitions and they are decided by a common award and the sole claimant in one of the petitions has died during the pendency of the reference proceedings, the entire award cannot be termed a nullity. Since the award is a common award based on common evidence led by all the parties, the legal representatives of the deceased can be brought on record during the pendency of the appeal also.

e. In cases(c) and (d) above, the abatement, if any, will be qua the deceased and the entire proceedings will not abate. In both these cases the legal representatives can be brought on record even during the pendency of the appeal.

3. The present is a case which is covered by (b) and (c) of para 13 of the judgment supra, because deceased Des Raj was not the only petitioner in the reference petition but his brother S/Sh. Jitender, Prakash Chand, Diwakar, Gian Chand and Tipender being co-owners of the acquired land were also the petitioners with him. Above all, the reference petition, they preferred has been decided by a common award passed in a batch of petitions on the basis of common evidence available on record. Therefore, irrespective of the death of deceased respondent Des Raj during the course of the proceedings in the reference petition in the trial Court, the question of abatement of the appeal and substitution of his legal representative can be gone into by this Court in the present appeal. Since his brothers, petitioners No. 1 to 3, 5 and 6 were their on record to represent the estate of the deceased petitioner-respondent and to pursue the petition, therefore, the question of abatement does not arise. The proposed legal representatives of deceased respondent Des Raj named in para 3 of the application are otherwise also required to be brought on record being entitled to receive the compensation in respect of the acquired land to the extent of their share and also to straighten the record.

4. I, therefore, allow the application and on setting aside the abatement of the proceedings, order to substitute the proposed legal representatives named in para 3 of the application as respondents No. 4(a) to 4(c) in the main appeal. Necessary corrections be made in the records accordingly. Amended memo, in terms of this order be also filed within two weeks. The application stands disposed of. Record be sent back to learned trial Court along with an authenticated copy of this order for making necessary corrections therein, in terms of this order and remitting the same to this Court after doing the needful.

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

Puran Chand & anr. .....Petitioners.

Versus

Sanjay & ors. .....Respondents.

CMPMO No. 221 of 2014.
Decided on: 17.6.2015.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff claimed an injunction pleading that defendants had started interfering with the path and the kuhal due to which

plaintiffs were unable to sow paddy in the suit land- defendant pleaded that they had not consented for the construction of the path- when the objection was raised Panchayat stopped the construction work- major portion of the path has been constructed over the land of the plaintiff- respondents have given no objection for the construction of the jeepable road- plaintiffs could not be deprived of their right of access to the houses- therefore, plaintiff was rightly held entitled for the relief of injunction by Learned Civil Judge.

(Para-5 to 8)

Case referred:
Dorab Cawasji Warden vrs. Coomi Sorab Warden and ors., AIR 1990 SC 867

For the petitioners: Mr. Ajay Sharma, Advocate.
For the respondents: Mr. Vishwa Bhushan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 29.5.2014, rendered by the learned District Judge, Kangra at Dharamshala, in Civil Misc. Appeal No. 8/XIV-2014.

2. Key facts, necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs) have instituted a suit for mandatory as well as prohibitory injunction against the defendants-respondents (hereinafter referred to as the defendants). The plaintiffs have their abadi and land comprised in Khata No. 175, Khatauni No. 317, Kh. No. 96, 97, 106 and 107, area measuring 0-19-32 hectares situated in Up Mohal Narwana, Mouza Yol, Tehsil Dharamshala, Distt. Kangra, H.P., as per jamabandi for the year 2009-10. There exists a village path shown in red colour in plan from State Highway Dharamshala-Palampur to go to the suit land. Two meter path has been cemented by the Gram Panchayat out of the funds provided by the State Government with the consent of effected persons. There was a Kuhal shown in blue colour in the plan and one of the Kuhal was drawn from the Nullah. The land and houses of the defendants were also situated on the spot. The defendants have started causing obstruction in the use of path and free flow of water in the Kuhal and have placed boulders at point 'A', as shown in the plan. The plaintiffs were not able to sow paddy crops in the suit land.

3. The suit was contested by the defendants. According to them, the path and Kuhal had not been constructed out of public funds. Defendant No. 1 had been living in Noida since 1994. He alongwith defendant No. 2 had not consented for the construction of the path. Defendant No. 1 during the year 2009-10, on coming to know that the suit path was being converted into a cemented path, rushed to the Village. He sought information under the RTI Act regarding construction of the path. He was informed by the Panchayat Secretary that construction work of suit path had been stopped. He placed rocks and stones on his land. The Kuhal did not exist on the spot.

4. The learned Civil Judge (Sr. Divn.), Kangra at Dharamshala, vide order dated 2.9.2013 directed the defendants to remove the heap of stones and rocks from the passage within a period of 30 days from the date of passing of the order. The defendants preferred an appeal before the learned District Judge, Kangra at Dharamshala. The learned District Judge, Kangra at Dharamshala, partly allowed the same on 29.5.2014 and the parties were directed to maintain status quo till the disposal of the suit.

5. It is evident from the facts enumerated hereinabove that the path is in existence. It was cemented by the Gram Panchayat. The path connects the State Highway Dharamshala-Palampur. The plaintiffs had been using this path to reach their houses. It is not in dispute that the path has been constructed by the Panchayat and it was cemented only in 2009-10. Defendant No. 1 Puran Chand came from Noida and stacked stones on the path.

6. The major portion of the path has been constructed from the land of the plaintiffs. The respondents have given no-objection for the construction of jeepable road from the house of Purvi Ram to the house of Panju Ram. The learned Civil Judge(Sr. Divn.), has rightly ordered to defendants to remove the stones and rocks from the passage. The learned District Judge, has erred in law by directing the parties to maintain status quo. The plaintiffs could not be deprived of their right of access to the houses. They had also been using the path to go to their fields. The defendants have not raised objection when the path was cemented by the Gram Panchayat.

7. Mr. Vishwa Bhushan, Advocate, has vehemently argued that the relief of interlocutory mandatory injunction could not be ordered by the learned Civil Judge (Sr. Divn.), Kangra at Dharamshala. Their lordships of the Hon'ble Supreme Court in the case of ***Dorab Cawasji Warden vrs. Coomi Sorab Warden and ors.,*** reported in ***AIR 1990 SC 867,*** have held as under:

> "14. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guid- lines. Generally stated these guidelines are:
>
> (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.
>
> (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.
>
> (3) The balance of convenience is in favour of the one seeking such relief."

8. In the instant case, the plaintiffs have made out a strong case and they would have suffered irreparable loss and injury in case the right to access to their houses is denied. The balance of convenience also lies in their favour.

9. Accordingly, the petition is allowed. Order dated 29.5.2014 in Civil Misc. Appeal No. 8/XIV-2014 passed by the learned District Judge, Kangra at Dharamshala, H.P. is set aside. Order dated 2.9.2013 in Civil Suit No. 276 of 2013 passed by the learned Civil Judge (Sr. Divn.), Kangra at Dharamshala is restored.

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

Seli Hydro Electric Power Company Ltd. ...Petitioner

Versus

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

CWP No. 9566 of 2014
Judgment reserved on: 20.5.2015
Date of Decision : June 17th , 2015

Constitution of India, 1950- Article 226- Petitioner sought quashing of the letter stating that notification issued under Section 4 of Land Acquisition Act, 1984 stood lapsed and direction be issued to Land Acquisition Collector to initiate the proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013- the record showed that there was unreasonable delay on the part of the respondents in finalizing the proceedings under Land Acquisition Act- therefore, respondents cannot take advantage of the wrong to claim that they will proceed under the new Act- provision of Section 6 will not come in to operation till the requirement laid down in part-VII of the Act are fulfilled – respondents had delayed the proceedings instead of promptly paying compensation- petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents- Writ Petition allowed and the letter issued by respondents quashed. (Para-34 to 55)

Cases referred:

Kusheshwar Prasad Singh vs. State of Bihar and others (2007) 11 SCC 447
Babu Barkya Thakur vs. State of Bombay and others (1961) 1 SCR 128
Larsen & Toubro Ltd. vs. State of Gujarat and others (1998) 4 SCC 387

For the Petitioner : Mr. M.H. Baig, Mr. Bhupinder Gupta, Senior Advocates, with Ms. Ritu Bhalla, Ms. Shivambika Sinha, Mr. Janesh Gupta and Ms. Jyotsna Rewal Dua, Advocates.

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

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner has sought directions for quashing letter issued by the State on 5.8.2014 stating therein that the notification issued under Section 4 of the Land Acquisition Act, 1894 (for short 1894 Act) stands lapsed and directed the Land Acquisition Collector, Udaipur to initiate fresh acquisition proceedings under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (for short 2013 Act). The petitioner has further prayed for quashing the opinion of the Principal Secretary (Law) on the basis of which the impugned letter has been issued. The petitioner has lastly sought a writ of mandamus seeking directions to the respondents to proceed with deliberate speed to conclude the proceedings under Section 6 of the Land Acquisition Act, 1894 or in the alternative to proceed with the Land Acquisition proceedings

initiated by way of Section 4 Notification under the second proviso to Section 19 (7) of the Act of 2013.

2. The brief facts of the case are that on 9.6.2008 the Government of Himachal Pradesh invited bids for setting up of 320 MW Hydro Electric Power Plant in District Lahaul and Spiti. On 28.2.2009 SELI Project was awarded to M/s Hindustan Powerprojects Private Limited (then known as Moser Baer Projects Private Limited).

3. On 22.3.2011 Hindustan Powerprojects Private Limited entered into a Pre-Implementation Agreement with Government of Himachal Pradesh. Simultaneously, a tripartite agreement was executed between the Government of Himachal Pradesh, Hindustan Powerprojects Private Limited and petitioner for transferring all assets, liabilities, obligations, privileges, NOCs of Hindustan Powerprojects Private Limited arising under the terms of the Pre-Implementation Agreement to the petitioner.

4. On 9.9.2011 Directorate of Energy increased the installed capacity of the SELI Project from 320 MW to 400 MW subject to fulfillment of certain terms and conditions provided therein.

5. On 15.11.2011 a joint Inspection Committee consisting of respondent No.5, Divisional Forest Officer, Range Forest Officer, Assistant Engineer, H.P. Public Works Department, Assistant Engineer, HPSEB Limited and Assistant Engineer, I&PH Department, conducted a joint inspection of the project sites proposed by the petitioner and recommended diversion of forest land admeasuring 276.1875 Ha under Section 2 of the Forest Conservation Act, 1980 and acquisition of private land measuring 16.7779 Ha under the Land Acquisition Act, 1894.

6. On 28.2.2012 inescapability certificate dated 27.2.2012 was forwarded by the Deputy Commissioner, Lahaul and Spiti to respondent No.5 clearly stating therein that the land required for the construction of the SELI Project was inescapable and the landowners would not be rendered landless due to acquisition of the proposed land.

7. On 3.3.2012 petitioner submitted a proposal to respondent No.5 for acquisition of private land required for the construction of SELI Project under Section 4 of the 1894 Act. It was requested to acquire private land admeasuring 198-12-19 bigha under the 1894 Act.

8. On 9.3.2012 respondent No.5 wrote to the Deputy Commissioner, District Lahaul and Spiti, recommending acquisition of 198-12-19 bigha of land in revenue villages Udaipur, Salpat, Madgran, Kurched and Salgran in favour of the petitioner. It was also requested that the proposal for the acquisition be forwarded to respondent No.1 for approval and issuance of notification under Section 4 of the 1894 Act.

9. In compliance with Section 4 of the 1894 Act, the preliminary notification for acquisition of land was issued on 7.3.2013 by the Government of Himachal Pradesh. On various dates, Section 4 Notification was published in various newspapers and wide publicity was given to Section 4 notification in the locality through the field revenue agency of the area concerned.

10. On 25.4.2013 Section 4 Notification, being Notification No. Vidyut-CH: (5)-5/2012 was published in the official gazette and objections were invited from concerned persons within a period of 30 days from the date of said notification.

11. The Ministry of Environment and Forests (for short "MOEF") on 1.7.2013 in principle approved the divergence of forest land. The environmental clearance was granted by the MOEF to the petitioner vide letter No. J-12011/6/2010-1A.1 dated 3.7.2013.

12. On 10.10.2013 respondent No.5 after conducting proceedings under Section 5A of the 1894 Act, prepared his report under Section 5A (2) of the said 1894 Act.

13. On 19.10.2013 respondent No.5 forwarded the report dated 10.10.2013 under Section 5A (2) of the 1894 Act to the respondent No.1 for further action. The documents pertaining to the proceedings culminating in the report including copies of objections filed, statements recorded and the proceedings were also enclosed with the said letter.

14. On 3.12.2013 respondent No.1 wrote to respondent No.5 stating that report under Section 4 of the Land Acquisition (Companies) Rules, 1963 (for short 1963 Rules) had not been received and respondent No.5 was requested to forward such a report to respondent No.1.

15. On 1.1.2014 the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 came into force.

16. On 3.1.2014 respondent No.5 wrote to the petitioner calling upon it to file a representation on matters detailed in the said letter in terms of Rule 4 (1) of the 1963 Rules. The petitioner immediately responded to this letter on 6.1.2014 and provided all supporting documents.

17. On 1.2.2014 respondent No.5 wrote to the District Agriculture Officer, Lahaul and Spiti, requesting him to submit his report whether the agricultural land sought to be acquired was "Good Agricultural Land" and/or how much area of this land was of average or above average productivity.

18. On 13.2.2014 the District Agriculture Officer responded to the letter of respondent No.5 and furnished the desired information. On 17.2.2014 respondent No.1 wrote to respondent No.4 with reference to the 2013 Act alongwith a request to frame rules under the 2013 Act and to indicate the further course of action in cases where Section 4 notification under the 1894 Act already stood issued.

19. On 4.3.2014 respondent No.5 submitted to respondent No.1 a report in terms of Rule 4 of the 1963 Rules. The approximate amount payable in lieu of the land to be acquired in terms of the 2013 Act was stated in the said letter to be Rs.1,22,20,00,000/- (Rupees One Hundred and Twenty Two Crores Twenty Lacs).

20. On 13.3.2014 the respondent No.4 in response to respondent No.1 letter dated 17.2.2014 clarified that in terms of Section 24 (1) (a) of the 2013 Act, in cases where the proceedings for acquisition were initiated, no award was made under Section 11 of the 1894 Act, then the compensation should be determined as per the provisions of the 2013 Act.

21. On 2.5.2014 meeting of the Land Acquisition Committee were held under the Chairmanship of respondent No.4 and recommended that notifications under Sections 6 and 7 of the 1894 Act be issued. On 26.5.2014 respondent No.1 forwarded a draft of the agreement under Section 41 of the 1894 Act to the petitioner requesting it to execute the same.

22. On 19.6.2014 the agreement in terms of Section 41 of the 1894 Act was executed between the petitioner and the Governor of Himachal Pradesh. This agreement was directed to be published in the official gazette and the same was published in the official gazette on 1.7.2014.

23. On 5.8.2014 the respondent No.1 wrote to the respondent No.5 and sent intimation to the petitioner that as per advice received from respondent No.2, fresh acquisition proceedings under the 2013 Act should be commenced in respect of SELI Project since one year period from the date of Section 4 Notification had lapsed.

24. On 11.8.2014 the petitioner after receipt of the letter dated 5.8.2014 from respondent No.1, responded to it and pointed out that no delay whatsoever had occurred on account of the petitioner and requested that extension be granted for issuance of declaration of purpose notification and acquisition proceedings be continued.

25. On 28.8.2014 respondent No.4 wrote to the respondent No.1 stating that the Revenue Department was not in a position to render any advice on the representation of the petitioner dated 11.8.2014 and recommended that respondent No.1 may re-examine the issue in consultation with respondent No.2 under the power to remove difficulties Clause (Section 113 of the 2013 Act) considering the geographical/geological conditions of the project location in Chenab Valley, being a snow bound area.

26. When no response was received from the respondents, the petitioner again on 1.10.2014 sent a representation to the respondents reiterating therein its earlier representation dated 11.8.2014 and it set out the events of delay caused at the hands of the respondents.

27. On 4.11.2014 the petitioner followed up on its letter dated 1.10.2014, but has not received any response from the respondents. It thereafter has been consistently following up with the respondents, but are yet to receive any response on such representations. Left with no other option, it has approached this Court for the grant of following substantive reliefs:

> *(a) A writ of certiorari for quashing the impugned letter No. MPP-Chh(5)-5/2012 dated 05.08.2014 (Annexure P-1) issued by respondent No.1 and the impugned opinion of respondent No.2 relied upon and mentioned extensively in the impugned letter.*
>
> *(b) A writ of mandamus directing the respondents to forthwith issue a declaration under Section 6 of the 1894 Act as the agreement under Section 41 of the 1894 Act has already been entered into.*
>
> *(c) A writ of mandamus directing the respondents to proceed with deliberate speed to conclude the proceedings under Section 6 of the 1894 Act within a stipulated time.*
>
> *(d) In the alternative to prayers (b) and (c) above, issue a writ of mandamus directing the respondents to proceed with the present case under the second proviso to Section 19 (7) of the 2013 Act and to extend the time for issuance of a notification for declaration of purpose and to continue with the Notifiction No. Vidyut-CH: (5)-5/2012 dated 25.04.2013 issued under Section 4 of the Land Acquisition Act, 1894.*

28. The respondents in response to the writ petition have filed their reply and have averred that the department through the Director of Energy entered on 22.3.2011 a Pre-implementation Agreement with M/s Moser Bear Projects Private Limited and a

Tripartite Agreement was also executed through the Director of Energy with M/s Moser Bear Projects Pvt. Ltd and M/s Seli Hydroelectric Power Company for setting up of Seli Hydro Power Project (320 MW). The capacity of this project was subsequently enhanced from 300 MW to 400 MW.

29. The respondent department on receipt of a proposal from the Land Acquisition Collector-cum-Sub Divisional Officer (Civil), Udaipur i.e. Respondent No.5, for acquisition of land in favour of the petitioner for implementation of Seli (400 MW) HEP issued the preliminary notification on 7.3.2013 under provisions of Section 4 of the 1894 Act after completing codal formalities and obtaining concurrence of Forest, Tribal Development and Law Departments. The respondent department was further required to issue declaration i.e. Notification under Section 6 of the Act within a period of one year from the date of last publication in Rajpatra i.e. 24.4.2013 of Notification under Section 4, which could not be issued within stipulated period for the following reasons:

"(i) That the report under Section 5(2) of the Land Acquisition Act, 1894 was submitted by the Land Acquisition Collector on 19.10.2013 i.e. after a period of 7 months from the issue of notification under Section 4.During examination of this report, it was noticed that the report of Land Acquisition Collector under Section 4 of the Land Acquisition Companies Act, 1963 was not available which was, therefore, asked from the Land Acquisition Collector on 3.12.2013 and received subsequently on 5.3.2014.

(ii) That in the meanwhile, the Land Acquisition Act, 1894 was repealed and the new Act namely "The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013" came into force w.e.f. 1.1.2014 which provided that all fresh notifications for acquiring the land in any area for public purposes henceforth now shall be initiated as per provisions contained in the new Act ibid. Therefore, the case was returned to the Land Acquisition Collector on 6.3.2014 to facilitate required action under the provisions of new Act at his level with the following advice:

> *".....that since the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 has come into force w.e.f. 1.1.2014 and all fresh notifications for acquiring the land in any area for public purposes henceforth now shall be initiated as per provisions contained in the new Act ibid. As provided under Section 109 of the said Act bestows powers with the appropriate Government i.e.State Government to make rules for carrying out the provisions of this Act. As such in order to comply with the provisions contained under Sections 2 (2), 2(3) (a), 4 (1), 6 (1), 16, 19(2), 33 (3), 41 (4), 43 (2), 45 (3), 48(3), 50(3), 55 (3), 56, 60(1), 84 (2), 101 and (t) manner of publication whenever the provisions of this Act provide for; the statutory rules are being framed by the Revenue Department. However, Section 24 of the Act makes the position clear where award u/s 11 of the Land Acquisition Act 1894 has not been made and even otherwise.*
>
> *In view of the above mentioned facts and position the case is returned herewith to you with the request to facilitate required action at LAO level under the new Act, till new notification of Rules is made by Revenue Department".*

(iii) That the matter was taken up with the State Revenue Department vide letter dated 17.2.2014 for framing of required Rules under the provisions of New Act so that land acquisition cases could be processed accordingly. It was also

requested to clarify and advise the further course of action in such cases where proposals for acquisition of lands have already been initiated and Notification under Section 4 of the Land Acquisition Act, 1894 stands issued. A clarification in this regard was conveyed by the Revenue Department (respondent No.4.) on 13.3.2014 stating that "the question raised is squarely covered under the provisions of Section 24 (1) (a) of the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 which clearly states that in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894, where no award under Section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply. Hence, you are advised to take action as per provisions of aforesaid section". Thus, it took about one month's time to have the advice from the Revenue Department.

(iv) That on receipt of above advice from the Revenue Department, proceedings were further processed by the respondent Department for issuance of declaration/ Notification under Sections 6 & 7 of the Land Acquisition Act, 1894 and the case proposal was sent to Revenue Department on 31.3.2014 to place the matter before the Land Acquisition Committee for its consideration and recommendations. This Committee considered the proposal in its meeting held on 2.5.2014 and recommended the acquisition of land measuring 197-14-15 bighas in Villages Udaipur, Saplat, Madgran, Kurched and Salgran of Sub Division Udaipur for construction of Seli HEP (400 MW) in favour of the petitioner and further recommended to issue the notifications under Sections 6 and 7 of the Land Acquisition Act, 1894. However, proceedings of this meeting was circulated by the Revenue Department only on 22.5.2014 (i.e. with a delay of 20 days) and received in the respondent department on 23.5.2014 i.e. after the expiry of limitation period as stipulated under the Land Acquisition Act, 1894."

30. We have heard learned counsel for the parties and have gone through the record of the case carefully.

31. Mr. M.H. Baig, learned Senior counsel for the petitioner has strenuously argued that the petitioner cannot be prejudiced for the inaction and delay caused by the respondents themselves. He has further argued that the respondents have completely misconstrued and misinterpreted the provisions of Section 6 of the 1894 Act. The impugned letter relies on proviso (1) (ii) to Section 6 (1) of the 1894 Act to the effect that no declaration under Section 6 can be made after the expiry of one year from the date of publication of the Section 4 notification. But the respondents have failed to take into consideration the opening sentence of Section 6 makes it clear that the said Section 6 alongwith all provisos is subject to Part VII of the 1894 Act as amended by Act 68 of 1984, which specifically deals with the acquisition of the land for companies. He further contended that it was only after the statutory requirement as envisaged in Part VII of the 1894 Act are fulfilled that the legal prohibition to "put in force" only Section 6 of the 1894 Act is lifted. Therefore, any provision of Section 6 including its provisos will not come into operation till the stipulated requirements of Part VII are fulfilled.

32. The sum and substance of the argument of the learned counsel for the petitioner is that Section 6 of the 1894 Act is subject to Part VII of the Act and execution of the agreement under Section 41 thereof, is not only reasonable but even necessary when a company is involved for whose use the proposed land is sought to be acquired. On the

question of limitation, it has been argued that the same shall not begin to run unless and until the proceedings under Part VII are complete. He further contended that the rigors of limitation set forth in proviso 1 (ii) to Section 6 of the 1894 Act have been relaxed under the 2013 Act inasmuch as the second proviso to Section 19 (7) thereof provides for and vests with the respondents the power to extend one year period for making a declaration of purpose in circumstances that justify such an extension.

33. While on the other hand, learned Advocate General has argued that once the Notification under Section 4 of the Land Acquisition Act, 1894 had lapsed prior to that the 1894 Act being repealed and the new 2013 Act had come into force on 1.1.2014, then in such situation there was no option with the respondents but to proceed for fresh land acquisition proceedings under the new Act. He further contended that insofar as the pending land acquisition proceedings as on 1.1.2014 are concerned, only the provision of Section 24 (1) (a) of the 2013 Act was relevant which reads as under:

> "(1) Notwithstanding anything contained in the Act in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 – (a) where no award under Section 11 of the said Land Acquisition Act has been made, than, all provisions of this Act relating to the determination of the compensation shall apply".
>
> We now proceed to deal with the rival contentions of the parties.
>
> **Delay on the part of the respondents:**

34. A perusal of the record would show that it was only on account of the respondents that there has been delay in commencing and taking to its logical end the proceedings under the Land Acquisition Act. The respondent No.5 received notification under Section 4 of the Act on 7.3.2013 and he promptly within three days on 11.3.2013 dealt with the same. The objections from the land owners were received and dealt with by respondent No.5 without any delay, but then the issuance of final report under Section 5 A (2) of the 1894 Act took six months and thereafter the report was prepared on 10.10.2013 and final report under Section 5 A (2) of the 1894 Act was issued.

35. The record further reveals that first, it took respondent No.5 almost five months and fifteen days from the date of publication of the Section 4 notification to complete the proceedings under Section 5A of the 1894 Act; second having prepared this report, it took the respondent No.5 nine days to forward the same to respondent No.1; third at the time of sending of the report under Section 5A(2) of the 1894 Act on 19.10.2013, respondent No.5 ought to have but failed to send the report under Rule 4 of the 1963 Rules; fourth, after having received the said report under Section 5A of the 1894 Act, respondent No.1 took almost forty-five days to realise that the report under Rule 4 of the 1963 Rules had not been received by it and pointed the same out only vide letter dated 3.12.2013; fifth respondent No.5 thereafter took a month to intimate the petitioner about the above and sought the information from it for preparing the Rule 4 report vide its letter dated 3.1.2014; sixth though the petitioner vide its letter dated 6.1.2014 promptly supplied the information sought within three days of the letter dated 3.1.2014 (though almost all the information was already otherwise with respondent No.5), respondent No.5 forwarded the report under Rule 4 of the 1963 Rules only on 4.3.2014; seventh the meeting of the Land Acquisition Committee dated 2.5.2014 was held after about one month twenty eight days of the report dated 4.3.2014 under Rule 4 of the 1963 Rules. The respondents in the meeting of even date recommended inter alia that the notification under Section 6 of the 1894 Act be issued. It took respondent No.4 about twenty-five days to reply the same and there is no explanation whatsoever for such delay. Here, it may be pertinent to note that while respondent No.1's

query dated 17.2.2014 was pending with respondent No. 4, respondent No.1 had already issued direction to respondent No.5 on 6.3.2014 to proceed under the 2013 Act.

36. After receipt of the reply from respondent No.4 on 13.3.2014 it took the respondent No.1 seventeen days for asking the respondent No.4 to place the matter before the Land Acquisition Committee vide his letter dated 31.3.2014. It took thirty-two days for holding the meeting of the Land Acquisition Committee which was finally convened by respondent No.4 on 2.5.2014. It took twenty days to circulate the proceedings of the Land Acquisition Committee which was circulated on 22.5.2014. It was eventually one month eighteen days after the decision had been taken by the Land Acquisition Committee that the agreement under Section 41 of the 1894 Act came to be executed on 19.6.2014 and after about twelve days of the execution of this agreement, the same was published in the official gazette on 1.7.2014. Draft notification under Sections 6 and 7 of the 1894 Act was sent to respondent No.2 for vetting on 7.7.2014 i.e. six days after publication of Section 41 agreement. It was eventually on 5.8.2014 i.e. after twenty-nine days after draft notification under Section 6 and 7 of the 1894 Act was sent to respondent No.2 for vetting that the impugned letter was issued by respondent No.1 on 5.8.2014 directing respondent No.5 to initiate fresh proceedings under the 2013 Act on the ground that one year period had lapsed from the date of issuance of the Section 4 notification.

37. Not only this, the representations made by the petitioner against the impugned letter dated 11.8.2014, 1.10.2014 and 4.11.2014 were left unattended and it is only pursuant to the directions passed by this Court on 19.12.2014 that the same came to be decided.

38. The aforesaid narration of facts clearly reveals that there has been an unreasonable delay at the instance of the respondents in finalizing the proceedings under the Land Acquisition Act. The respondents ought to had dealt with the case immediately or in any case within "reasonable time". The authority cannot neglect to do that which the law mandates and requires doing. By not promptly issuing notifications as envisaged under the Land Acquisition Act, it can safely be concluded that the respondents have failed to discharge their statutory duty and the petitioner is therefore fully justified in urging that such default in discharge of statutory duty by respondents under the Act cannot prejudice it.

39. We also find merit in the contention of the petitioner that once the respondents had itself failed to discharge its statutory duty, they cannot claim any advantage of the same by directing the respondent No.5 to initiate fresh proceedings under the 2013 Act on the ground that one year period had lapsed from the date of issuance of Section 4 notification.

40. In drawing such conclusion, we are supported by the observations of the Hon'ble Supreme Court in ***Kusheshwar Prasad Singh vs. State of Bihar and others (2007) 11 SCC 447*** wherein it has been held as follows:

> *"12. Having considered the rival submissions of the learned counsel for the parties, in our opinion, the appeal deserves to be partly allowed. So far as the contention of the appellant that the proceedings had been initiated in 1973-74 and final order was passed on 7.1.1976 is not disputed and cannot be disputed. If it is so, submission of the appellant is well founded that final statement as required by sub section (1) of Section 11 ought to have been issued and effect ought to have been given to the final order. Admittedly, no appeal was filed. Nor the order was challenged by any party. <u>The appellant is right in contending that final statement ought to have been issued immediately</u>*

or in any case within "reasonable time". The authority cannot neglect to do that which the law mandates and requires doing. By not issuing consequential final statement under Section 11 (I) of the Act, the authority had failed to discharge its statutory duty. Obviously, therefore, the appellant is justified in urging that such default in discharge of statutory duty by the respondents under the Act cannot prejudice him. To that extent, therefore, the grievance of the appellant is well founded.

13. The appellant is also right in contending before this Court that the power under Section 32-B of the Act to initiate fresh proceedings could not have been exercised. Admittedly, Section 32-B came on the statute book by Bihar Act 55 of 1982. The case of the appellant was over much prior to the amendment of the Act and insertion of Section 32-B. The appellant, therefore, is right in contending that the authorities cannot be allowed to take undue advantage of their own default in failure to act in accordance with law and initiate fresh proceedings."

Position of law:

41. Before we proceed further, certain provisions of the Land Acquisition Act, 1894, Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 and The Land Acquisition (Companies) Rules, 1963 may be noticed.

Section 4 of the Land Acquisition Act, 1894 reads thus:

"4. Publication of preliminary notification and power of officers thereupon. -

(1) Whenever it appears to the [appropriate Government] the land in any locality [is needed or] is likely to be needed for any public purpose [or for a company], a notification to that effect shall be published in the Official Gazette [and in two daily newspapers circulating in that locality of which at least one shall be in the regional language], and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality [(the last of the dates of such publication and the giving of such public notice , being hereinafter referred to as the date of the publication of the notification)].

(2) Thereupon it shall be lawful for any officer, either generally or specially authorized by such Government in this behalf, and for his servants and workman,-

to enter upon and survey and take levels of any land in such locality; to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle;

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent

of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so."

Section 5A of the 1894 Act, reads thus:

*"**5A. Hearing of objections**. - (1) Any person interested in any land which has been notified under section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a Company may, [within thirty days from the date of the publication of the notification], object to the acquisition of the land or of any land in the locality, as the case may be.*

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard [in person or by any person authorized by him in this behalf] or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, [either make a report in respect of the land which has been notified under section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government]. The decision of the [appropriate Government] on the objections shall be final.

(3) For the purpose of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.]

Section 6 of the 1894 Act, reads thus:

***"6. Declaration that land is required for a public purpose.** - (1) Subject to the provision of Part VII of this Act, [appropriate Government] is satisfied, after considering the report, if any, made under section 5A, sub-section (2)], that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorized to certify its orders [and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under section 4, sub-section (I) irrespective of whether one report or different reports has or have been made (wherever required) under section 5A, sub-section (2)];*

[Provided that no declaration in respect of any particular land covered by a notification under section 4, sub-section (1)-

(i) published after the commencement of the Land Acquisition (Amendment and Validation) Ordinance, 1967 (1 of 1967), but before the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), shall be made after the expiry of three years from the date of the publication of the notification; or

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984 (68 of 1984), shall be made after the expiry of one year from the date of the publication of the notification:]

Provided further that] no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

[Explanation 1. - In computing any of the periods referred to in the first proviso, the period during which any action or proceeding to be taken in pursuance of

the notification issued under section 4, sub-section (1), is stayed by an order of a Court shall be excluded.

Explanation 2. - Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.]

(2) [Every declaration] shall be published in the Official Gazette [and in two daily newspapers circulating in the locality in which the land is situated of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state] the district or other territorial division in which the land is situate, the purpose for which It is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be; and, after making such declaration, the [appropriate Government] may acquire the land in manner hereinafter appearing."

Sections 39, 40 and 41 of the 1894 Act reads thus:

***"39. Previous consent of appropriate Government and execution of agreement necessary**. - The provisions of [sections 6 to 16 (both inclusive) and sections 18 to 37 (both inclusive)] shall not be put in force in order to acquire land for any company [under this Part], unless with the previous consent of the [appropriate Government], not unless the Company shall have executed the agreement hereinafter mentioned.*

***40. Previous enquiry**. - (1) Such consent shall not be given unless the [appropriate Government] be satisfied. [either on the report of the Collector under section 5A, sub-section (2), or] by an enquiry held as hereinafter provided, -*

[(a) that the purpose of the acquisition is to obtain land for the erection of dwelling houses for workmen employed by the Company or for the provision of amenities directly connected therewith, or

[(aa) that such acquisition is needed for the construction of some building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, or]

(b) that such acquisition is needed for the construction of some work, and that such work is likely to prove useful to the public].

(2) Such enquiry shall be held by such officer and at such time and place as the [appropriate Government] shall appoint.

(3) Such officer may summon and enforce the attendance of witnesses and compel the production of documents by the same means and, as far as possible, in the same manner as is provided by the [Code of Civil Procedure, 1908 (5 of 1908)] in the case of a Civil Court."

***41. Agreement with appropriate Government.** - If the [appropriate Government] is satisfied [after considering the report, if any, of the Collector under section 5A, sub-section (2), or on the report of the officer making an*

inquiry under section 40] that [the proposed acquisition is for any of the purposes referred to in clause (a) or clause (aa) or clause (b) of sub-section (1) of section 40], it shall require the Company to enter into an agreement [with the [appropriate Government]], providing to the satisfaction of the [appropriate Government] for the following matters, namely:-

(1) the - [payment to the [appropriate Government]] of the cost of the acquisition;

(2) the transfer, on such payment, of the land to the Company.

(3) the terms on which the land shall be held by the Company,

[(4) where the acquisition is for the purpose of erecting dwelling houses or the provision of amenities connected therewith, the time within which, the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided;

[(4A) where the acquisition is for the construction of any building or work for a Company which is engaged or is taking steps for engaging itself in any industry or work which is for a public purpose, the time within which, and the conditions on which, the building or work shall be constructed or executed; and]

(5) where the acquisition is for the construction of any other work, the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.]"

Section 19 (7) of the 2013 Act reads thus:

*"**19. Publication of declaration and summary of Rehabilitation and Resettlement.** – (1) when the appropriate Government is satisfied, after considering the report, if any, made under sub-section (2) of Section 15, that any particular land is needed for a public purpose, a declaration shall be made to that effect, alongwith a declaration of an area identified as the "resettlement area" for the purposes of rehabilitation and resettlement of the affected families, under the hand and seal of a Secretary to such Government or of any other officer duly authorized to certify its orders and different declarations may be made from time to time in respect of different parcels of any land covered by the same preliminary notification irrespective of whether one report or different reports has or have been made (wherever required).*

(2) to (6). xxx xxx xxx

(7) Where no declaration is made under sub-section (1) within twelve months from the date of preliminary notification, then such notification shall be deemed to have been rescinded:

Provided that in computing the period referred to in this sub-section, any period or periods during which the proceedings for the acquisition of the land were held up on account of any stay or injunction by the order of any Court shall be excluded:

Provided further that the appropriate Government shall have the power to extend the period of twelve months, if in its opinion circumstances exist justifying the same:

Provided also that any such decision to extend the period shall be recorded in writing and the same shall be notified and be uploaded on the website of the authority concerned."

Section 24 of the 2013 Act reads thus:

"24. Land acquisition process under Act No.1 of 1894 shall be deemed to have lapsed in certain cases*.- (1) Notwithstanding anything contained in this Act, in any case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), -*

(a) where no award under section 11 of the said Land Acquisition Act has been made, then, all provisions of this Act relating to the determination of compensation shall apply; or

(b) where an award under said section 11 has been made, then such proceedings shall continue under the provisions of the said Land Acquisition Act, as if the said Act has not been repealed.

(2) Notwithstanding anything contained in sub-section (1), in case of land acquisition proceedings initiated under the Land Acquisition Act, 1894 (1 of 1894), where an award under the said section 11 has been made five years or more prior to the commencement of this Act but the physical possession of the land has not been taken or the compensation has not been paid the said proceedings shall be deemed to have lapsed and the appropriate Government, if it so chooses, shall initiate the proceedings of such land acquisition afresh in accordance with the provisions of this Act:

Provided that where an award has been made and compensation in respect of a majority of land holdings has not been deposited in the account of the beneficiaries, then, all beneficiaries specified in the notification for acquisition under Section 4 of the said Land Acquisition Act, shall be entitled to compensation in accordance with the provisions of this Act."

Section 114 of the 2013 Act, reads thus:

"114. Repeal and saving*.- (1) The Land Acquisition Act, 1894 (1 of 1894) is hereby repealed.*

(2) Save as otherwise provided in this Act the repeal under sub-section (1) shall not be held to prejudice or affect the general application of Section 6 of the General Clauses Act, 1897 (10 of 1897) with regard to the effect of repeals."

Rule 4 of 1963 Rules reads thus:

*"**4. Appropriate Government to be satisfied with regard to certain matters before initiating acquisition proceedings**.- (1) Whenever a Company makes an application to the appropriate Government for acquisition of any land, that Government shall direct the collector to submit a report to it on the following matters, namely:*

(i) that the company has made its best endeavour to find out lands in the locality suitable for the purpose of acquisition;

(ii) that the company has made all reasonable efforts to get such lands by negotiation with the persons interested therein on payment of reasonable price and such efforts have failed;

(iii) that the land proposed to be acquired is suitable for the purpose;

(iv) that the area of land proposed to be acquired is not excessive;

(v) that the company is in a position to utilize the land expeditiously; and

(vi) where the land proposed to be acquired is good agricultural hand, that no alternative suitable site can be found so as to avoid acquisition of that land.

(2) The collector shall, after giving the company a reasonable opportunity, to make any representation in this behalf, hold an enquiry into the matters referred to in sub-rule (1) and while holding such enquiry he shall:

(i) in any case where the land proposed to be acquired is agricultural land, consult the Senior Agricultural Officer of the district whether or not such land is good agricultural land;

(ii) determine, having regard to the provisions of sections 23 and 24 of the Act, the approximate amount of compensation likely to be payable in respect of the land, which, in the opinion of the Collector, should be acquired for the Company; and

(iii) ascertain whether the company offered a reasonable price (not being less than the compensation so determined), to the persons interested in the land proposed to be acquired.

Explanation.- For the purpose of this rule "good agricultural land" means any land which, considering level of agricultural production and the crop pattern of the area in which it is situated, is of average or above average productivity and includes a garden or grove land.

(3) As soon as may be after holding the enquiry under sub-rule (2) the collector shall submit a report to the appropriate Government and a copy of the same shall be forwarded by that Government to the Committee.

(4) No declaration shall be made by the appropriate Government under section 6 of Act unless –

(i) the appropriate Government has consulted the committee and has considered the report submitted under this rule and the report, if any, submitted under section 5-A of the Act; and

(ii) the agreement under section 41 of the Act has been executed by the company."

42. The only justification sought to be put forward by the respondents for directing the initiation of fresh proceedings under 2013 Act is that one year period had lapsed from the date of issuance of Section 4 notification dated 25.4.2013. But then, the respondents appear to have misinterpreted the provisions of Section 6 of the Act. The very opening sentence wherein makes it clear that the said Section 6 alongwith all provisos is subject to Part VII of the 1894 Act, as amended by Act 68 of 1984.

43. Part VII of the 1894 Act deals specifically with the acquisition of land for companies. Section 39 of the Act provides that when land is to be acquired under Part VII, i.e. for a company, then Section 6 of the Act will not be "put in force" unless two conditions are fulfilled:

(i) There must be a previous consent of the appropriate Government that land be acquired for a company; and

(ii) The Company shall have executed an agreement as provided under Section 41 of the 1894 Act.

44. As per Section 40 of the Act, the appropriate Government can give such consent (required under Section 39) only after an enquiry is held, either under Section 5A or

under Section 40 of the Act. Since the enquiry in the present case had already been held under Section 5A, therefore, no further enquiry as envisaged under Section 40 of the Act was necessary. Moreover, once the Government was satisfied with the report of the Collector under Section 5A of the Act, then it was required to ask the Company to enter into an agreement with the appropriate Government in terms of Section 41 of the Act providing for various matters including payment of the cost of acquisition specified therein.

45. This was so held by the Hon'ble Supreme Court in ***Babu Barkya Thakur vs. State of Bombay and others (1961) 1 SCR 128*** in the following terms:

> *"9. From the preamble as also from the provisions of Sections 5A, 6 and 7, it is obvious that the Act makes a clear distinction between acquisition of land needed for a public purpose and that for a Company, as if land needed for a Company is not also for a public purpose. The Act has gone further and has devoted Part VII to acquisition of land for Companies and in sub-s. (2) s. of 38, with which Part VII begins, provides that in the case of an acquisition for a Company, for the words " for such purpose " the words " for purposes of the Company " shall be deemed to have been substituted. It has been laid down by s. 39 that the machinery of the Land Acquisition Act, beginning with s. 6 and ending with s. 37, shall not be put into operation unless two conditions precedent are fulfilled, namely, (1) the previous consent of the appropriate Government has been obtained and (2) an agreement in terms of s. 41 has been executed by the Company.*
>
> *10. The condition precedent to the giving of consent aforesaid by the appropriate Government is that the Government has to be satisfied on the report of the enquiry envisaged by s. 5A(2) or by enquiry held under s. 40 itself that the purpose of the acquisition is ;to obtain land for the erection of dwelling house-, for workmen employed by the Company or for the provision of amenities directly connected therewith or that such acquisition is needed for the construction of some work which is likely to prove useful to the public. When the Government is satisfied as to the purposes aforesaid of the acquisition in question, the appropriate Government shall require the Company to enter into an agreement providing for the payment to the Government (1) of the cost of the acquisition, (2) on such payment, the transfer of the land to the Company and (3) the terms on which the land shall be held by the Company. The agreement has also to make provision for the time within which the conditions on which and the manner in which the dwelling houses or amenities shall be erected or provided and in the case of a construction of any other kind of work the time within which and the conditions on which the work shall be executed and maintained and the terms on which the public shall be entitled to use the work.*

46. In view of the aforesaid exposition of law, it can safely be held that it was only after the statutory requirement under Sections 39, 40 and 41 of Part VII of the 1894 Act are fulfilled that the legal prohibition to "put in force' inter alia Section 6 of the 1894 Act is lifted. In other words, any provision of Section 6 including its provisos will not come into operation till the stipulated requirements of Part VII are fulfilled.

47. Further, the combined reading of proviso (1) of Section 6 (1) and Sections 39, 40 and 41 of Part VII of the 1894 Act, leads to the following inescapable conclusions:

> Where acquisition is for a company, proviso (1) of Section 6 (1) of the 1894 Act will not operate. The statute has to be read down and the relevant provisions of Part VII will override proviso (1) of Section 6 (1) and in this process the time spent for fulfilling the legal requirements will have to be excluded in computing the limitation period of one year indicated in proviso (1) (ii) of Section 6 (1) of the 1894 Act. This will be in accordance with the principles clearly accepted in accordance with Explanation (1) to the second proviso of Section 6 (1) of the Act which provides that the period spent in legal proceedings shall be excluded from the limitation period indicated in the first proviso to Section 6 (1) of the Act. The first proviso to Section 6 stipulates that declaration should be made within one year of notification issued under Section 4 of the 1894 Act. Whereas, second proviso, which qualifies and modifies the first proviso, *inter alia* mandates that no declaration shall be made under Section 6 of the Act unless compensation is to be paid by the company. The obligation of the company to pay compensation is undertaken by the Company only after an agreement is signed with the appropriate Government in terms of Section 41 of the Act. Therefore, the limitation of one year will come into operation only after the proceedings under Sections 39, 40 and 41 of the Act are complete.

48. It is basic rule of interpretation that there has to be a harmonious construction between different sections of the Act so that reading of one section of the statute does not render otiose another section of the same statute. From the harmonious construction of Section 6 and Sections 39, 40 and 41 of the Act, it can safely be concluded that proviso 1 (ii) to Section 6 (1) of the 1894 Act would be excluded in case of acquisition of land for a company. If in case these provisions are construed in the manner aforesaid, Sections 39 to 41 of Part VII of the Act to which Section 6 has been made subject to as is clear from the opening words of Section 6 itself would be rendered otiose. Once the applicability of proviso 1 (ii) of Section 6 of the 1894 Act is excluded, then the applicability of period of limitation of one year is excluded.

49. The Hon'ble Supreme Court in ***Larsen & Toubro Ltd. vs. State of Gujarat and others (1998) 4 SCC 387*** has clearly held that declaration under Section 6 of the Act is made by the notification only after formalities under Part VII of the Act which contains Sections 39 to 42 have been complied and the report of the Collector under Section 5-A (2) of the Act is before the State Government, who consents to acquire the land on its satisfaction that it is needed for the company. The relevant observations read thus:

> *"31……. After notification under Section 4 is issued, when it appears to the State Government that the land in any locality is needed for a company, any person interested in such land which has been notified can file objections under Section 5-A (1) of the Act. Such objections are to be made to the Collector in writing and who after giving the objector an opportunity of being heard and after hearing of such objections and after making such further enquiry, if any, as the Collector thinks necessary, is to make a report to the State Government for its decision. Then the decision of the State Government on the objections is final. Before the applicability of other provisions in the process of acquisition, in the case of a company, previous consent of the State Government is required under Section 39 of the Act nor (sic) unless the company shall have executed the agreement as provided in Section 41 of the Act. Before giving such consent, Section 40 contemplates a previous enquiry. Then compliance with Rules 3 and 4 of the Land Acquisition (Company) Rules, 1963 is mandatorily required.*

After the stage of Sections 40 and 41 is reached, the agreement so entered into by the company with the State Government is to be published in the Official Gazette. This is Section 42 of the Act which provides that the agreement on its publication would have the same effect as if it had formed part of the Act. After having done all this, the State Government cannot unilaterally and without notice to the company withdraw from acquisition. Opportunity has to be given to the company to show cause against the proposed action of the State Government to withdraw from acquisition. A declaration under Section 6 of the Act is made by notification only after formalities under Part VII of the Act which contains Sections 39 to 42 have been complied and the report of the Collector under Section 5-A (2) of the Act is before the State Government, who consents to acquire the land on its satisfaction that it is needed for the company."

50. Now, insofar as the 2013 Act is concerned, it addresses the issues which are more equitable and realistic. Section 93 of the 2013 Act states that completion of acquisition is not necessary, but in that case, complete and fair compensation has to be awarded to the land owners. Even the rigors of limitation as set forth in proviso 1 (ii) of Section 6 (1) of the Act have been relaxed under the 2013 Act inasmuch as the second proviso to Section 19 (7) thereof clearly provides for and vests with the respondents the power to extend one year period for making a declaration of purpose in circumstances that justify such an extension.

51. We have no hesitation to hold that the respondents have failed to appreciate that the intent expressed under Section 19 (7) read with Section 24 (1) (a) of the 2013 Act has to be construed so as to facilitate the acquisition of land for projects of general public interest in a timely and transparent manner. The respondents rather than working in accordance with the stated object of the 2013 Act and by reversing the clock back by relegating the petitioner's case to be started *de novo* under the 2013 Act, have only delayed the acquisition proceedings for the project and resultantly even the implementation, construction and operation of the project has been delayed.

52. Therefore, in the given circumstances, we are of the considered view that instead of directing the initiation of fresh acquisition proceedings the respondents ought to have extended the benefit of second proviso to Section 19 (7) of the 2013 Act. They ought to have taken into consideration the express provision of Section 24 (1) (a) of the 2013 Act which extended the benefit of compensation as envisaged under the 2013 Act to the land owners for the proceedings which had been initiated under the 1894 Act.

53. In addition to the above, it has come on record that the petitioner's has so far already invested a huge amount of `1,02,88,61,000/- (Rupees One Billion two Million Eighty Eight Lacs, Sixty One Thousand only) towards the project execution and implementation and has committed additional funds to the tune `2,96,26,88,000/- (Two Billion Ninety Six Million Twenty Six Lacs Eighty Eight Thousand only) towards project allotment costs, identification, marking, preparation etc. of forest land, additional bank guarantees and preparation and approval of CAT plan. Therefore, the initiation of fresh acquisition proceedings at this stage would only entail further expenditure thereby causing further loss to the petitioner.

54. Now, we proceed to deal with the contention of learned Advocate General that once the notification under Section 4 of the Land Acquisition Act, 1894 had lapsed prior to the Act being repealed and the new Act having come to force only on 1.1.2014, then in such a situation, the State Government had no option but to proceed afresh acquisition proceedings under the new Act.

55. We have considered this submission and are of the considered opinion that the respondents have clearly misdirected themselves in arriving at the decision that the proceedings for acquisition of land had lapsed. Sections 114 (2) and 24 (1) (a) of the 2013 Act have to be read with Section 6 of the General Clauses Act, 1897. The Section 4 notification issued under the 1894 Act was valid and subsisting at the time of coming into force of the 2013 Act, that being so, the benefit of second proviso to Section 19 (7) of the 2013 Act had to be invoked and applied to the facts of the present case. Moreover, had the respondents acted with the sense of responsibility by ensuring that there was no inordinate delay, probably such a situation may not have arisen. The respondents have been procrastinating the taking of action under the 1894 Act in a swift, timely and apposite manner. In addition, the petitioner cannot be made to suffer for the default in discharge of statutory duties by the respondents and in no event can the same work to its prejudice as that would amount to allowing the respondents to take undue advantage of their own fault in failing to act promptly in accordance with law.

56. In view of the aforesaid discussion, the writ petition is allowed, impugned letter No. MPP-Chh (5)-5/2012 dated 5.8.2014 (Annexure P-1) issued by respondent No.1 and the impugned opinion of respondent No.2 relied upon and mentioned extensively in the impugned letter are quashed. Since the 2013 Act is more equitable and realistic, more especially to the claimants whose lands have been sought to be acquired, we direct the respondents to proceed with the present case under the second proviso to Section 19 (7) of the 2013 Act and extend the time for issuance of a notification for declaration of purpose and the respondents are further directed to continue with the notification No. Vidyut-CH: (5)-5/2012 dated 25.4.2013 issued under Section 4 of the Land Acquisition Act, 1894. Pending application also stands disposed of. The parties are left 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.

OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 and OSA No.4002 of 2013.
Judgment reserved on : 05.05.2015.
Date of decision: June 17, 2015.

1. OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014.

The Reserve Bank of India and another .....Appellants.

Versus

M/s A.B.Tools (P) Ltd., and another .....Respondents.

For the Appellants : Mr.J.L.Kashyap, Advocate.
For the Respondents : Mr.J.S.Bhogal, Senior Advocate with Mr.Parmod Negi, Advocate.

2. OSA No.4002 of 2013

M/s A.B.Tools Pvt. Ltd., and another .....Appellants.

Versus

The Reserve Bank of India and another .....Respondents.

For the Appellants : Mr. J.S.Bhogal, Senior Advocate with Mr.Parmod Negi, Advocate.
For the Respondents : Mr.J.L.Kashyap, Advocate.

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaintiff sought the amendment of the plaint for claiming the outstanding charges from the defendants- defendants contended that

evidence had been led and the proposed amendment will change the nature of the suit - held, that no new fact was being introduced- the power to allow amendment is wide and can be exercised at any stage- plaintiff had claimed any other relief to which they are entitled, therefore, application allowed and plaintiff permitted to amend the plaint. (Para-3 to 5)

Indian Contract Act, 1872- Section 70- Plaintiff No.1 had sold 8 flats in the Valley Side Estate to the defendants together with lease- it was specifically agreed that the seller will not be bound to carry out any repair after one year and alternate arrangement will be made by Flat Owner Association- plaintiff spent Rs. 26,000,00/- towards the maintenance of common area- held, that no Flat Owners Association was formed in area and services were rendered by the plaintiff- once the defendants had taken the advantage of the services, they were bound to pay for the same- Article 113 of Limitation Act will be applicable in such a situation - cause of action arose on 20.9.2004 and the suit was filed on 18.1.2006 within limitation- hence, suit decreed. (Para- 24 to 55)

Cases referred:

State of West Bengal versus M/s B.K. Mondal and Sons AIR 1962 SC 779
V.R.Subramanyam versus B.Thayappa (deceased) and others AIR 1966 SC 1034
Fibrosa versus Fairbairn (1943) A.C. 32
Nelson versus Larholt (1948) 1 K.B. 339
Mulamchand versus State of Madhya Pradesh, AIR 1968 SC 1218
M/s Hansraj Gupta and Co. versus Union of India AIR 1973 SC 2724
Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644
Indian Council for Enviro-Legal Action Vs. Union of India and Others (2011) 8 SCC 161
Hole versus Chard Union reported in 1894 (1) Ch. 293
Union of India and others versus Tarsem Singh (2008) 8 SCC 648
Upendra Krishna Mandal and another versus Naba Kishore Mandal and others AIR 1921 Calcutta 93
Nalini Ranian Guha versus Union of India (1954) 93 Calcutta Law Journal 373
Kora Lukose versus Chacko Uthuppan AIR 1957 Kerala 19 (Full Bench)
State of Bihar versus Thawardas Pherumal AIR 1964 Patna 225
Keshab Kishore Narain Saraswati versus State of Bihar and another AIR 1971 Patna 99
Union of India versus Kamal Kumar Goswami and others AIR 1974 Calcutta 231

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

CMP No.13380 of 2014.

This application has been preferred by the plaintiffs-appellants (hereinafter referred to as the plaintiffs) for the amendment of the plaint. It is averred that the plaintiffs had prayed for a decree of Rs.26 lacs on account of outstanding charges due from the defendants/respondents (hereinafter referred to as the defendants) for the maintenance charges of the common areas, but due to sheer inadvertence they could not claim maintenance charges from the date of filing of the suit till its disposal and, therefore, now seek to incorporate amended para 13 of the plaint to the following effect:-

> "The plaintiff is also entitled to future maintenance costs at the rate of Rs.1089/- per flat per month from the date of filing of this suit together with interest thereon till the date of decree and the plaintiff undertakes to pay the court fee on the amount so decreed."

2. In addition, the plaintiffs have sought permission to amend the prayer clause by adding in the prayer clause the following sentence:-

> "The plaintiff may also be allowed maintenance charges from the filing of the suit till decree at the rate of Rs.1089/- per month per flat and interest thereon."

3. The defendants have vehemently opposed this application by raising various objections like amendment if allowed would change nature of the case and a new cause of action would be introduced in the case, the amendment was belated and has been moved only when the case has been fixed for arguments. The parties have already led evidence in the case and, therefore, the application was not maintainable and lastly that the proposed amendment was not permissible inasmuch as the plaintiffs have restricted the whole of their claim in the suit to Rs.26 lacs and it was not permissible under Order 2 Rule 2 of the Code of Civil Procedure to sue for the portion of the claim so omitted or relinquished at this stage. These very objections have been reiterated in reply to the merits of the application.

We have heard the learned counsel for the parties.

4. It is not in dispute that by way of amendment, the plaintiffs are not seeking to introduce any new fact and the parties are alive to the real nature of the dispute. It can also not be disputed that wide discretion is vested with the Court in matters of amendment of pleadings. The power to allow amendment is wide and can be exercised at any stage of the proceedings in the interest of justice, though the same has to be exercised with great care and circumspection.

5. By way of amendment, the plaintiffs have only sought maintenance charges that too from the date of filing of the suit till the date of decree and, therefore, even bar of Order 2 Rule 2 CPC is not attracted to such a case. That apart, even in the suit, the plaintiffs have already by an abundant caution prayed for any other relief to which the plaintiffs may be found entitled which prayer in itself takes care even of the proposed amendment.

6. In view of the aforesaid discussion, the application is allowed, as prayed for and the amended plaint is ordered to be taken on record.

OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 & OSA No.4002 of 2013.

7. The plaintiff-Company A.B.Tools (P) Ltd. and its Managing Director filed a suit against the defendants, the Reserve Bank of India, for recovery of Rs.26 lacs alongwith interest at the rate of 21% per annum with quarterly rests from the date of filing of the suit till its realization. The plaintiffs have also prayed for future maintenance costs at the rate of Rs.1089/- per month per flat from the date of filing of the suit together with interest till the date of decree.

8. The plaintiff No.1 vide deed of lease and conveyance dated 08.06.1995 sold to the defendants blocks No.C-2 and C-3 containing 8 flats in the Valley Side Estate, measuring approximately 981.84 sq. mtrs. (10565 sq.ft.) a built up area alongwith attic in the said blocks measuring 247.63 sq. mtrs (2665 sq. ft.) together with lease of land measuring 600 sq. mtrs (approx.) underneath and appurtenant to blocks No.C-2 and C-3, situated at Station Ward, Bada Shimla, Tehsil and District Shimla (H.P.) for a sum of Rs.1,01,07,000/- (Rupees One Crore One Lac Seven Thousand Only).

9. Prior to the execution of the conveyance-cum-lease deed, an agreement for purchase of 8 apartments in blocks No.C-2 and C-3 was executed between the parties on 17.12.1994 and para-xviii thereof reads as under:-

> "(xviii) That the Vendors after one year of the execution of the Sale deed and Lease Deed in favour of the Purchaser, shall not be bound in any way to

carry out repair or maintenance work of the property hereby intended to be sold. After the period of one year and till alternate arrangements are made by the flat owners Association to be formed for this purpose, if required by the Purchaser, the vendors shall look after and maintain the common areas, services, green areas etc. at the cost of all the flat owners of the Valley Side Estate. The Vendors shall maintain, at its cost, all such areas and services during the defects liability period of one year from the date of the execution of the Sale Deed and the Lease Deed."

10. It is claimed that the terms of the agreement of purchase were incorporated and infact formed an integral part of the sale-cum-lease deed executed between the parties as Appendix 'A' and, therefore, all the conditions became inseparable part of the registered deed executed between the parties. The lease-cum-conveyance deed specifically incorporated and mentioned that by agreement dated 17.12.1994, 8 apartments in blocks C-2 and C-3 had been purchased by the defendants. The plaintiffs claim to have spent Rs.26 lacs towards maintenance of the common areas/facilities provided to the entire estate holders and thereafter future maintenance at the rate of Rs.1089/- per month.

11. The defendants contested the suit wherein preliminary objections regarding maintainability, locus-standi, cause of action, limitation, want of notice under Section 80 CPC and the suit being abuse of process of law, false, frivolous, vexatious and vague. On merits, it was pleaded that the defendants are not liable to pay any maintenance charges and placed reliance on clause (vi) of the deed of lease and conveyance dated 08.06.1995 which reads as under:-

"(vi) THAT the Vendors hereby grant to the Purchaser the rights pertaining to (i) use of the main access road connecting the Valley Side Estate to the Municipal and main road, (ii) use of the common green areas, (iii) maintenance of Electrical cables water supply and drainage lines, sewer and storm water drains, (iv) use of internal path ways together with the use of steps connecting the pathways with the main access road on both ends, more particularly delineated and marked green in Annexure 'P' and 'Q' (v) access to common facilities and use thereof etc. without any further consideration whatsoever over and above the aforesaid total consideration of Rs.1,01,07,000/- (Rupees One Crore One Lakh Seven Thousand Only)."

12. The plaintiffs filed replication and reiterated the averments made in the plaint and, at the same time, refuted the allegations as set out in the written statement.

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

1. Whether in terms of the agreement, whereby the suit property was sold to the defendants, the defendants are liable to pay certain charges for the maintenance of roads and common facilities, as alleged? OPP.
2. If issue No.1 is proved, whether the plaintiffs are entitled to the suit amount or any other amount of money on account of the charges, referred to in issue No. 1? OPP
3. Whether the claim of the plaintiffs is barred by time? OPD
4. Whether defendants are Government, within the meaning of Section 80 of the Code of Civil Procedure and, hence, notice under the aforesaid provision was required to be served before the institution of the suit and no such notice having been served, whether the plaint is liable to be rejected? OPD.

5. Whether the plaint lacks material particulars, especially the details of the claim? If so, its effect? OPD

6. Whether the plaintiffs are estopped to file the present suit by their acts of omission and commission and conduct of their functionaries? OPD

7. Relief.

14. After recording the evidence and evaluating the same, the suit of the plaintiffs was partly decreed for a sum of Rs.3,13,632/- along with past, pendente lite and future interest at the rate of 12% per annum as maintenance charges for the aforesaid facilities for a period of three years preceding institution of the suit i.e. from 18.01.2003 to 17.01.2006 at the rate of Rs.1089/- per flat per month.

15. Aggrieved by the judgment and decree passed by the learned single Judge, both the parties have filed separate appeals before this Court. The plaintiffs have filed OSA No.4002 of 2013 against the part dismissal of the suit and have prayed for decreeing the suit in its entirety, whereas, the defendants have not only filed the Cross Objections registered as Cross Objections No.19 of 2014 in the appeal filed by the plaintiffs being OSA No.4002 of 2013, but have also filed on the same allegations separate appeal being OSA No.2 of 2014 against the decree passed by the learned single Judge.

16. The plaintiffs (appellants in OSA No.4002 of 2013) have vehemently argued that the learned single Judge while partly deciding issue No.3 in their favour has misappreciated the provisions of Section 22 of the Limitation Act, 1963. They have further contended that the learned single Judge while applying the provisions of Section 70 of the Indian Contract Act failed to appreciate that it also contains the provisions of "quasi contract" and, therefore, the provisions of Section 22 of the Limitation Act, 1963, will also apply to the claim preferred under Section 70 of the Indian Contract Act. It is also claimed that the learned single Judge had not given due consideration to the fact that the plaintiffs had been raising the demand right from the date the amounts became due in 1996 and the defendants had been assuring them that the matter was under consideration and it was only in the year 2005 that the claim of the plaintiffs came to be repudiated by the defendants, for the first time, and immediately thereafter in January, 2006, the plaintiffs had instituted the suit.

17. On the other hand, the defendants (appellants in OSA No.2 of 2014) have argued that the learned single Judge while deciding against the appellants and even while decreeing the suit of the plaintiffs for a sum of Rs.3,13,632/- had lost sight of the fact that between 12.02.1999 and 20.09.2004 there had not been given any acknowledgement on behalf of the appellants and, therefore, admittedly the suit was barred by time even as on 20.09.2004. It is further contended that the learned single Judge had erred in recording a finding that the defendants are also responsible for formation of the association and the plaintiffs alone cannot be held responsible for non-formation of the association which findings are contrary to clause xxiii of the purchase agreement whereby responsibility of the vendor (plaintiff) was to form the association. It is also argued that the plaintiffs in their letter dated 04-18/06/2005 had clearly admitted that the common areas had not been transferred and are with the plaintiffs. In such circumstances, if the plaintiffs were maintaining those premises without any express authority or an agreement that they would be entitled to receive maintenance charges, the plaintiffs were not entitled to make any claim for the same. It was further contended that the learned single Judge has not appreciated that the provisions of Clause xviii of purchase agreement clearly envisage that the plaintiffs after one year of the execution of the sale deed and lease deed in favour of the defendants shall not be bound to carry out any repair or maintenance work and having said so, it was

not permissible for the plaintiffs without express authority and permission of the defendants to carry out the maintenance work as per the provisions of Section 70 of the Indian Contract Act.

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

19. It is the specific case of the plaintiffs that till the flat owners' association had not been formed, it was the plaintiffs, who were required to look after and maintain the common areas, services green areas etc. at the cost of all the flat owners of the Valley Side Estate. Records reveal that no such association was formed, though as per Clause xix, the defendant No.1 had undertaken to become a member of such association. The plaintiffs admittedly vide notice Ex.PW-1/B dated 10.06.1995 had raised a demand with the defendants for maintenance charges at the rate of Rs.1058/- per flat per month. However, the defendants in their reply dated 28.07.1995 (Ex.PW-1/C) informed that no such claim was tenable for the period of one year from the date of registration of deed of lease and conveyance dated 08.06.1995. The plaintiffs thereafter issued notice dated 17.12.1996 Ex.PW-1/ZC wherein a fresh demand of Rs.1058/- per flat per month for the period 08.06.1996 to 08.12.1996 (six months) was raised. It was after prolonged correspondence that the plaintiffs on 6th July, 2004 asked the defendants to settle the issue of maintenance charges which was pending for years together.

20. The defendants in response to this letter informed the plaintiffs that the matter was still under consideration and as and when any decision is taken, they would be informed accordingly. However, when even after six months, nothing was heard from the defendants, the plaintiffs again sent a reminder on 22.01.2005, however, the defendants vide letter dated 08.02.2005 (Ex.PW-1/Z) repudiated the claim of the plaintiffs and this was again reiterated in letter dated 17.09.2005.

21. Undoubtedly, the property requires maintenance, but the question is who is to maintain the same. As per the deed of lease and conveyance, the right of use/maintenance viz:-

i) use of the main access road connecting the Valley Side Estate to the Municipal and main road;

ii) Use of the common green areas;

iii) maintenance of electrical cables, water supply and drainage lines, sewer and storm water drains;

iv) use of internal pathways together with the use of steps connecting the pathways with the main access road on both ends;

v) access to common facilities and use thereof were granted by the plaintiff No.1 to the defendant No.2 without any further consideration whatsoever over and above the aforesaid total sale consideration of Rs.1,01,07,000/-.

22. The rights of user were implicit in the property sold and, therefore, no further consideration was to be charged by the plaintiffs from the defendant No.1 on this score. But, then who was to bear expenditure which would be incurred on the maintenance of these facilities in future is the moot question.

23. DW-1 Shri Pankaj Arora has stated that the defendants had an Annual Maintenance Contract (AMC) for maintaining their part of the premises from the date of sale, but he was unable to produce on record any document to this effect. While, on the other hand, plaintiff No.2 Shri Satish Jain while appearing as PW-1 has stated in unequivocal

terms that the plaintiff had been providing all services to the defendants which obviously were not gratuitous nor was there any undertaking given to this effect to any of the residents. It is not even the case of the defendants that the plaintiffs were providing such facilities gratuitously. The plaintiffs have calculated the maintenance cost at Rs.1089/- per month per flat for eight flats and the defendants have not seriously disputed this.

24. Section 70 of the Indian Contract Act, 1872, (for short the 'Act') reads thus:-

> "**70. Obligation of person enjoying benefit of non-gratuitous act.-** Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

25. The conditions to be satisfied for invoking of Section 70 of the Act are three-fold.

i) A person must lawfully do anything for another person or deliver anything to him.

ii) The person so doing must have done it with no intention to do so gratuitously.

iii) The other person must have enjoyed the benefit thereof.

If these three conditions stand fulfilled, then the latter is bound to make compensation to the former in respect of or to restore the things so done or delivered.

26. In ***State of West Bengal*** *versus* ***M/s B.K. Mondal and Sons AIR 1962 SC 779*** with regard to the conditions to be fulfilled for invoking the provisions of Section 70, it was observed as follows:-

> "(13) Section 70 reads thus:
>
> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."
>
> (14) It is plain that three conditions must be satisfied before this section can be invoked. The first condition is that a person should lawfully do something for another person or deliver something to him. The second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When these conditions are satisfied S. 70 imposes upon the latter person, the liability to make compensation to the former in respect of or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section it would operate. If a person delivers something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case S. 70 would not come in to operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again S. 70 would not apply. In other words, the person said to be made liable under S. 70 always has the option not to accept the thing or to return it. It is only where he voluntarily accepts the thing or enjoys the work done that the liability under S. 70 arises. Taking the facts in the case before us, after the respondent constructed the warehouse,

> for instance, it was open to the appellant to refuse to accept the said warehouse and to have the benefit of it. It could have called upon the respondent to demolish the said warehouse and take away the materials used by it in constructing it; but; if the appellant accepted the said warehouse and used it and enjoyed its benefit then different considerations come into play and S. 70 can be invoked. Section 70 occurs in chapter V which deals with certain relations resembling those created by contract. In other words, this chapter does not deal with the rights or liabilities accruing from the contract. It deals with the rights and liabilities accruing from relations which resemble those created by contract. That being so, reverting to the facts of the present case once again after the respondent constructed the warehouse it would not be open to the respondent to compel the appellant to accept it because what the respondent has done is not in pursuance of the terms of any valid contract and the respondent in making the construction took the risk of the rejection of the work by the appellant. Therefore, in cases falling under S. 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract nor ask for damages for the breach of the contract for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. All that Section 70 provides is that if the goods delivered are accepted or the work done is voluntarily enjoyed then the liability to pay compensation for the enjoyment of the said goods or the acceptance of the said work arises. Thus, where a claim for compensation is made by one person against another under S. 70, it is not on the basis of any subsisting contract between the parties, it is on the basis of the fact that something was done by the party for another and the said work so done has been voluntarily accepted by the other party. That broadly stated is the effect of the conditions prescribed by S. 70."

27 In ***V.R.Subramanyam*** *versus* ***B.Thayappa (deceased) and others AIR 1966 SC 1034***, it has been held that if a party to the contract has rendered service to the other, not intending to do so gratuitously and other person has obtained some other benefit, the former is entitled to compensation for the value of the services rendered by him.

28. In a case falling under Section 70 of the Act, a person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person. So, when a claim for compensation is made by one person against another under Section 70 of the Act, the juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution.

29. In ***Fibrosa*** *versus* ***Fairbairn (1943) A.C. 32,*** Lord Wright stated the legal position as follows:-

> ".....any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

30. In ***Nelson*** *versus* ***Larholt (1948) 1 K.B. 339, Lord Denning observed as follows:***

> *"*....It is no longer appropriate to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

31. In ***Mulamchand*** *versus* ***State of Madhya Pradesh, AIR 1968 SC 1218***, the observations of Lord Wright and of Lord Denning, extracted above, were adverted to and it was further observed as follows:-

> ".....The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution....."

32. In ***M/s Hansraj Gupta and Co.*** *versus* ***Union of India AIR 1973 SC 2724***, it has been countenanced that the liability under Section 70 of the Act arises on equitable grounds, even though express agreement or a contract may not be proved.

33. Thus, what would be seen is that Section 70 is not founded on contract, but embodies the equitable principle of restitution and prevention of unjust enrichment.

34. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. This was so held by the Hon'ble Supreme Court in ***Renusagar Power Co. Ltd. Vs. General Electric Co. 1994 Supp (1) SCC 644***:-

> "98. The principle of unjust enrichment proceeds on the basis that it would be unjust to allow one person to retain a benefit received at the expense of another person. It provides the theoretical foundation for the law governing restitution. The principle has, however, its critics as well as its supporters. In the words of Lord Diplok: "...there is no general doctrine of unjust enrichment in English law. What it does is to provide specific remedies in particular cases of what might be classed as unjust enrichment in a legal system that is based upon civil law." (See: Orakpo V. Manson Investments Ltd. 1978 AC, 104). In The Law of Restitution by Goff and Jones, it has, however, been stated "that the case-law is now sufficiently mature for the courts to recognize a generalized right of restitution" (3rd Edn., P. 15). In Chitty on Contracts, 26th Edn., Vol. I, p. 1313, para 2037, it has been stated that "the principle of unjust enrichment is not yet clearly established in English law". The learned editors have, however, expressed the view:

> "Even if the law has not yet developed to that extent, it does not follow from the absence of a general doctrine of unjust enrichment that the specific remedies provided are not justifiable by reference to the principle of unjust enrichment even if they were originally found without primary reference to it." (pp. 1313-1314, para 2037)."

35. The issue regarding undue enrichment thereafter came up before the Hon'ble Supreme Court in ***Indian Council for Enviro-Legal Action Vs. Union of India and Others (2011) 8 SCC 161*** and it was held as follows:-

> "**UNJUST ENRICHMENT**
>
> 151. Unjust enrichment has been defined as:
>
> > "Unjust enrichment.---A benefit obtained from another, not
> >
> > intended as a gift and not legally justifiable, for which the beneficiary must make restitution or recompense."
>
> See Black's Law Dictionary, 8th Edition (Bryan A. Garner) at page
>
> 1573. A claim for unjust enrichment arises where there has been an "unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."
>
> 152. "Unjust enrichment" has been defined by the court as the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.
>
> 153. Unjust enrichment is "the unjust retention of a benefit to the
>
> loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." A defendant may be liable "even when the defendant retaining the benefit is not a wrongdoer" and "even though he may have received [it] honestly in the first instance." (Schock v. Nash, 732 A.2d 217, 232-33 (Delaware. 1999). USA)
>
> 154. Unjust enrichment occurs when the defendant wrongfully secures a benefit or passively receives a benefit which would be unconscionable to retain. In the leading case of Fibrosa v. Fairbairn, [1942] 2 All ER 122, Lord Wright stated the principle thus : (AC p.61)
>
> > "... .Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."
>
> 155. Lord Denning also stated in Nelson v. Larholt, [1947] 2 All ER 751 as under:-
>
> > "..... It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light

> of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular frame-work. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."

156. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment.

Restitution and compound interest

157. American Jurisprudence 2d. Volume 66 Am. Jur. 2d defined Restitution as follows:

> "The word `restitution' was used in the earlier common law to denote the return or restoration of a specific thing or condition. In modern legal usage, its meaning has frequently been extended to include not only the restoration or giving back of something to its rightful owner, but also compensation, reimbursement, indemnification, or reparation for benefits derived from, or for loss or injury caused to, another. As a general principle, the obligation to do justice rests upon all persons, natural and artificial; if one obtains the money or property of others without authority, the law, independently of express contract, will compel restitution or compensation."

158. While Section 3 (unjust enrichment) reads as under:

> "The phrase "unjust enrichment" is used in law to characterize the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor. It is a general principle, underlying various legal doctrines and remedies, that one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received, retained, or appropriated, where it is just and equitable that such restitution be made, and where such action involves no violation or frustration of law or opposition to public policy, either directly or indirectly."

159. Unjust enrichment is basic to the subject of restitution, and is indeed approached as a fundamental principle thereof. They are usually linked together, and restitution is frequently based upon the theory of unjust enrichment. However, although unjust enrichment is often referred to or regarded as a ground for restitution, it is perhaps more accurate to regard it as a prerequisite, for usually there can be no restitution without unjust enrichment. It is defined as the unjust retention of a benefit to the loss of another or the retention of money or property of another against the fundamental principles of justice or equity and good conscience. A person is enriched if he has received a benefit, and he is unjustly enriched if retention of the benefit would be unjust. Unjust enrichment of a person occurs when he has and retains money or benefits which in justice and equity belong to another.

160. While the term `restitution' was considered by the Supreme Court in South-Eastern Coalfields 2003 (8) SCC 648 and other cases excerpted later, the term `unjust enrichment' came to be considered in Sahakari Khand

Udyog Mandal Ltd vs Commissioner of Central Excise & Customs (2005) 3 SCC 738). This Court said:

> "31. ...'unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. `Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else."

161. The terms `unjust enrichment' and `restitution' are like the two shades of green - one leaning towards yellow and the other towards blue. With restitution, so long as the deprivation of the other has not been fully compensated for, injustice to that extent remains. Which label is appropriate under which circumstances would depend on the facts of the particular case before the court. The courts have wide powers to grant restitution, and more so where it relates to misuse or non-compliance with court orders.

162. We may add that restitution and unjust enrichment, along with an overlap, have to be viewed with reference to the two stages, i.e., pre-suit and post-suit. In the former case, it becomes a substantive law (or common law) right that the court will consider; but in the latter case, when the parties are before the court and any act/omission, or simply passage of time, results in deprivation of one, or unjust enrichment of the other, the jurisdiction of the court to levelise and do justice is independent and must be readily wielded, otherwise it will be allowing the Court's own process, along with time delay, to do injustice.

163. For this second stage (post-suit), the need for restitution in relation to court proceedings, gives full jurisdiction to the court, to pass appropriate orders that levelise. Only the court has to levelise and not go further into the realm of penalty which will be a separate area for consideration altogether.

164. This view of law as propounded by the author Graham Virgo in his celebrated book on "The Principle of Law of Restitution" has been accepted by a later decision of the House of Lords (now the UK Supreme Court) reported as 136 Sempra Metals Ltd (formerly Metallgesellschaft Limited) v Her Majesty's Commissioners of Inland Revenue and Another [2007] UKHL 34 = [2007] 3 WLR 354 = [2008] 1 AC 561 = [2007] All ER (D) 294.

165. In similar strain, across the Altantic Ocean, a nine judge Bench of the Supreme Court of Canada in Bank of America Canada vs Mutual Trust Co. [2002] 2 SCR 601 = 2002 SCC 43 (both Canadian Reports) took the view :

> "There seems in principle no reason why compound interest should not be awarded. Had prompt recompense been made at the date of the wrong the plaintiff should have had a capital sum to invest; the plaintiff would have received interest on it at regular intervals and would have invested those sums also. By the same token the defendant will have had the benefit of compound interest. Although not historically available, compound interest is well suited to compensate a plaintiff for the interval between when damages initially arise and when they are finally paid."

This view seems to be correct and in consonance with the principles of equity and justice.

166. Another way of looking at it is suppose the judgment- debtor had borrowed the money from the nationalised bank as a clean loan and paid the money into this court. What would be the bank's demand.

> 167. In other words, if payment of an amount equivalent of what the ledger account in the nationalised bank on a clean load would have shown as a debit balance today is not paid and something less than that is paid, that differential or shortfall is what there has been : (1)failure to restitute; (2) unfair gain by the non-complier; and (3) provided the incentive to obstruct or delay payment. Unless this differential is paid, justice has not been done to the creditor. It only encourages non-compliance and litigation. Even if no benefit had been retained or availed even then, to do justice, the debtor must pay the money. In other words, it is this is not only disgorging all the benefits but making the creditor whole i.e. ordering restitution in full and not dependent on what he might have made or benefited is what justice requires."

36. What therefore can be gathered from the aforesaid exposition of law is that the terms of Section 70 of the Contract Act are unquestionably wide, but they have to be applied with discretion so as to enable the Courts to do substantial justice in cases where it would be difficult to impute to the person's concerned relations actually created by contract. Section 70 prevents undue enrichment and it applies as much to individuals as to Corporation and Government and where one voluntarily accepts the things and enjoys the work done that the liability under Section 70 arises voluntarily accepts all the benefits of the work done or the things delivered is the foundation of the claim under Section 70. If once the benefit of the work done or the things delivered is accepted, it can be presumed that the said work was done or thing was delivered, not intending to do so gratuitously. Similarly, it can as well be presumed that the person who has accepted the work done or thing delivered has enjoyed the benefit also.

37. Clause xviii of the agreement dated 17.12.1994 provides as under:-

> "*After the period of one year and till alternate arrangements are made by the flat owners association to be formed for this purpose, if required by the purchaser, the vendors shall look after and maintain the common areas, services, green areas etc. at the cost of all the flat owners of the Valley Side Estate."*

38. Indisputably, no flat owners association was formed and there is positive evidence on record that the common areas and the services were maintained by the plaintiffs, who had been maintaining the other areas also for which the flat owners had been paying for the same. Therefore, once the defendants have taken advantage of the services which obviously were not rendered by the plaintiff gratuitously, they cannot escape their liability to pay for such services as per the provisions of Section 70 of the Act. The mere fact that the defendants may not have requested the plaintiffs to do maintenance and even if there is no express agreement qua the same, it is of no consequence since this aspect could have been considered only in the event of all the flat owners association having been formed.

39. Thus, it can be safely concluded that all the three conditions as envisaged under Section 70 of the Contract Act have been fulfilled in this case. The plaintiffs have undertaken the maintenance work for the defendants and the said work was done with no intention to do so gratuitously and the defendants have enjoyed the benefit thereof.

40. Now the further question that arises as to what provisions of the Limitation Act would be applicable to the facts of the present case.

41. The learned counsel for the plaintiffs has strenuously argued that the learned single Judge erred in invoking the provisions of Article 113 of the Limitation Act and held the plaintiffs entitled to the amount only for the period of three years preceding the

institution of the suit, whereas, the breach on behalf of the defendants was continuous and, therefore, it was Section 22 of the Limitation Act which was applicable.

42. Section 22 of the Limitation Act provides as under:-

> *"**22. Continuing breaches and torts**-In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."*

43. Section 22 deals with the question as to when the period of limitation commences for a suit or other proceedings in respect of various cause of action may arise from the wrongful act of the parties. It provides that in case of a continuing breach, or of a continuing tort, a fresh period of limitation begins to run at every moment of time during which the breach or the tort, as the case may be, continues.

44. The underlying principle of this Section is that the plaintiff is not bound to launch an endless succession of suits each day wrong persists. He can wait and include in the action all damages sustained by a reason of the wrong down to the date of filing of the suit. The criteria for application of Section 22 is not whether the *right* or its corresponding obligation is a continuing one, but whether the *wrong* is a continuing one.

45. Where rights and duties are created by the terms of a contract between the parties, a breach of duty is a wrong arising out of contract. Where they are created otherwise than under a contract, the breach of a duty is a wrong independent of a contract. The duty may be either positive or negative. In the case of a positive duty, the test to find out whether a breach of duty would amount to a continuous wrong is to see whether the duty is one to continue to do the act. In other words, where the wrong commences in the omission of the legal duty to continue to do something the omission to do it is a continuous wrong. Where the duty is negative, the test would be to see whether the act produces, a state of affairs whose continuous every moment amounts to a new injury and renders its doers responsible for its being continuous. If the wrongful act is of such a nature, it is a continuing wrong.

46. Thus, it can safely be concluded that the very essence of a continuing wrong is that it is an act which creates a continuing source of injury and renders the doers of the act responsible and liable for the continuance of the said injury.

47. A cause of action may be either single or continuing. When an Act is final and complete and becomes a cause of action for injury to the plaintiff, it is single, arises once and for all and the plaintiff is entitled to sue for compensation at one time. But if there is a repetition of a wrongful act or omission, it will comprise a continuing cause of action.

48. In ***Hole*** *versus* ***Chard Union*** reported in ***1894 (1) Ch. 293*** Lord Justice Lindley held:-

> "What is a continuing cause of action? Speaking accurately, ' there is no such thing; but what is called a continuing cause of action is a cause of action which arises from the repetition of acts or omissions of the same kind as that for which the action was brought."

What is emphasized is that there has to be repetition of acts or omissions in respect of repeated wrongs.

49. The principles underlying continuous wrongs and recurring and successive wrongs were lucidly explained by the Hon'ble Supreme Court in ***Union of India and others*** *versus* ***Tarsem Singh (2008) 8 SCC 648*** wherein it was held as under:-

> "4. The principles underlying continuing wrongs and recurring/ successive wrongs have been applied to service law disputes. A "continuing wrong" refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong giving rise to a distinct and separate cause of action. This Court in Balakrishna Savalram Pujari Waghmare vs. Shree Dhyaneshwar Maharaj Sansthan AIR 1959 SC 798, explained the concept of continuing wrong (in the context of section 23 of Limitation Act, 1908 corresponding to section 22 of Limitation Act, 1963) : (AIR p.807, para 31)
>
> > "31.....It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury."
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> 5. In M. R. Gupta vs. Union of India (1995) 5 SCC 628, the appellant approached the High Court in 1989 with a grievance in regard to his initial pay fixation with effect from 1.8.1978. The claim was rejected as it was raised after 11 years. This Court applied the principles of continuing wrong and recurring wrongs and reversed the decision. This Court held: (SCC pp.629-30, para 5)
>
> > "5.....The appellant's grievance that his pay fixation was not in accordance with the rules, was the assertion of a continuing wrong against him which gave rise to a recurring cause of action each time he was paid a salary which was not computed in accordance with the rules. So long as the appellant is in service, a fresh cause of action arises every month when he is paid his monthly salary on the basis of a wrong computation made contrary to rules. It is no doubt true that if the appellant's claim is found correct on merits, he would be entitled to be paid according to the properly fixed pay scale in the future and the question of limitation would arise for recovery of the arrears for the past period. In other words, the appellant's claim, if any, for recovery of arrears calculated on the basis of difference in the pay which has become time barred would not be recoverable, but he would be entitled to proper fixation of his pay in accordance with rules and to cessation of a continuing wrong if on merits his claim is justified. Similarly, any other consequential relief claimed by him, such as, promotion etc., would also be subject to the defence of laches etc. to disentitle him to those reliefs. The pay fixation can be made only on the basis of the situation existing on 1.8.1978 without taking into account any other consequential relief which may be barred by his laches and the bar of limitation. It is to this limited

extent of proper pay fixation, the application cannot be treated as time barred....."

6. In Shiv Dass vs. Union of India (2007) 9 SCC 274, this Court held: (SCC p.277, paras 8 & 10)

"8.....The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction.

* * *

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition.....If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years."

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition."

50. The plaintiffs in Para-14 of the plaint have raised the plea of cause of action which reads thus:-

"That the cause of action arose in favour of the plaintiffs and against the defendants on various dates specially on 17.12.1994 when the agreement was executed between the plaintiffs and defendants on 8th June, 1995 when the lease and conveyance deed was executed between the plaintiffs and defendants and on various dates when the defendants acknowledged and

accepted the fact that the estate had to be maintained and the common facilities were being enjoyed regularly the defendants, on 10.6.1995, 28.7.1995, 2.8.1995, 17.12.1996, 6.5.1997, 21.2.1998, 2.1.1999, 18.1.1999, 12.2.1999, 5.5.1999, 7.6.1999, 14.8.1999, 23.10.1999, 6.11.1999, 7.12.1999, 28.4.2000, 19.5.2000,24.10.2000, 23.1.2001, 26.5.2004, 6.7.2004. 10.9.2004, 20.9.2004, 22.1.2005, 8.2.2005, 4/18.6.2005 when the letters were addressed by the plaintiff to the defendants or by the defendants to the plaintiffs and finally on 17.9.2005 when the claim of the plaintiff was rejected by the defendants when the right to use arose on the rejection of the claim as in none of the previous communications the claim of the plaintiffs had been rejected rather the plaintiffs were assured that the claim would be accepted. The cause of action still continues to subsist in favour of the plaintiffs and against the defendants. The cause is a continuing cause with each day on which the defendants are enjoying the facilities provided by the plaintiffs without bearing the proportionate cost payable by them."

51. The learned single Judge held that since the plaintiffs' case was based on Section 70 of the Indian Contract Act, therefore, it was Article 113 of the Limitation Act which was applicable in the instant case and consequently the plaintiffs were held entitled to the maintenance charges but only for a period of three years preceding institution of the suit.

52. It is the consistent view of the various High Courts that since the obligation under Section 70 is statutory and not contractual, it would be Article 113 of the Limitation Act, 1963 (Article 120 of the Limitation Act, 1908) which would be applicable to such cases. (Refer: ***Upendra Krishna Mandal and another*** *versus* ***Naba Kishore Mandal and others AIR 1921 Calcutta 93, Nalini Ranian Guha*** *versus* ***Union of India (1954) 93 Calcutta Law Journal 373, Kora Lukose*** *versus* ***Chacko Uthuppan AIR 1957 Kerala 19 (Full Bench), State of Bihar*** *versus* ***Thawardas Pherumal AIR 1964 Patna 225, Keshab Kishore Narain Saraswati*** *versus* ***State of Bihar and another AIR 1971 Patna 99*** and ***Union of India*** *versus* ***Kamal Kumar Goswami and others AIR 1974 Calcutta 231)***.

53. Article 113 of the Limitation Act reads thus:

"

Description of Application	Period of limitation	Time from which period begins to run
113. Any suit for which no period of limitation is provided elsewhere in this Schedule."	Three years	When the right to sue accrues.

54. It is established on record that the defendants had impliedly admitted the liability vide their letter dated 28.07.1995 Ex.PW-1/C and thereafter vide their letter dated 03.05.1997 Ex.DX had requested the plaintiffs to send their representatives for discussion and again vide letter dated 12.02.1999 Ex.PW-1/J had informed plaintiff No.1 that the matter was being examined and they would revert to the plaintiffs in due course. Even as late as on 20.09.2004, plaintiff No.1 was informed vide letter Ex.PW-1/X that the matter was still under consideration and as soon as any decision was taken, it would be informed accordingly. This suit was admittedly filed on 18.01.2006 i.e. within three years from the accrual of the cause of action which as was observed commences on 20.09.2004. Thus, there was no occasion for the learned single Judge to have held that the limitation already

stood expired on 07.06.1999 and, therefore, could not have been revived even vide letter dated 20.09.2004. In a case of continuous tort, as per Section 22 the cause of action for filing a suit in respect of a continuous tort would arise during which the tort continuous.

55. Now the question which remains to be determined is as to whether the plaintiffs can be held entitled to the future maintenance costs at the rate of Rs.1,089/- per flat per month from the date of filing of this suit together with interest thereon till the date of decree. This question need not detain us any longer in view of the fact that we have already held that the cause of action in favour of the plaintiffs is a continuing one and the defendants have also not disputed the rate of maintenance. That being so, the plaintiffs are, therefore, entitled to the future maintenance costs at the rate of Rs.1,089/- per flat per month from the date of filing of the suit together with interest at the rate of 12% per annum till the date of decree.

56. In view of the aforesaid discussion, we find merit in the appeal filed by the plaintiffs being OSA No.4002 of 2013 and the same is accordingly allowed and the plaintiffs are held entitled:-

i) a decree for Rs.26 lacs alongwith past, pendente lite and future interest @12% per annum from the date of institution of the suit;

ii) the plaintiffs are further held entitled to future maintenance costs at the rate Rs.1,089/- per flat per month from the date of institution of the suit i.e.18.01.2006 together with interest @ 12% per annum.

This, however, shall be subject to the plaintiffs paying court fee on this amount within a period of eight weeks from today. The appeal filed by the defendants being OSA No.2 of 2014 alongwith Cross Objections No.19 of 2014 is ordered to be dismissed. The judgment and decree passed by the learned single Judge is modified to the aforesaid extent. Parties are left to bear their own costs.

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

Mrs. Anu Rana ..... Petitioner

Vs.

Central Bank of India & ors. ..... Respondents

CWP No. 2366 of 2014.
Date of decision: 18.6.2015.

Constitution of India, 1950- Article 226- Departmental proceedings were initiated against the petitioner- disciplinary authority asked the petitioner to explain as to why the proposed penalty be not imposed upon her within seven days from the date of receipt of the order- however, an order of compulsory retirement was passed on the same day- held, that purpose of show cause notice is to enable the delinquent to show as to how the report submitted by the Inquiry Officer is factually incorrect - when the order imposing the penalty and to show cause are passed on the same day, show cause notice is an empty formality to show that principle of natural justice had been complied with - order of compulsory retirement could have been passed after adhering to the principle of natural justice and fair play- authority passing an order must act with an open mind while issuing show cause notice-order of compulsory retirement set aside, however, respondent left at liberty to pass a fresh order after complying with the principle of natural justice. (Para- 4 to 16)

Case referred:
S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136

For the petitioner : Mr. D.K. Bhatti and Mr. Nimish Gupta, Advocates.
For the respondents : Mr. A.K. Sood, Advocate, for respondents No. 1 to 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

By medium of this petition, the petitioner has prayed for the following reliefs:

(A) Issue a writ, order or direction especially in the nature of Certiorari for quashing the charge-sheet dated 28.8.2012 (Annexure P-7) and the Enquiry report dated 27.4.2013 (Annexure P-8) thereby quashing the order dated 15.7.2013 (Annexure P-11) whereby an order of punishment was passed pre-maturely even without receiving the reply to the show cause notice and order dated 6.8.2013 (Annexure P-14) awarding the punishment of compulsory retirement and order 17.1.2014 (Annexure P-16) issued by respondent No. 2 whereby the said respondent while confirming the punishment imposed by the Disciplinary Authority has dismissed the appeal filed by the petitioner in a summary and cursory manner by ignoring the facts, documentary and legal submissions made therein;

(B) Direct the respondents to reconsider the orders dated 15.7.2013, 6.8.2013 and 17.1.14 Annexures P-11, P-14 and P-16 respectively and absolve the petitioner of the illegal and wrong charges leveled by the respondents against the petitioner with mala-fide intentions besides the same is arbitrary and disproportionate to the alleged misconduct;

(C) Direct respondent authorities to maintain status quo ante with regard to the services of the petitioner as it exists prior to the issuance of the suspension order dated 2nd March, 2012 during the pendency of the present petition in the interest of justice and fair play;

(D) In alternative the respondent may be directed to consider the case of the petitioner at par with Smt. Reksha Devi who is similarly situated and has punished with much lesser punishment as per the provisions of clause 6 (e) & (f) of MoU dated 19.4.2002.

2. It is not in dispute that the petitioner was proceeded against departmentally. Vide show cause notice dated 15.7.2013 the Disciplinary Authority had asked the petitioner to explain as to why the proposed penalty may not be imposed upon her within seven days from the date of receipt of this letter.

3. Surprisingly vide an administrative order of the same day i.e. 15.7.2013, the petitioner was informed that she has been awarded the following consolidated punishment:-

> "Be compulsorily retired with superannuation benefits i.e. pension and/ or Provident Fund and Gratuity as would be due otherwise under the rules or regulations prevailing at the relevant time and without

disqualification from future employment as per provisions of clause No. 6(c) of MOU dated 10.4.2002.

The above punishment is inflicted upon Mrs. Anu Rana with immediate effect."

4. In this background, the question which would require consideration, therefore, is as to whether at the time of issuance of show cause notice and passing of impugned order, the requirements of natural justice have been complied with, because non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It is here that the action of the respondents is required to be tested on the touchstone of justice, equity, fair play and in case the decision is not based on justice, equity and fair play, then the decision cannot be allowed to stand.

5. In this connection, the decision in **S. L. Kapoor vs. Jagmohan, AIR 1981 SC 136** is relevant. In paragraph 16 of the judgment, their Lordships have held as follows:-

".....In our view, the requirements of natural justice are met only if opportunity to represent is given in view of proposed action. The demands of natural justice are not met even if the very person proceeded against has furnished the information on which the action is based if it is furnished in a casual way or for some other purpose. We do not suggest the opportunity need be a 'double opportunity' that is one opportunity on the factual allegations and another on the proposed penalty. Both may be rolled into one. But the person proceeded against must know that he is being required to meet the allegations which might lead to a certain action being taken against him. If that is made known the requirements are met. ..." (Emphasis added)

".....In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal." (Emphasis supplied)

6. In Wade & Forsyth -- 'Administrative law', the learned Authors have said thus :-

"A proper hearing must always include a 'fair opportunity to those who are parties in the controversy for correcting or contradicting anything prejudicial to their view'. Lord Denning has added :

'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.' ...."

(Emphasis supplied)

7. In De Smith, Woolf and Jowell's --Judicial Review of Administrative Action, under the caption 'Duty of adequate disclosure', it is said thus :-

> *"If prejudicial allegations are to be made against a person, he must normally, as we have seen, be given particulars of them before the hearing so that he can prepare his answers. In order to protect his interests he must also be enabled to controvert, correct or comment on other evidence or information that may be relevant to the decision; indeed, at least in some circumstances [here will be a duty on the decision maker to disclose information favourable to the applicant, as well as information prejudicial to his case. If material is available before the hearing, the right course will usually be to give him advance notification; .....*
>
> *If relevant evidential material is not disclosed at all to a party who is potentially prejudiced by it, there is prima facie unfairness, irrespective of whether the material in question arose before, during or after the hearing. ,, ..."*

8. The very purpose of issuance of a show cause notice is to enable the delinquent to show how the report submitted by the Inquiry Officer is factually/ legally incorrect. It is a serious business and cannot be taken lightly and the respondents owed a duty to act fairly.

9. The record reveals that the show cause notice was issued only to demonstrate that the principles of natural justice were complied with, but as a matter of fact it is proved that the same was a farce and an empty formality because the proposed penalty and the impugned order imposing penalty, are issued on the same very day i.e. 15.7.2013. This renders the show cause notice illusionary and an empty ritual and above all an idle formality.

10. The punishment of compulsory retirement as imposed upon the petitioner is a serious business and could not have been taken lightly. In order to justify the action taken to compulsory retire the petitioner, the authority concerned had to act fairly and in complete adherence to the rules apart from following the basic principles of natural justice and fair play.

11. It is well settled that a disciplinary authority while acting in exercise of its statutory power acts as a quasi judicial authority and must therefore act fairly and must act with an open mind while initiating a show cause proceeding. The show cause proceedings is meant to give a person proceeded against a reasonable opportunity of making his objection against the penalty indicated in the notice.

12. Justice is rooted in confidence and justice is the goal of a quasi- judicial proceeding also. If the functioning of a quasi- judicial authority has to inspire confidence in the mind of those subjected to its jurisdiction, such authority must act with utmost fairness.

13. It is well settled that justice should not only be done but should be seen to be done. This principle was reiterated by the Hon'ble Supreme Court in **S.L.Kapoor's** case (supra), wherein the Hon'ble Supreme Court has held as follows:-

> "*24. The matter has also been treated as an application of the general principle that justice should not only be done but should be seen to be done. Jackson's Natural Justice (1980 Edn.) contains a very interesting discussion of the subject. He says:*
>
> > *"The distinction between justice being done and being seen to be done has been emphasised in many cases.....*

The requirement that justice should be seen to be done may be regarded as a general principle which in some cases can be satisfied only by the observance of the rules of natural justice or as itself forming one of those rules. Both explanations of the significance of the maxim are found in Lord Widgery C. J.'s judgement in R. v. Home Secretary, Ex. P. Hosenball, (1977) 1 WLR 766, 772, where after saying that "the principles of natural justice are those fundamental rules, the breach of which will prevent justice from being seen to be done" he went on to describe the maxim as "one of the rules generally accepted in the bundle of the rules making up natural justice."

It is the recognition of the importance of the requirement that justice is seen to be done that justifies the giving of a remedy to a litigant even when it may be claimed that a decision alleged to be vitiated by a breach of natural justice would still have been reached had a fair hearing been given by an impartial tribunal. The maxim is applicable precisely when the Court is concerned not with a case of actual injustice but with the appearance of injustice, or possible injustice. In Altco Ltd. v. Sutherland, (1971) 2 Lloyd's Rep 515 Donaldson J. said that the court, in deciding whether to interfere where an arbitrator had not given a party a full hearing was not concerned with whether a further hearing would produce a different or the same result, It was important that the parties should not only be given justice, but, as reasonable men, know that they had had justice or "to use the time hallowed phrase" that justice should not only be done but be seen to be done. In R. v. Thames Magistrates' Court, ex. p. Polemis, (1974) 1 WLR 1371, the applicant obtained an order of certiorari to quash his conviction by a stipendiary magistrate on the ground that he had not had sufficient time to prepare his defence. The Divisional Court rejected the argument that, in its discretion, it ought to refuse relief because the applicant had no defence to the charge.

> *'It is again absolutely basic to our system that justice must not only be done but must manifestly be seen to be done. If justice was so clearly not seen to be done, as on the afternoon in question here, it seems to me that it is no answer to the applicant to say: 'Well, even if the case had been properly conducted, the result would have been the same'. That is mixing up doing justice with seeing that justice is done (per Lord Widgery C. J. at P. 1375)."*

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference it natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied Justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the Court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because Courts do not issue futile writs. We do not agree with the contrary view taken by the Delhi High Court in the judgment under appeal."

14. When the respondents had issued a show cause notice and granted time to file reply to the same, then the respondents could not have turned around on the same day itself and passed the impugned penalty. The respondents were bound to act fairly, justly and reasonably. The right to impose penalty carriage with a duty to act justly.

15. Having observed so and without gong into the other contentions raised in this petition, I am of the considered opinion that impugned order of penalty dated 15.7.2013 (Annexure P-12) cannot be sustained and the same is accordingly quashed and set-aside. The respondents are, however, at liberty to pass fresh order, that too, after issuing a show cause notice and after affording an opportunity of hearing to the petitioner.

16. The petition is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Bansi Lal Thakur. .....Appellant.

Versus

Ram Saran Thakur .....Respondent.

RSA No. 22 of 2015.
Reserved on: May 26, 2015.
Decided on: June 18, 2015.

Specific Relief Act, 1963- Section 5- Plaintiff claimed that he had rented out one shop consisting of two rooms to the defendant- tenancy was terminated by serving a legal notice- correct address was mentioned in the notice and there is presumption that addressee had received the same- mere acceptance of the rent subsequent to the delivery of notice which will not have affected extending the tenancy. (Para-9 to 11)

Case referred:
Shanti Prasad Devi and another vrs. Shankar Mahto and others, AIR 2005 SC 2905

For the appellant: Mr. J.R.Poswal, Advocate.
For the respondent: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree dated 8.7.2014 rendered by the learned District Judge, Shimla, H.P., in Civil Appeal No. 3-S/13 of 2014.

2. Key facts, necessary for the adjudication of this second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff, for the convenience sake) has filed a suit for possession against the appellant-defendant (hereinafter referred to as the defendant, for the convenience sake) with the averments that the plaintiff is owner of five storyed building known as Saw Mill Building at village Banuti, Tehsil and Distt. Shimla, H.P., situated over Kh. No. 960/434/638, comprised in Khewat No. 78, Khatauni No. 124, as per jamabandi for the year 2001-02. The defendant approached the plaintiff in the

month of March, 2009 for renting out one shop comprising of two rooms on rent i.e. 4th floor of the building for running medical store known as M/S Rakesh Medicine Centre for a period of one year on a rent of Rs.20,000/- per annum. An agreement was executed on 23.3.2009. The tenancy of the shop premises commenced from 1.4.2009 till 31.3.2010. Legal notice was served upon the defendant dated 6.3.2012 terminating the tenancy rights qua the tenanted shop asking the defendant to vacate and hand over the possession on or before 30.4.2012 and to pay use and occupation charges.

3. The suit was contested by the defendant. According to him, agreement dated 23.3.2009 was extended twice impliedly by plaintiff in favour of the defendant. The plaintiff has accepted the rent w.e.f. 1.4.2010 to 31.3.2011 and thereafter w.e.f. 1.4.2012 to 31.3.2012. The legal notice dated 6.3.2012 was neither delivered nor has ever been received by him. The tenancy was never terminated and has denied that he is liable to pay the use and occupation charges at the rate of Rs. 300/- per day.

4. The plaintiff filed the replication. The issues were framed by the learned trial Court on 30.10.2012. The learned trial Court, decreed the suit on 28.12.2013. The defendant preferred an appeal against the judgment and decree dated 28.12.2013 before the learned District Judge, Shimla, H.P. The learned District Judge, Shimla, dismissed the same on 8.7.2014, hence this regular second appeal.

5. Mr. J.R.Poswal, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that notice Ext. PW-1/B was never served upon the defendant. No separate findings were given by the Courts below on all the issues. The learned courts below have mis-read and misconstrued the oral as well as documentary evidence on record. The provisions of Section 106 and 107 of the Transfer of Property Act, have not been correctly appreciated by the learned courts below. On the other hand, Mr. G.D.Verma, learned Sr. Advocate, has supported the judgments and decrees passed by both the Courts below.

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

7. The plaintiff has appeared as PW-1. According to him, he had given one shop comprising of two rooms in the fourth floor of the building on rent at the rate of Rs.20,000/- per annum to the defendant. The defendant had agreed to vacate the shop by 31.3.2010. The agreement was never renewed. The defendant has paid the use and occupation charges to him upto 31.3.2012. He had given notice dated 6.3.2012 through registered AD Ext. PW-1/B to the defendant vide postal receipt Ext. PW-1/C. The same was duly received and acknowledged vide Ext. PW-1/D. The shop was not vacated despite the notice. The defendant was liable to pay arrears of rent. He has proved rough plan of the premises vide Ext. PW-1/E.

8. The defendant has appeared as DW-1. He has admitted that he has taken shop on rent from the plaintiff vide agreement Mark X on yearly rent of Rs.20,000/-. He has made all the payments for the year 2010-11 and 2011-12 through cheque. He has not received any legal notice for the vacation of the shop. He has denied his signatures on acknowledgement Ext. PW-1/D. He has admitted that he runs a shop in the name and style of Rakesh Medical Shop in the disputed premises.

9. The copy of jamabandi is Ext. PW-1/A. According to this jamabandi, the shop is situated on Kh.No.960/434/638. The suit premises were given on rent to the defendant on 1.4.2009. The plaintiff has served a notice upon the defendant vide Ext. PW-1/B. The postal receipt is Ext. PW-1/C. The address in the notice was of the store/agency

run by the defendant situated at The Mall Road, Shimla. Thus, there is no merit in the contention of Mr. J.R.Poswal, Advocate that the address mentioned in the notice Ext. PW-1/B as well as postal receipt Ext. PW-1/C and acknowledgement Ext. PW-1/D is wrong. The only requirement of the law is that the address mentioned in the notice should be correct so that the addressee could receive the same. Moreover, the presumption under Section 3 (C) of the Postal Act is that if the correct address is mentioned upon the envelope/post card, the addressee has received the same. There is also presumption under the General Clauses Act, 1897. The defendant has admitted that he is running medical store/agency on the Mall Road. Mr. J.R.Poswal, Advocate has vehemently argued that the plaintiff has received the rent after 31.3.2010. The plaintiff has served defendant with notice Ext. PW-1/B on 6.3.2012. The plaintiff has not received any rent after 6.3.2012.

10. Their lordships of the Hon'ble Supreme Court in the case of ***Shanti Prasad Devi and another vrs. Shankar Mahto and others,*** reported in ***AIR 2005 SC 2905*** have held that mere acceptance of rent for the subsequent months in which the lessee continued to occupy the leased premises cannot be said to be conduct signifying assent to the continuance of the lessee even after expiry of lease period. Their lordships have held as under:

> "17. We fully agree with the High Court and the first appellate court below that on expiry of period of lease, mere acceptance of rent for the subsequent months in which the lessee continued to occupy the lease premises cannot be said to be a conduct signifying 'assent' to the continuance of the lessee even after expiry of lease period. To the legal notice seeking renewal of lease, the lessor gave no reply. The agreement of renewal contained in clause (7) read with clause (9) required fulfillment of two conditions; first the exercise of option of renewal by the lessee before the expiry of original period of lease and second, fixation of terms and conditions for the renewed period of lease by mutual consent and in absence thereof through the mediation of local Mukhia or Panchas of the village. The aforesaid renewal clauses (7) & (9) in the agreement of lease clearly fell within the expression 'agreement to the contrary' used in Section 116 of the Transfer of Property Act Under the aforesaid clauses option to seek renewal was to be exercised before expiry of the lease and on specified conditions.
>
> 18. The lessor in the present case had neither expressly nor impliedly agreed for renewal. The renewal as provided in the original contract was required to be obtained by following a specified procedure i.e. on mutually agreed terms or in the alternative through the mediation of Mukhias and Panchas. In the instant case, there is a renewal clause in the contract prescribing a particular period and mode of renewal which was 'an agreement to the contrary' within the meaning of Section 116 of the Transfer of Property Act. In the face of specific clauses (7) & (9) for seeking renewal there could be no implied renewal by 'holding over' on mere acceptance of the rent offered by the lessee . In the instant case, option of renewal was exercised not in accordance with the terms of renewal clause that is before the expiry of lease. It was exercised after expiry of lease and the lessee continued to remain in use and occupation of the leased premises. The rent offered was accepted by the lessor for the period the lessee overstayed on the leased premises. The lessee, in the above circumstances, could not claim that he was 'holding over' as a lessee within the meaning of Section 116 of the Transfer of Property Act.

22. As the leased premises were in use for running a petrol pump, we grant the appellant a reasonable period of two months from the date of this order to deliver possession of the leased premises after removing her installations and other movables."

11. In the instant case, the defendant is continuing in possession after notice Ext. PW-1/B without the consent of the landlord. This possession cannot be termed to be possession of tenant with the consent of the landlord. The learned Courts below have correctly appreciated the provisions of Section 106 and 107 of the Transfer of Property Act. Once the tenancy of the defendant has been terminated, thereafter he has no right to remain in the premises. The issues were inter-linked and thus they have been decided together. The Courts below have correctly appreciated the oral as well as documentary evidence on record. The substantial questions of law are answered accordingly.

12. Consequently, there is no merit in this regular second appeal, the same is dismissed. No costs.

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

CWP Nos. 1776, 1923 & 2101 of 2015.
Reserved on: 5.6.2015.
Decided on: 18.6.2015.

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1. CWP No. 1776 of 2015.
Dr. Vivek Kumar Garg and ors.
Vrs.
State of H.P. & ors.
2. CWP No. 1923 of 2015.
Kirti Rana and ors.
Vrs.
State of H.P. & ors.
3. CWP No. 2101 of 2015.
Dr. Narendeep Ashutosh.
Vrs.
State of H.P. & ors.

Constitution of India, 1950- Article 226- All India Post Graduate Medical Entrance Examination (AIPGMEE) was conducted from 1.12.2014 to 6.12.2014- admission process was started on the basis of entrance examination - initially it was provided that allotment of the seats will be made in the specified ratio- however, subsequently roster was issued on the basis of method of appointment- petitioner contended that allotment has to be made in accordance with original condition- held, that while filling up the seats for post graduate qualification, the only criterion should be merit – State has created sub groups on the basis of method of appointment – all the medical officers discharge the same duties - once they are permitted to sit in one examination, they are to be treated as the same- the classification within the classification is not permissible and it was also not permissible to change the condition after the publication of the prospectus. (Para-14 to 27)

Cases referred:
AIIMS Students' Union vrs. AIIMS and others, (2002) 1 SCC 428
State of M.P. and others vrs. Gopal D. Tirthani and others, (2003) 7 SCC 83

Asha vrs. Pt. B.D.Sharma University of Health Sciences and others, (2012) 7 SCC 389
Nikhil Himthani vrs. State of Uttarakhand and others, (2013) 10 SCC 237
Vishal Goyal and others vrs. State of Karnataka and others, (2014) 11 SCC 456,
Kulmeet Kaur Mahal and others vrs. State of Punjab and others, (2014) 13 SCC 756
Union of India and others vrs. Atul Shukla etc., AIR 2015 SC 1777

For the petitioner(s):	Mr. R.K.Gautam, Sr. Advocate, with Mr. Gaurav Gautam Advocate, for petitioner(s) in CWP Nos. 1776 & 2101 of 2015. Mr. Ajay Mohan Goel, Advocate, for the petitioners in CWP No. 1923 of 2015 & for respondents No. 6 t0 9 in CWP No. 1776 of 2015.
For the respondents:	Mr. P.M.Negi, Dy. AG and Mr. Ramesh Thakur, Asstt. AG for respondent-State in all the petitions. Respondents No. 5 to 7 in CWP No. 2101 of 2015 proceeded ex parte.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, in order to maintain clarity, the facts of CWP No. 1776 of 2015 have been taken into consideration.

CWP No. 1776 of 2015

2. The All India Post Graduate Medical Entrance Examination (AIPGMEE) for session 2015-18 was conducted from 1.12.2014 to 6.12.2014. The result of the All India Post Graduate Medical Entrance Examination was declared on 15.1.2015. The Department of Medical Education and Research, Himachal Pradesh, in accordance with the result, issued Prospectus for Medical Post Graduate Courses (MD/MS) in IGMC, Shimla and Dr. RPGMC, Kangra at Tanda. The last date for submission of application form was 20.3.2015. The date of first round of counselling at Auditorium Complex, IGMC, Shimla was at 11:00 AM sharp on 27.3.2015. The last date of joining the allotted course/College was 6.4.2015. The date of 2nd round of counselling at Auditorium Complex, IGMC, Shimla was at 11:00 AM sharp on 27.4.2015. The last date of joining for candidates admitted in 2nd round of counselling was 8.5.2015. The 3rd round of counselling at Auditorium Complex, IGMC, Shimla was at 2:30 PM on 22.6.2015. The last date of joining for candidates admitted in 3rd round of counselling was 22.6.2015. The commencement of academic session was w.e.f. 30.6.2015. The last date up to which students can be admitted against vacancies arising due to any reason from the waiting list was notified as 10.7.2015.

3. The eligibility and distribution of seats have been provided under para 3 of the Prospectus. Para 3.1 (A), deals with HPHS (In-service GDO) Group, which reads as under:

> **"ELIGIBILITY & DISTRIBUTION OF SEATS**
>
> **3.1 (A) HPHS(In-service GDO) Group.**
>
> **(i)** 66.6% of the State Quota Seats will be filled up by in-service Medical Officers. The in-service group will consist of two sub-groups i.e. one sub-group consisting of regularly appointed Medical officer and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The

distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18, the distribution of seats between above two sub-groups will be in the ratio of 2:1."

4. Para 3.5 (iii) of the Prospectus reads as under:

"(iii) the allotment of seats/specialities between the Regular GDO's and the contractual GDO's (including appointees of RKS) on the basis of the respective in position strength ratio of both the categories as on 31.10.2014 i.e. (2:1) will be made in the following manner:

1. GDO (Regular)
2. GDO (Regular)
3. GDO (Contract)

After 3rd point, it will be repeated again."

5. Para 3.5 (iii) has been substituted by notice dated 16.3.2015, which reads as under:

"(iii) 4 point roster will be applied for allotment of seats/specialities between the GDO(Regular) and the GDO(Contract/RKS) on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014 (i.e. 3:1). The 4 point roster will be applied in the following manner as per previous practice:-

1. GDO(Regular)
2. GDO(Regular)
3. GDO(Contract)
4. GDO(Regular)

After 4th point, it will be repeated again."

6. The 4 point roster was also published in the daily edition of The Tribune, dated 17.3.2015 vide Annexure P-8. The petitioners have challenged the allocation of seats on the basis of roster points based on sub-groups in the in-service HPHS (In-service GDO). In CWP No. 1923 of 2015, the petitioners have also sought quashing of communication dated 16.3.2015. According to them, the counselling be held as per the contents of para 3.5(iii), as originally contained in the prospectus.

CWP No. 2101 of 2015.

7. The All India Post Graduate Dental Entrance Examination (AIPGDEE) was conducted on 24.1.2015. The result was declared on 5.2.2015. The State issued Prospectus. The last date of receipt of application(s) was 20.3.2015. The first date of counselling was 30.3.2015. The last date for joining the allotted course/College was 7.4.2015. The date of 2nd round of counselling at HP Govt. Dental College & Hospital, Shimla at 11:00 AM was 29.4.2015. The last date for joining the allotted course/College was 10.5.2015. The 3rd round of counselling at H.P. Govt. Dental College & Hospital, Shimla at 11:00 AM was on 20.6.2015 and the last date for joining the allotted course/College was 20.6.2015. Para 3 of the Prospectus lays down the eligibility and distribution of seats. Para 3.1(i) reads as under:

"ELIGIBILITY & DISTRIBUTION OF SEATS

3.1 (A) In-service GDO (M.O Dental) Group Seats.

(i) 66.6% of the State Quota Seats will be filled up by in-service (M.O.Dental) Group Candidates. The in-service (M.O. Dental) Group will consist of two sub-groups i.e. one sub-group consisting of regular In-service (M.O. Dental) and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular M.O. Dental and those appointed on contractual basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18, the distribution of seats between above two sub-groups will be in the ratio of 2:1."

8. The allotment of seats between the regular in-service GDO(MO Dental) and the contractual in-service GDO(MO Dental) on the basis of the respective in-position strength ratio has been laid down in para 3.6 (b) (iii), which reads as under:

"3.6 (b) (iii). The allotment of seats between the regular in-service GDO(MO Dental) and the contractual in-service GDO(MO Dental) on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014 in the following manner:-

1. GDO (Regular)
2. GDO (Regular)
3. GDO (Contract)

After 3rd point, it will be repeated again."

9. The respondents have filed the replies. They have justified the constitution of different sub-groups and framing of the roster points.

10. Mr. R.K.Gautam, Sr. Advocate, with Mr. Gaurav Gautam, Advocate and Mr. Ajay Mohan Goel, Advocate, for the respective petitioners, have strenuously argued that the allocation/distribution of seats as per the sub-groups created under the Prospectus for HPHS (In-service GDO) and In-service GDO(MO Dental), is impermissible and unconstitutional. They further contended that the rules of the game cannot be changed mid-way by prescribing the new roster after the issuance of Prospectus. They lastly contended that the merit should be the sole criterion for MD/MS and MDS Courses. On the other hand, Mr. P.M.Negi, learned Dy. Advocate General has vehemently argued that constituting of sub-groups was in accordance with law and he has also justified the preparation of roster.

11. We have heard learned Advocates and gone through the pleadings carefully.

12. The petitioners have participated in the selection process seeking admission to postgraduate degree (MD/MS/MDS) courses for the academic session 2015-18, as per the prospectus issued by the State Government. According to para 3.1 of the Prospectus issued for degree/MD/MS/MDS, courses, 66.6% of the State quota seats are to be filled up by in-service candidates. The in-service group comprises of two further sub-groups; one sub-group consisting of regularly appointed Medical Officers and the second comprising of Medical Officers appointed on contractual basis, including Rogi Kalyal Samiti appointees. The distribution of seats between the regular and those appointed on contractual basis, including Rogi Kalyal Samiti appointees, is to be made in the ratio proportionate to the total number as on 31.10.2014 for the academic session 2015-18. Initially, as per para 3.5 (iii), the ratio between the regular GDO's and the contractual GDOs, including appointees of RKS was as under:

1. GDO (Regular)

2. GDO (Regular)
3. GDO (Contract)

13. After the 3rd point, the process was to be repeated again. The respondent-State issued communication on 16.3.2015, whereby 4 point roster was to be applied for allotment of seats between GDO regular and GDO contract (including the RKS), on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014. Initially as per para 3.5 (iii), the first two seats were to be allotted to GDO (Regular) and thereafter 3rd to GDO (Contract), but after the notification of 16.3.2015, the first two seats would go to GDO(Regular) and 3rd to GDO (Contract) and thereafter 4th to GDO (Regular).

14. It is settled law that for filling up the MD/MS/MDS seats, the criteria should be merit alone. The respondent-State has created two groups within the HPHS (In-service GDO) group, comprising of regularly appointed Medical Officers and contractual/Rogi Kalyan Samiti appointees. The respondent-State has also created sub-groups in the In-service GDO (MO Dental) Group seats, comprising of two sub-groups; one sub-group comprising of regularly appointed Medical Officers and other comprising of contractual/Rogi Kalyan Samiti appointees. All the Medical officers appointed either on regular basis, contractual or by RKS, discharge the same duties. Once they have been permitted to sit in the examination, they would loose birthmark of their initial recruitment either as Medical Officers appointed on regular basis or contractual or appointed by the RKS. They have to be treated as one class/group. The respondent-State has created the classification within the classification by dividing the HPHS in-service GDOs appointed either on regular basis or on contractual basis or appointed by RKS for the purpose of distribution/allotment of seats. There is no intelligible differentia so as to distinguish one group of Medical officers from the other group. They are all Medical officers and possess essential qualifications to sit in the Post Graduate Courses on the basis of All India Test. The respondent-State has further perpetuated the illegality by introducing new roster as per Annexure P-8 on 16.3.2015, whereby the candidates belonging to GDO (Regular), irrespective of their merit would get the first and second seat. The 3rd seat would go to contractual and the 4th again to regularly appointed GDO. The best available method as per the settled law would have been to fill up the MD/MS/MDS courses, strictly as per the marks obtained by in-service candidates, irrespective of their category.

15. The matter can be considered from yet another angle. The candidate who would be at Sr. No. 3 of the roster may have also secured less marks than the candidate appointed on regular basis but merely on the basis of the point allocated to him, he would be permitted to take MD/MS/MDS, seat.

16. The result of the All India Post Graduate Dental Entrance Examination was declared on 5.2.2015. The result of All India Post Graduate Medical Entrance Examination was declared on 15.1.2015. Thereafter, the Prospectus was issued. The last date of receipt of application form for MD/MS course was 20.3.2015. The same date was prescribed for All India Post Graduate Dental Entrance Examination. The counsellings have taken place. Once the prospectus has been issued and the same has been duly notified, it was not open to the respondents to change the terms and conditions contained in the Prospectus mid-way after the issuance of Prospectus. The candidates have taken the examination as per the terms and conditions issued initially at the time of issuance of prospectus. The respondents are also estopped from changing the conditions.

17. The issue raised in these petitions had also cropped up in CWP No. 2390 of 2014. It was decided on 26.5.2014. The operative portion of the judgment reads as under:

"12. Thus, it is more than clear from the above that allocation of quota to a particular group or sub group is not akin to reservation envisaged under Articles 15(4) and 16(4) of the Constitution. It being so "inter se merit of the candidates in each quota shall be determined based on the merit performance of the candidates belonging to that quota" : Re **State of M.P. and others vs. Gopal D. Tirthani and others**, supra. "There cannot be any circumstance where rule of merit can be compromised": Re **Asha vs. Pt. B.D. Sharma University of Health Sciences and others,** supra. Above all, a more meritorious candidate ought to and must get a preferential right to choose a particular specialty.

13. The rival contention that once the petitioners have elected to participate in the process enunciated under the aforesaid prospectus, they cannot approbate and reprobate, does not hold good in view of the binding nature of the dictum of law laid down by the Hon'ble Apex Court in the judgments referred to hereinabove. It is for the same reason that lack of challenge against sub clause 3.5(i) (iii) of clause 3 of the Prospectus in the writ petition is of no consequence in the peculiar facts and circumstances of the present case.

14. In view of the above, the petition is allowed. Consequently, the counselling held by respondents No. 2 and 3 on 28.3.2014, followed by subsequent counselling, if any, for admission to post graduate MD/MS courses in Indira Gandhi Medical College and Dr. Rajindera Prasad Medical College Kangra at Tanda, vis-à-vis 66.6% quota meant for in service candidates, is quashed with a direction to respondents No. 2 and 3 to hold fresh counselling strictly in order of merit based on the State merit list, Annexure P-11. To be explicit, the candidates belonging to both the sub groups, that is, regular GDOs and contractual GDOs (including appointees of RKS) shown in the merit list shall be called for counselling one by one in order of their merit. To illustrate once candidates at Sr. Nos. 1 to 5 of list Annexure P-11 belonging to the first sub group of regular GDOs are called, the candidate at Sr. No.6, who belongs to the other sub group of contractual GDOs (including appointees of RKS) shall be called. The process shall proceed further so on and so forth. The entire process shall be completed well within the schedule for admission fixed by the Hon'ble Supreme Court in its order dated 14.3.2014, in Writ Petition (Civil) No. 433 of 2013, **Dr. Fraz Naseem & Ors. vs. Union of India & Ors**. and the connected matters."

18. The SLP was preferred against the judgment dated 28.5.2014, rendered in CWP No. 2390 of 2014. The appeal was allowed on 13.10.2014. The Hon'ble Supreme Court has taken into consideration that the provisions contained in the prospectus dated 20.2.2014 and Notification dated 19.5.2009 were not specifically challenged. In the instant case, the petitioners have specifically challenged the *inter se* grouping in HPHS (In-service GDO) and In-service GDO(MO Dental) and the subsequent issuance of roster after the issuance of Prospectus by the respondent-State.

19. Their lordships of the Hon'ble Supreme Court in the case of ***AIIMS Students' Union vrs. AIIMS and others,*** reported in ***(2002) 1 SCC 428,*** have held that a candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance for the higher levels of education like postgraduate courses. It has been held as follows:

> "44. When protective discrimination for promotion of equalisation is pleaded, the burden is on the party who seeks to justify the ex facie deviation from equality. The basic rule is equality of opportunity for every person in the country which is a constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best, according to this rule of equal chance for equal marks. This proposition has greater importance when we reach the higher levels and education like post-graduate courses. Reservation, as an exception, may be justified subject to discharging the burden of proving justification in favour of the class which must be educationally handicapped - the reservation geared up to getting over the handicap. The rationale of reservation in the case of medical students must be removal of regional or class inadequacy or like disadvantage. Even there the quantum of reservation should not be excessive or societally injurious. The higher the level of the speciality the lesser the role of reservation."

20. Their lordships in the case of ***State of M.P. and others vrs. Gopal D. Tirthani and others,*** reported in ***(2003) 7 SCC 83,*** while dealing with the issue of in-service candidates and non-service or general category candidates, have laid down the following test to adjudge reasonable classification:

> "[21] To withstand the test of reasonable classification within the meaning of Art. 14 of the Constitution, it is well settled that the classification must satisfy the twin tests; (i) it must be founded on an intelligible differentia which distinguishes persons or things placed in a group from those left out or placed not in the group, and (ii) the differentia must have a rational relation with the object sought to be achieved. It is permissible to use territories or the nature of the objects or occupations or the like as the basis for classification. So long as there is a nexus between the basis of classification and the object sought to be achieved, the classification is valid. We have, in the earlier part of the judgment, noted the relevant statistics as made available to us by the learned Advocate General under instructions from Dr. Ashok Sharma, Director (Medical Services), Madhya Pradesh, present in the Court. The rural health services (if it is an appropriate expression) need to be strengthened. 229 community health centres (CHCs) and 169 first referral units (FRUs) need to be manned by specialists and block medical officers who must be post-graduates. There is nothing wrong in the State Government setting apart a definite percentage of educational seats at post-graduation level consisting of degree and diploma courses exclusively for the in-service candidates. To the extent of the seats so set apart, there is a separate and exclusive source of entry or channel for admission. It is not reservation. In-service candidates, and the candidates not in the service of the State Government, are two classes based on an intelligible differentia. There is a laudable purpose sought to be achieved. In-service candidates, on attaining higher academic achievements, would be available to be posted in rural areas by the State Government. It is not that an in-service candidate would leave the service merely on account of having secured a post-graduate degree or diploma though secured by virtue of being in the service of the State Government. If there is any misapprehension the same is allayed by the State Government obtaining a bond from such candidates as a condition precedent to their taking admission that after completing PG Degree/Diploma Course they would serve the State

> Government for another five years. Additionally a Bank guarantee of rupees three lakhs is required to be submitted along with the bond. There is, thus, clearly a perceptible reasonable nexus between the classification and the object sought to be achieved."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Asha vrs. Pt. B.D.Sharma University of Health Sciences and others,*** reported in ***(2012) 7 SCC 389,*** while dealing with admission to Medical Colleges have held that criteria for selection has to be merit alone and it will be a travesty of the scheme formulated by the Supreme Court and duly notified by the States, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. It has been held as follows:

> "21. At this stage, we may refer to certain judgments of the Court where it has clearly spelt out that the criteria for selection has to be merit alone. In fact, merit, fairness and transparency are the ethos of the process for admission to such courses. It will be travesty of the scheme formulated by this Court and duly notified by the states, if the Rule of Merit is defeated by inefficiency, inaccuracy or improper methods of admission. There cannot be any circumstance where the Rule of merit can be compromised. From the facts of the present case, it is evident that merit has been a casuality. It will be useful to refer to the view consistently taken by this Court that merit alone is the criteria for such admissions and circumvention of merit is not only impermissible but is also abuse of the process of law. Ref. Priya Gupta Vs. State of Chhatisgarh & Anr. [CA @ SLP(C) No. 27089 of 2011, decided on 8th May, 2012], Harshali v. State of Maharashtra and Others [(2005) 13 SCC 464], Pradeep Jain v. UOI [1984 (3) SCC 654], Sharwan Kumar and Others v. Director of Health Services and Another [1993 Supp (1) SCC 632], Preeti Srivastava v. State of MP [(1999) 7 SCC 120], Guru Nanak Dev University v. Saumil Garg and Others [2005 (13) SCC 749], AIIMS Students' Union v. AIIMS and Others [(2002) 1 SCC 428]."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Nikhil Himthani vrs. State of Uttarakhand and others,*** reported in ***(2013) 10 SCC 237,*** have held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in the higher levels of education like postgraduate medical courses, such as MD. Excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation. It has been held as follows:

> "[11] The Constitution Bench of this Court has held in Saurabh Chaudri and Ors. v. Union of India and Ors. that giving institutional preference is a matter of State Policy which can be invalidated only in the event of it being violative of Article 14 of the Constitution. Hence, the question that we have to decide in this writ petition is whether clauses 1, 2 and 3 of the Eligibility Criteria in the information bulletin are ultra vires Article 14 of the Constitution of India.
>
> [12] Article 14 of the Constitution guarantees to every person equality before law and equal protection of laws. In Dr. Jagadish Saran and Ors. v. Union of India, 1980 2 SCC 768, Krishna Iyer J, writing the judgment on behalf of the three Judges referring to Article 14 of the Constitution held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in

the higher levels of education like post-graduate medical courses, such as MD. In the language of Krishna Iyer, J.:

> "23. Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure all the highest scales of speciality where the best skill or talent, must be handpicked by selecting according to capability. At the level of Ph.d. M.D., or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon as important lose their potency. Here equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk...."

[13] Relying on the aforesaid reasons in Dr. Jagadish Saran and Ors. v. Union of India a three Judge Bench of this Court in Dr. Pradeep Jain's case held that excellence cannot be compromised by any other consideration for the purpose of admission to post-graduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and therefore reservation based on residential requirement in the State will affect the right to equality of opportunity under Article 14 of the Constitution but:

> "22. .....a certain percentage of seats may in the present circumstances be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the post-graduate course in the same medical college or university....."

This view expressed in Dr. Pradeep Jain's case has been reiterated by another three Judge Bench of this Court in Magan Mehrotra and Ors. v. Union of India and Ors. after a reconsideration and independent examination."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Vishal Goyal and others vrs. State of Karnataka and others,*** reported in ***(2014) 11 SCC 456,*** have held that at post graduate level even partial reservation based on residence requirement is impermissible. It has been held as follows:

> "10. We have considered the submissions of learned counsel for the parties and we find that the basis of the judgment of this Court in Dr. Pradeep Jain's case (supra) is Article 14 of the Constitution which guarantees to every person equality before the law and equal protection of the laws. As explained by this court in paragraphs 12 and 13 10 Page 11 of the judgment in Nikhil Himthani v. State of Uttarakhand & Others (supra):
>
> > "12. Article 14 of the Constitution guarantees to every person equality before law and equal protection of laws. In Jagadish Saran v. Union of India (1980) 2 SCC 768, Krishna Iyer, J., writing the judgment on behalf of the three Judges referring to Article 14 of the Constitution held that equality of opportunity for every person in the country is the constitutional guarantee and therefore merit must be the test for selecting candidates, particularly in the higher levels of

education like postgraduate medical courses, such as MD. In the language of Krishna Iyer, J. (SCC pp.778-79, para 23)

"23. Flowing from the same stream of equalism is another limitation. The basic medical needs of a region or the preferential push justified for a handicapped group cannot prevail in the same measure all the highest scales of specialty where the best skill or talent, must be handpicked by selecting according to capability. At the level of PhD, MD, or levels of higher proficiency, where international measure of talent is made, where losing one great scientist or technologist in-the-making is a national loss, the considerations we have expanded upon a important lose their potency. Here, equality, measured by matching excellence, has more meaning and cannot be diluted much without grave risk."

13. Relying on the aforesaid reasons in Jagadish Saran v. Union of India, a three- 11 Page 12 Judge Bench of this Court in Pradeep Jain case held excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and therefore reservation based on residential requirement in the State will affect the right to equality of opportunity under Article 14 of the Constitution……."

In Magan Mehrotra v. Union of India (supra) and Saurabh Chaudri v. Union of India (supra) also, this Court has approved the aforesaid view in Dr. Pradeep Jain's Case that excellence cannot be compromised by any other consideration for the purpose of admission to postgraduate medical courses such as MD/MS and the like because that would be detrimental to the interests of the nation and will affect the right to equality of opportunity under Article 14 of the Constitution.

11. Mr. Mariarputham is right that in Saurabh Chaudri v. Union of India (supra), this Court has held that institutional preference can be given by a State, but in the aforesaid decision of Saurabh Chaudri, it has also been held that decision of the State to give institutional preference can be invalidated by the Court in the event it is shown that the decision of the State is ultra vires the right to equality under Article 14 of the Constitution. When we examine sub-clause (a) of clause 2.1 of the two Information Bulletins, we find that the expression "A candidate of Karnataka Origin" who only is eligible to appear for Entrance Test has been so defined as to exclude a candidate who has studied MBBS or BDS in an institution in the State of Karnataka but who does not satisfy the other requirements of sub-clause (a) of clause 2.1 of the Information Bulletin for PGET-2014. Thus, the institutional preference sought to be given by sub-clause (a) of clause 2.1 of the Information Bulletin for PGET-2014 is clearly contrary to the judgment of this Court in Dr. Pradeep Jain's case (supra).

12. To quote from paragraph 22 of the judgment in Dr. Pradeep Jain's case:

"…… a certain percentage of seats may in the present circumstances, be reserved on the basis of institutional preference in the sense that a student who has passed MBBS course from a medical college or university, may be given preference for admission to the postgraduate course in the same medical college or university….."

13. Sub-clause (a) of clause 2.1 of the two Information Bulletins does not actually give institutional preference to students who have passed MBBS or BDS from Colleges or Universities in the State of Karnataka, but makes some of them ineligible to take the Entrance Test for admission to Post Graduate Medical or Dental courses in the State of Karnataka to which the Information Bulletins apply.

14. We now come to the argument of Mr. Mariarputham that the scheme formulated by this Court in Dr. Dinesh Kumar and Others v. Motilal Nehru Medical College, Allahabad and Others (supra) pursuant to the judgment in Dr. Pradeep Jain's case (supra) is confined to medical and dental colleges or institutions run by the Union of India or a State Government or a Municipal or other local authority and does not apply to private medical and dental colleges or institutions. Paragraph (1) of the scheme on which Mr. Mariarputham relied on is extracted hereinbelow:

> "(1) In the first place, the Scheme has necessarily to be confined to medical colleges or institutions run by the Union of India or a State Government or a municipal or other local authority. It cannot apply to private medical colleges or institutions unless they are instrumentality or agency of the State or opt to join the Scheme by making 15 per cent of the total number of seats for the MBBS/BDS course and 25 per cent of the total number of seats for the postgraduate course, available for admission on the basis of All India Entrance Examination. Those medical colleges or institutions which we have already excepted from the operation of the judgment dated June 22, 1984 will continue to remain outside the scope of the Scheme."

This Court has, thus, said in the aforesaid paragraph (1) of the scheme that the scheme cannot apply to private medical and dental colleges or institutions unless they are instrumentalities or agencies of the State or opt to join the scheme. The reason for this is that private medical and dental colleges or institutions not being State or its instrumentalities or its agencies were not subject to the equality clauses in Article 14 of the Constitution, but the moment some seats in the private medical and dental colleges or institutions come to the State quota, which have to be filled up by the State or its instrumentality or its agency which are subject to the equality clauses in Article 14 of the Constitution, the principles laid down by this Court in Dr. Pradeep Jain's case (supra) will have to be followed while granting admissions to the seats allotted to the State Quota in post graduate medical and dental courses even in private colleges.

15. In the result, we allow the writ petitions, declare subclause (a) of clause 2.1 of the two Information Bulletins for post graduate medical and dental courses for PGET-2014 as ultra-vires Article 14 of the Constitution and null and void. The respondent will now publish fresh Information Bulletins and do the admissions to the post graduate medical and dental courses in the Government colleges as well as the State quota of the private colleges in accordance with the law by the end of June, 2014 on the basis of the results of the Entrance Test already held. We also order that the general time schedule for counselling and admissions to post graduate Medical Courses in our order dated 14.03.2014 in Dr. Fraz Naseem & Ors. v. Union of India will not apply to such admissions in the State of Karnataka for the

academic year 2014-2015. Similarly, the general time schedule for counselling and admissions for post graduate dental courses will not apply 16 Page 17 to such admissions in the State of Karnataka. The parties shall bear their own costs."

24. Their lordships of the Hon'ble Supreme Court in the case of ***Kulmeet Kaur Mahal and others vrs. State of Punjab and others,*** reported in ***(2014) 13 SCC 756,*** have held that additional weightage given to in-service candidates in open category defeats rule of merit.

25. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India and others vrs. Atul Shukla etc.,*** reported in ***AIR 2015 SC 1777,*** have held that the classification of employees based on the method of their recruitment has long since been declared impermissible. There can be no differential treatment between an employee directly recruited vis-à-vis another who is promoted. It has been held as follows:

"17. The Tribunal has rejected both the reasons aforementioned and, in our opinion, rightly so. Classification of employees based on the method of their recruitment has long since been declared impermissible by this Court. There can be no differential treatment between an employee directly recruited vis-a-vis another who is promoted. So long as the two employees are a part of the same cadre, they cannot be treated differently either for purposes of pay and allowances or other conditions of service, including the age of superannuation. Take for instance, a directly recruited District Judge, vis-a-vis a promotee. There is no question of their age of superannuation being different only because one is a direct recruit while the other is a promotee. So also an IAS Officer recruited directly cannot for purposes of age of superannuation be classified differently from others who join the cadre by promotion from the State services. The underlying principle is that so long as the officers are a part of the cadre, their birth marks, based on how they joined the cadre is not relevant. They must be treated equal in all respects salary, other benefits and the age of superannuation included.

18. In the case at hand, Group Captains constitute one rank and cadre. The distinction between a Group Captain (Select) and Group Captain (Time Scale) is indicative only of the route by which they have risen to that rank. Both are promotees. One reaches the rank earlier because of merit than the other who takes a longer time to do so because he failed to make it in the three chances admissible to them. The select officers may in that sense be on a relative basis more meritorious than time scale officers. But that is bound to happen in every cadre irrespective of whether the cadre comprises only directly recruited officers or only promotees or a mix of both. Inter se merit will always be different, with one officer placed above the other. But just because one is more meritorious than the other would not by itself justify a different treatment much less in the matter of age of superannuation.

19. It is common ground that Time Scale Officers do not get to the higher rank only because of the length of service. For purposes of time scale promotion also the officers have to maintain the prescribed minimum standard of physical fitness, professional ability, commitment and proficiency. Rise to the next rank by time scale route is, therefore, by no means a matter of course. It is the length of service and the continued usefulness of the officer on the minimal requirements stipulated for such promotion that entitles an officer to rise to higher professional echelons.

> Suffice it to say that while better inter se merit would earn to an officer accelerated promotion to the Group Captain's rank and resultant seniority over Time Scale Officers who take a much longer period to reach that position, but once Time Scale Officers do so they are equal in all respects and cannot be dealt with differently in the matter of service conditions or benefits. All told the submission of the Time Scale Officers that because of their long years of service and experience, they make up in an abundant measure, for a relatively lower merit cannot be lightly brushed aside. That Group Captains (Time Scale) wear the same rank, are paid the same salary and allowances and all other service benefits admissible to Group Captains (Select) supports that assertion for otherwise there is no reason why they should have been equated in matters like pay, allowances and all other benefits including the rank they wear if they were not truly equal. Once it is conceded that the two are equal in all other respects as indeed they are, there is no real or reasonable basis for treating them to be different for purposes of age of retirement.
>
> 24. The principles stated in the above decisions lend considerable support to the view that classification of Group Captains (Select) and Group Captains (Time Scale) in two groups for purposes of prescribing different retirement ages, is offensive to the provisions of Articles 14 and 16 of the Constitution of India. These appeals must, on that basis alone, fail and be dismissed, but, for the sake of a fuller treatment of the subject, we may as well examine whether the classification has any nexus with the object sought to be achieved by the Government decision taken in the wake of the AVS Committee recommendations."

26. The quota of 66.6% prescribed for the in-service candidates *stricto sensu* cannot be termed as reservation. It is only a source/channel for admission to educational institution(s). The in-service candidates and non-service or general category candidates are two separate classes based on intelligible differentia, having a rationale relation with the object sought to be achieved, however, there could not be further micro classification on the basis of source of recruitment qua in-service candidates under 66.6% quota.

27. The goal to be achieved by classification is that only meritorious candidates are admitted in postgraduate courses. The methodology adopted by the respondents by prescribing the roster points would promote only mediocracy and not merit. It is discriminatory, arbitrary and unreasonable. The purpose of prescribing a source from in-service candidates is to ensure that they improve their qualifications to serve people at large more efficiently. Thus, allocation/distribution of seats on the basis of groups/sub-groups under clause 3.1(A)(i) of the Prospectus for HPHS (In-service GDO) Group and In-service GDO(MO Dental) Group seats is unreasonable and unconstitutional. It is reiterated that these groups should have been treated as one group for the purpose of admission to MD/MS/MDS courses.

28. Accordingly, the Writ Petitions are allowed. The allotment of seats/roster points on the basis of sub-groups comprising of regularly appointed Medical Officers, contractual and Rogi Kalyan Samiti appointees and sub groups comprising of regular Medical Officers (Dental) and second group comprising of contractual and Rogi Kalyan Samiti appointees as per clause 3.1(A) (i) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MD/MS) Courses and clause 3.6(b)(iii) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MDS) Courses for the academic session 2015-18, respectively, are quashed and set

aside. The admissions made to MD/MS/MDS courses on the basis of the first counselling, second counselling and 3rd counselling under clause 3.1(A)(i) of both the Prospectus under HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group seats are also quashed and set aside. The respondents are directed to re-do the entire selection process by filling up the MD/MS/MDS seats, strictly as per the merit list on the basis of All India Post Graduate Medical Entrance Examination and All India Post Graduate Dental Entrance Examination, within a period of one week from today in order to adhere to the time schedule framed by the Hon'ble Supreme Court of India qua HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group. Pending application(s), if any, shall also stand disposed of.

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

Pradeep Kumar. ...Appellant.

Versus

State of H.P. & others. ...Respondents.

RSA No. 229 of 2001
Reserved on: 22.5.2015
Decided on: 18.6.2015

Indian Succession Act, 1925- Section 63- Plaintiff claimed to be a successor on the basis of registered will- administrator had wrongly resumed the property in favour of State without affording any opportunity of hearing to the plaintiff- defendant claimed that bidder had not raised construction within two years- thus, he had violated the condition of the auction- general notice was published in the weekly gazette requiring all the bidders to complete the construction after getting the plans approved from the respondent- order was passed in exercise of power under H.P. New Mandi Townships (Development and Regulation) Act, 1973- a plot was purchased in the year 1940 and the provisions of the act were not in operation, therefore, plot could not be resumed under provision of the Act. (Para- 15 to 17)

For the Appellant : Mr. Neeraj Gupta, Advocate.

For the Respondents : Mr. Shrawan Dogra, A.G. with Mr. M.A. Khan, Addl. A.G., Mr. Neeraj K.Sharma, Dy. A.G. and Mr. Ramesh Thaur, Asstt. A.G. for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 7.4.2001 rendered by the Addl. District Judge, Solan in Civil Appeal No. 6-S/13 of 2000.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration with consequential relief of injunction stating therein that the predecessor in interest of Puran Singh son of Wazir Singh had purchased a plot No.5, Block-B, Saproon Mandi, Solan, now depicted as Khasra Nos. 827, 828, 829, 833, 834, 879 and 882 as per Jamabandi for the year 1992-93 Mauja Dahun, Tehsil and District Solan, H.P. Puran Singh remained owner in possession of the land till his death. He died on 1.11.1995. Plaintiff

succeeded to the property as sole successor on the basis of registered will dated 13.10.1992. It was registered before the Sub-Registrar, Patiala. Plaintiff came to know from the record of the Administrator, Saproon Mandi, Solan that the Administrator has resumed the property in favour of State of Himachal Pradesh vide case No. SP No. 8/1980 dated 29.6.1981. Plaintiff was owner in possession of the same and the predecessor-in-interest of the plaintiff was not afforded hearing by the respondents/defendants (hereinafter as the 'defendants' for the convenience sake) at any point of time. Notice under Section 80 of the Code of Civil Procedure dated 8.4.1997 was served upon the defendants.

3. The suit was contested by the defendants. According to them, plot No.5 Block-B was reported to have been purchased by Sh. Puran Singh. Patwari, Saproon Mandi made a report on 28.8.1980 that the bidder has not constructed the house within the prescribed period of 2 years, and thus, he has violated the condition of auction. Since the residential address of Puran Singh was not available, therefore, a general public notice was published in the weekly gazette dated 28.2.1981 requiring all the bidders to complete the construction after getting the plans approved from the defendants. They were granted 30 days period, failing which the plot could be resumed. Thereafter, the plot was resumed by the Administrator (Deputy Commissioner, Solan) and the order was given effect to in the revenue record on 1.12.1981.

4. Replication was filed by the plaintiff. Issues were framed by the Sub Judge on 21.4.1998. Sub Judge decreed the suit on 15.1.2000. Defendants preferred an appeal before the Additional District Judge, Solan. He allowed the same on 7.4.2001. Hence, the present appeal. It was admitted on 27.6.2001 on the following substantial questions of law:

1. "Whether the suit by the plaintiff-appellant as laid is within time?

2. **Whether the provisions of H.P. New Mandi Townships (Development and Regulation) Act, 1973 are not applicable to the facts of the present case?"**

5. Mr. Neeraj Gupta, learned counsel for the appellant, has vehemently argued that the suit was within limitation from the date of knowledge. He has also contended that provisions of H.P. New Mandi Townships (Development and Regulation) Act, 1973 were not applicable in the present case.

6. Mr. Shrawan Dogra, learned Advocate General has supported the judgment and decree passed by the first appellate court.

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, they are being discussed together to avoid repetition of discussion of evidence.

9. It is not in dispute that the predecessor-in-interest of the plaintiff Sh. Puran Singh has purchased the plot in the year 1940 in public auction. Puran Singh has executed "will" Ex.PW-3/A in favour of the plaintiff on 13.10.1992. The land has been resumed vide order dated 31.6.1981. Plaintiff came to know about the resumption of the plot vide order dated 29.6.1981 only on 8.4.1997 when he visited the office of Administrator. Notice under section 80 of the Code of Civil Procedure was served upon the defendants. Possession of the land despite order dated 29.6.1981 was not taken by the defendants. Suit was thus within the period of limitation from the date of knowledge. Plaintiff came to know about the

impugned order on 8.4.1997 and the suit was filed on 18.6.1997. Thus, the first appellate court has come to a wrong conclusion that the suit was barred by limitation.

10. PW-1 Bhagwan Singh, Registration Clerk office of the Sub-Registrar, Patiala has produced the summoned record and as per summoned record, "will" No. 363 was executed on 13.10.1992. Entry of the "will" was recorded at Sr. No. 363 Bahi No.3 and Zild No. 126.

11. PW-2 Om Parkash Garg was Document Writer. Puran Singh came to him for the execution of "will". The "will" was scribed by him at the instance of Puran Singh. Contents of the will were read over to Puran Singh. Puran Singh was in his senses. He after admitting the contents of the "will" to be correct signed the same.

12. According to PW-3 Rachpal Singh, Om Parkash has scribed the "will". Contents of the "will" were read over and explained to the testator. He after admitting the contents of the "will" to be true signed the same. Thereafter, marginal witnesses signed the "will". It was registered before the Sub-Registrar.

13. PW-4 Pardeep Kumar has proved the death certificate Ex.PW-4/A. According to him, Puran Singh has executed the "will" Ex.PW-3/A in his favour in the month of October, 1992. The suit land was resumed by the defendants vide order Ex.PW-4/H. Puran Singh was in possession of the suit land. No summons were issued. He came to know about the order on 8.4.1997. Notice Ex.PW-4/K was issued. He has proved postal receipt Ex.PW-4/L. According to him, revenue entry Ex.PW-4/B was wrong.

14. DW-1 Dhani Singh has deposed that as per record plot No.5 Block-B area 5 biswas was allotted to deceased Puran Singh. Puran Singh did not raise construction within 2 years over the plot for which purpose it was allotted. On 28.8.1980, a report was given by the Halqua Patwari. A notice was given to the allottee. Allottee did not appear despite notice and on 29.6.1981, plot was resumed by the State.

15. It has come on record that a notice was published in the weekly gazette dated 28.2.1981 requiring all the bidders to complete the construction after getting the plans approved within 30 days. order dated 29.6.1981 has been passed by the Administrator in exercising the powers vested in him under H.P. New Mandi Townships (Development and Regulation) Act, 1973. The plot, admittedly, has been purchased by Sh. Puran Singh in the year 1940. Thus, the previsions of the H.P. New Mandi Townships (Development and Regulation) Act, 1973 were not applicable. Order dated 29.6.1981 is without jurisdiction.

16. The question raised in the present Regular Second Appeal is no more *res integra* in view of the principles laid down by Division Bench of this Court in CWP No. 303/1984 decided on 4.4.1984. Operative portion of the judgment dated 4.4.1984 reads as under:

> **"It would thus appear that for the applicability of the Act, subject to other conditions, the sale must have been made:**
>
> **1. Under the provisions of the Act, or**
>
> **2. Under the provisions of the Punjab Act, or**
>
> **3. Under the notification No. 359-D(M)-57/884, dated March 5, 1957 of the Pubjab Government Agriculture Department.**

Unless the sale falls under anyone of the aforesaid categories, the power of resumption or forfeiture under Section 14 of the Act cannot possibly be exercised.

In the instant case, the petitioner claims that the land in dispute was purchased at a public auction by his deceased father in or about 1940. The fact that the land in dispute was sold at a public auction in 1940 by the ex-Patiala State is not in dispute, though the title of the petitioner is disputed. Under the circumstances, it is apparent that the power of resumption of forfeiture cannot be exercised under Section 14 of the Act. The Act does not apply in such cases. Any such exercise of power is wholly without authority and jurisdiction. On this short ground alone, the petition is entitled to succeed."

17. It is reiterated that the suit was filed within limitation from the date of knowledge. The plot could not be resumed under section 14 of the H.P. New Mandi Townships (Development and Regulation) Act, 1973 since the same has been purchased in the year 1940.

18. Both the substantial questions of law are answered accordingly.

19. In view of the analysis and discussion made hereinabove, present appeal is allowed. Judgment and decree dated 7.4.2001 rendered by the Additional District Judge Solan in Civil Appeal No. 6-S/13 of 2000 is set aside and the judgment and decree dated 15.1.2000 rendered by the Sub Judge, Kasauli at Solan in case No. 233/1 of 1997 is restored. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Smt. Anubha Sood and others .....Appellants

Versus

Sh. Krishan Chand and others ....Respondents

FAO (MVA) No. 254 of 2012
Judgment reserved on 29th May, 2015
Date of decision: 19th June, 2015.

Motor Vehicle Act, 1988- Section 166- Deceased was aged 42 years- multiplier of '14' will be applicable- he was earning Rs. 1,06,483/ as salary- Tribunal had deducted 1/3rd towards deduction and further deducted 1/4th towards his personal expenses- held, that further deductions are not permissible from the salary - only 1/4th amount was to be deducted towards personal expenses- after deducting 1/4th i.e. Rs.26,500/- -loss of dependency would be Rs. 79,500/- and claimant would be entitled for Rs.11,13,000/- as compensation for loss of income. (Para-24 to 26)

Motor Vehicle Act, 1988- Section 166- Income from the agriculture- deceased was managing orchard- claimants will have to engage a person to manage and supervise the orchard- at least Rs. 5,000/- per month would be payable as salary to him- therefore, claimants are entitled to Rs. 5,000x12x14 = Rs. 8,40,000/- as compensation on this account. (Para-27 to 30)

Cases referred:
State of Haryana and another versus 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
Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717
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
Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
New India Assurance Co. Ltd. versus Shanti Bopanna and others 2014 ACJ 219
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.
Santosh Devi versus National Insurance Company Ltd. and others (2012) 6 SCC 421
National Insurance Co. Ltd. versus Indira Srivastava and others 2008 ACJ 614
State of Haryana and another versus Jasbir Kaur and others, (2003) 7 SCC 484
V. Subbulakshmi and others versus S. Lakshmi and another (2008) 4 SCC 224
Amrit Bhanu Shali and others versus National Insurance Company Ltd. and others, (2012) 11 SCC 738
Kalpanaraj and others versus Tamil Nadu State Transport Corporation (2015) 2 SCC 764

For the appellants: Mr. Ajay Mohan Goel, Advocate.
For the respondents: Mr. Narender Sharma, Advocate, for respondents No. 1 and 2.
Mr. Jagdish Thakur, Advocate, for respondents No. 3 and 4.
Nemo for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice .

The claimants have thrown challenge to the judgment and award dated 23.3.2012, made by the Motor Accident Claims Tribunal-II, Shimla in M.A.C. No. 04-S/2 of 2011, titled *Smt. Anubha Sood and others versus Sh. Krishan Chand and others,* whereby compensation to the tune of Rs.7,72,000/- with interest @ 9% per annum came to be awarded in favour of the claimants/appellants herein and against the respondents and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short, on the grounds taken in the memo of appeal.

2. The insurer, driver and owner have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them. The claimants/appellants have questioned the impugned award only on the ground of adequacy of compensation on

the grounds taken in the memo of appeal read with the averments contained in the claim petition and evidence led before the Tribunal.

3. Thus, the only question to be determined in this appeal is whether the compensation awarded is adequate or otherwise?

4. In order to determine whether the amount awarded is just and appropriate, it is necessary to give a brief resume of the relevant facts.

5. The claimants being the victims of a vehicular accident filed claim petition before the Motor Accident Claims Tribunal, for short "the Tribunal", for the grant of compensation as per the break-ups given in the memo of appeal, on the ground that they have lost source of dependency on account of death of Sh.Rajesh Sood in a road accident, which was caused by respondent No.2 Sh.Satish Kumar, while driving Canter bearing registration No. HR-64-5419, rashly and negligently, owned by Sh.Krishan Chand, respondent No.1. It is averred in the claim petition that on 27.5.2010, Sh.Rajesh Sood was travelling in his Scorpio bearing registration No. HP-06B-0144 towards Solan and when he reached Mansar, aforementioned Canter came from opposite side and hit his vehicle. He received severe injuries and succumbed to the injuries on the spot. FIR was lodged in police station Solan. It is averred that the deceased was a businessman, orchardist and agent of the Life Insurance Corporation and was 42 years of age, at the time of accident. He was drawing salary to the tune of Rs.1,06,483/ from his firm M/s Mehar Chand Mool Raj, Main Bazar Rampur Bushahar, Rs.21,400/- as profit from the said firm, Rs.3,64,440/- per annum, from orchards, Rs.1,40,334/- from house property and Rs.42,000/- per annum as commission, being agent of the LIC of India, the details of which have been given in paras 4 and 6 of the claim petition. He was an income tax payee and in his income tax return for the assessment year 2010-2011, his income is shown Rs.10,77,710/- and has paid Rs.77373/- as tax for the said assessment year. The claimants have lost source of dependency.

6. Respondents contested the averments contained in the claim petition by filing separate replies.

7. Following issues were framed by the Tribunal on 18.2.2011:

(i) *Whether on 27.5.2010, the respondent No.2 drove truck No. HR-64-5419 in a rash and negligent manner resulting into death of Rajesh Sood? OPP*

(ii) If issue No. 1 is proved, to what compensation the petitioners are entitled and from whom? OPP.

(iii) Whether accident occurred due to negligence of Rajesh Sood, if so its effect? OPR-1.

(iv) Whether offending vehicle was being driven in violation of terms and condition of insurance policy? OPR-3.

(v) Whether respondent No. 2 was not holding effective and valid driving license at the time of accident ? OPR-3.

(vi) Relief.

8. The claimants examined as many as seven witnesses, namely, H.C. Kanshi Ram (PW1), Sh. Satya Parkash, (PW2), Mrs. Santosh (PW3), Mrs. Anubha Sood claimant No.1.(PW4), Dr. Rajan Sood (PW5), Ravinder Kumar (PW6) and Prem Singh (PW7) and have also placed on record documents, i.e., copy of RIR, Ext. PW1/A, copy of DL, Ext. PW2/A, copy of RC, Ext. PW2/B, copy of Insurance policy Ext. PW3/A.

9. The Tribunal, after scanning the evidence held that the claimants have proved by oral as well as documentary evidence that driver Satish Kumar had driven the vehicle rashly and negligently on the date of accident due to which deceased sustained injuries and succumbed the injuries on the spot.

10. Neither driver nor owner have questioned the findings returned by the Tribunal, not to speak of findings returned on issue No. 1., so, the findings returned on issue No. 1 are upheld.

11. The findings returned on issues No. 3 to 5 are not in dispute because the onus to prove these issues was on the respondents, i.e., owner and the insurer, have failed to discharge the same and have not questioned the impugned award. Thus, the findings returned on these issues are also upheld.

12. **Issue No.2.** The factum of insurance is not in dispute. At the cost of repetition, the insurer has not questioned the impugned award. Thus, the issue is whether the amount awarded is just and appropriate?

13. The word *"just compensation"* has been used in Section 168 of the Motor Vehicles Act, 1988 (for short "the Act"). In order to award just compensation, the Tribunal has to weigh all the aspects to come to the conclusion as to what is the just compensation.

14. 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)."*

15. 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***.

16. 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.*

17. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

18. The Apex Court in the judgments delivered in the cases titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others, reported in 2008 AIR SCW 1213** and **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** discussed what is the just compensation**.** It is apt to reproduce para 9 of the judgment rendered in ***Sanobanu's*** case supra, herein:

> *"9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for*

> *the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."*

19. The same principles of law have been laid down by this Court in case titled ***Jagdish versus Rahul Bus Service and others*** **(FAO No. 524 of 2007)** decided on 15.5.2015.

20. I, while dealing with a case of such a nature as Judge of Jammu and Kashmir High Court in case titled **New India Assurance Co. Ltd.** ***versus*** **Shanti Bopanna and others** reported in ***2014 ACJ 219***, have taken all these things in view and the ratio laid down in this case is squarely applicable to the facts of the present case and accordingly, the amount awarded merits to be enhanced.

21. Thus, in order to arrive at a conclusion whether the Tribunal has awarded just compensation, the Tribunal or the Appellate Court have to examine the pleadings of the parties and proof, i.e, evidence on the file.

22. The claimants have given details of the income and profession of the deceased. The reply of owner, driver and insurer are evasive, thus have not denied the same specifically, as per the mandate of Order 8 of the Code of Civil Procedure, for short "the Code". However, they have stated that the claimants be put to strict proof.

23. The claimants have proved the date of birth of the deceased as 28.7.1968 in terms of certificate Ext. PW4/A and the Tribunal has taken the age of the deceased as 42 years and applied the multiplier of "14". I am of the considered view that the Tribunal has rightly taken the age of the deceased as 42 years and applied the multiplier of "14", which is just and appropriate multiplier applicable, in view of Schedule-II of 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***.

24. The Tribunal has erred in assessing the income of the deceased. The claimants have pleaded that the income of the deceased was Rs.10,77,710/- per annum and have placed on record the income tax return Ext. PW4/B, which do disclose that the income from the house property was Rs.1,44,334/-, salary from firm Rs.1,06,483/-, interest on capital from firm Rs.67,015/-, income from Bank/P.O deposits Rs.2,33,816/-, agriculture income Rs.3,64,440/- other deposits Rs.21,429/-, PPF deposit interest

Rs.1,18,764 and total income recorded is Rs.10,77,710/-. The said document is also not denied by the respondents.

25. The apex Court in case titled ***Santosh Devi versus National Insurance Company Ltd. and others*** reported in **(2012) 6 SCC 421** discussed this issue and it is profitable to reproduce para 11, 14 to 18 of the said judgment herein:

> *"11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people.*
>
> *12-13. …. ….. …..*
>
> *14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.*
>
> *15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self- employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families.*
>
> *16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures*

and total emoluments of those in higher echelons of service will cross the figure of rupees one lac.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

26. The Tribunal has taken the income of the deceased as Rs.1,06,483/-, per annum as salary from Firm Mehar Chand Mool Raj and after deducting 1/3rd towards the deductions and concluded and held that the net salary of the deceased was Rs.70667/- and further deducted 1/4th towards his personal expenses and held that the loss of source of dependency was Rs.53,000/- per annum, which is not correct. The Tribunal has lost sight off the very important fact that the salary of the deceased was Rs.,06,483/- per annum and no deduction was permissible. In one breath the Tribunal has deducted Rs.35,333/- and thereafter has also made further deductions, which is not permissible in law. As per the ratio laid down in ***Sarla Verma's*** and other judgments referred to supra, the net salary for assessing compensation was to be taken as Rs.1,06,483/- and keeping in view the age of the claimants read with the fact that the widow has lost matrimonial home, sons have lost their father, love and affection, deductions of 1/4th was to be made towards personal expenses. Meaning thereby the claimants have lost source of dependency to the tune of Rs.1,06,483/-,rounded as Rs.1,06,000/-minus Rs.26,500/- = Rs.79,500/- per annum. Thus, the claimants are entitled to Rs.79,500/-x14= ***total Rs.11,13,000/-.***

27. The Tribunal has not taken into consideration the agriculture income of the deceased, was having orchards and was managing the same. The claimants have specifically

averred that the deceased was also managing the orchards. The widow, who has lost everything in her life, matrimonial home, love and affection, she is living broken life, can she manage the orchards? Virtually, the claimants have lost source of income from agriculture. They have to engage a person to manage and supervise the orchard. The compensation was to be awarded.

28. The apex Court in case titled ***National Insurance Co. Ltd. versus Indira Srivastava and others*** reported in ***2008 ACJ 614*** has laid down the same principles. It is apt to reproduce paras 8, 9, 17 and 18 of the said judgment herein:

> *"8. The term 'income' has different connotations for different purposes. A court of law, having regard to the change in societal conditions must consider the question not only having regard to pay packet the employee carries home at the end of the month but also other perks which are beneficial to the members of the entire family. Loss caused to the family on a death of a near and dear one can hardly be compensated on monetory terms.*
>
> *9. Section 168 of the Act uses the word 'just compensation' which, in our opinion, should be assigned a broad meaning. We cannot, in determining the issue involved in the matter, lose sight of the fact that the private sector companies in place of introducing a pension scheme takes recourse to payment of contributory Provident Fund, Gratuity and other perks to attract the people who are efficient and hard working. Different offers made to an officer by the employer, same may be either for the benefit of the employee himself or for the benefit of the entire family. If some facilities are being provided whereby the entire family stands to benefit, the same, in our opinion, must be held to be relevant for the purpose of computation of total income on the basis whereof the amount of compensation payable for the death of the kith and kin of the applicants is required to be determined. For the aforementioned purpose, we may notice the elements of pay, paid to the deceased :*
>
> *"BASIC : 63,400.00CONVEYANCEALLOWANCE : 12,000.00RENT CO LEASE : 49,200.00BONUS (35% OF BASIC) : 21,840.00 TOTAL : 1,45,440.00*
>
> *In addition to above, his other entitlements were :*
>
> *Con. to PF 10% Basic Rs. 6,240/- (p.a.) LTA reimbursement Rs. 7,000/- (p.a.)Medical reimbursement Rs. 6,000/- (p.a.)Superannuation 15% of Basic Rs. 9,360/- (p.a.)Gratuity Cont.5.34% of Basic Rs. 3,332/- (p.a.)Medical Policy-self & Family @ Rs.55,000/- (p.a.)Education Scholarship @ Rs.500 Rs.12,000/- (p.a.)Payable to his two children Directly".*
>
> *10 to 16. ....*
>
> *17. The amounts, therefore, which were required to be paid to the deceased by his employer by way of perks, should be included for computation of his monthly income as that would have been added to his monthly income by way of contribution to the family as contradistinguished to the ones which were for his benefit. We may, however, hasten to add that from the said*

amount of income, the statutory amount of tax payable thereupon must be deducted.

18. The term 'income' in P. Ramanatha Aiyar's Advanced Law Lexicon (3rd Ed.) has been defined as under :

"The value of any benefit or perquisite whether convertible into money or not, obtained from a company either by a director or a person who has substantial interest in the company, and any sum paid by such company in respect of any obligation, which but for such payment would have been payable by the director or other person aforesaid, occurring or arising to a person within the State from any profession, trade or calling other than agriculture."

It has also been stated :

'INCOME' signifies 'what comes in' (per Selborne, C., Jones v. Ogle, 42 LJ Ch.336). 'It is as large a word as can be used' to denote a person's receipts '(per Jessel, M.R. Re Huggins, 51 LJ Ch.938.) income is not confined to receipts from business only and means periodical receipts from one's work, lands, investments, etc. AIR 1921 Mad 427 (SB). Ref. 124 IC 511 : 1930 MWN 29 : 31 MLW 438 AIR 1930 Mad 626 : 58 MLJ 337."

29. Applying the test, it can safely be held that the claimants had to engage a labourer or a person, who has to supervise the orchards and have to pay, at least, Rs.5,000/- per month as salary to him. Thus, the claimants are held entitled to compensation under the head loss from agricultural income as Rs.5,000x12= Rs.60,000/- x14 total ***Rs.8,40,000/-.***

30. The apex Court has also discussed the same issue in another case titled ***State of Haryana and another*** **versus** ***Jasbir Kaur and others***, reported in ***(2003) 7 SCC 484.*** It is apt to reproduce para 8 of the said judgment herein:

"8. It is clear on a bare reading of the Tribunal's decision as affirmed by the High Court that no material was placed before the former to prove as to what was the income. As rightly contended by learned counsel for the appellants, there was not even any material adduced to show type of land which the deceased possessed. The matter can be approached from a different angle. The land possessed by the deceased still remains with the claimants as his legal heirs. There is however a possibility that the claimants may be required to engage persons to look after agriculture. Therefore, the normal rule about the deprivation of income is not strictly applicable to cases where agricultural income is the source. Attendant circumstances have to be considered. Furthermore, there was no material before the Tribunal to arrive at the figure of Rs. 4500 per month. No reason has been indicated to arrive at this figure. In the light of what has been discussed above about "just compensation" the income cannot be estimated without any material

to justify the estimation. In the normal course, we would have remitted the matter back to the Tribunal for fresh consideration. But considering the fact that one young person lost his life and the matter was pending before the Tribunal and the High Court for some years, we feel it appropriate to take all relevant factors into consideration, and decide the matter. Gauzing the relevant aspects, noted above, the monthly income is fixed at Rs. 3000/- per month, and after deducting Rs. 1,000/- for personal expenses, financial contribution so far as the claimant are concerned is fixed at Rs. 2,000/- per month. Worked out on the basis of multiplier of 18, the compensation is fixed at Rs. 4,32,000/-. The amount of Rs. 2,000/- awarded by the Tribunal for funeral expenses is not interfered with and thus the total compensation comes to Rs. 4,34,000/-. The rate of interest i.e. 9% per annum as fixed by the Tribunal and affirmed by the High Court is appropriate, and does not need any alteration. After adjusting the sum which was deposited pursuant to the order of this Court dated 14.12.2001, the balance amount along with interest shall be deposited within three months from today before the Tribunal. On the deposit being made along with the amount already deposited, a sum of Rs. 3 lakhs shall be kept in the fixed deposit in the name of the claimants and a sum of Rs. 50,000/- shall be kept in fixed deposit in the name of Smt. Baldev Kaur, mother of the deceased. They shall be entitled to draw interest on the deposit, which shall be re-deposited for further terms of five years. In case of urgent need, it shall be open to the claimants to move Tribunal for release of any part of the amount in deposit. The Tribunal shall consider the request for withdrawal and shall direct withdrawal in case of an urgent need and not otherwise of such sum as would meet the need. It shall be specifically indicated to the Bank where the deposits are to be made that no advance or withdrawal of any kind shall be permitted without the order of the Tribunal. It shall be open to the claimants to approach the Tribunal for variance of the order relating to deposit in fixed deposit, if any other scheme would fetch better returns and also would provide regular and permanent income.

31. The claimants have specifically pleaded that the deceased was an insurance agent and was earning Rs.42,000/- per annum as insurance agent. The said income is also reflected in the income tax return Ext. PW4/B. The said fact has not been disputed by the driver, owner and the insurer. The insured has not questioned the said income tax return and even they have not led any evidence to dislodge the same. The claimants have proved the income tax return.

32. The learned counsel for the insurance company has argued that the income tax return cannot be taken into consideration without proving the same in accordance with law, is not correct. The judgment relied upon by him in case ***V. Subbulakshmi and others versus S. Lakshmi and another*** reported in ***(2008) 4 SCC 224***, is not in his favour but in favour of the claimants. It is apt to reproduce paras 20 to 24 of the said judgment herein:

> *"20. So far as the question in regard to the quantum of compensation awarded in favour of the appellants is concerned, we are of the opinion that the High Court has taken into consideration all the relevant evidences brought on record.*
>
> *21. The accident took place on 7.5.1997. Income tax returns were filed on 23.6.1997.*
>
> *22. The Income Tax Returns (Exp. P-14), therefore, have rightly not been relied upon.*
>
> *23. Ex.P-8 is a deed of lease. It was an unregistered document. Although the document was purported to have been executed on 10.4.1993, the genuineness thereof was open to question. The stamp paper was purchased in the year 1983 but an interpolation was made therein to show that it was purchased in 1993. The purported receipts granted by the tenant were also unstamped.*
>
> *24. In the aforementioned fact situation, the High Court has not relied upon all the aforementioned documents, filed by the appellant. It may be true that there was no basis for the High Court to arrive at the conclusion that the income of the deceased was Rs.4,000/- from agricultural operation and Rs. 3,000/- from his commission business, but no reliable document having been produced to show that the deceased was earning an income of Rs.12,500/- per month, as claimed. The High Court, in our opinion, cannot be held to have, thus, committed any grave error in this behalf. There is no dispute as regards application of the multiplier."*

33. The apex Court in case titled ***Amrit Bhanu Shali and others*** versus ***National Insurance Company Ltd. and others,*** reported in ***(2012) 11 SCC 738*** has laid down the principles how to grant compensation and how to reach the victim of a vehicular accident. It is apt to reproduce para 17 of the said judgment herein:

> *"17. The appellants produced Income Tax Returns of deceased-Ritesh Bhanu Shali for the years 2002 to 2008 which have been marked as Ext.P-10-C. The Income Tax Return for the year 2007-2008 filed on 12.03.2008 at Raipur, four months prior to the accident, shows the income of Rs.99,000/- per annum. The Tribunal has rightly taken into consideration the aforesaid income of Rs.99,000/- for computing the compensation. If the 50% of the income of Rs.99.000/- is deducted towards personal and living expenses' of the deceased the contribution to the family will be 50%, i.e., Rs 49,500/- per annum At the time of the accident, the deceased-*

Ritesh Bhanu Shali was 26 years old, hence on the basis of decision in Sarla Verma (supra) applying the multiplier of 17, the amount will come to Rs 49,500/- x 17 =Rs 8,41,500/- Besides this amount the claimants are entitled to get Rs.50,000/- each towards the affection of the son, i.e., Rs 1,00,000/- and Rs 10,000/- on account of funeral and ritual expenses and Rs 2,500/- on account of loss of sight as awarded by the Tribunal. Therefore, the total amount comes to Rs.9,54.000/- (Rs.8,41,500/- + Rs. 1,00.000/ - + Rs. 10.000/- + Rs.2,500/-) and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the claim petition leaving rest of the conditions mentioned in the award intact."

34. The apex Court has also discussed this issue in ***Kalpanaraj and others versus Tamil Nadu State Transport Corporation*** reported in ***(2015) 2 SCC 764*** and held that there should be a judicial approach, while granting compensation to the victims of a vehicular accident. It is apt to reproduce para 8 of the said judgment herein:

"8. It is pertinent to note that the only available documentary evidence on record of the monthly income of the deceased is the income tax return filed by him with the Income Tax Department. The High Court was correct therefore, to determine the monthly income on the basis of the income tax return. However, the High Court erred in ascertaining the net income of the deceased as the amount to be taken into consideration for calculating compensation, in the light of the principle laid down by this Court in the case of National Insurance Company Ltd. v. Indira Srivastava and Ors, 2008 2 SCC 763. The relevant paragraphs of the case read as under:

"14. The question came for consideration before a learned Single Judge of the Madras High Court in National Insurance Co. Ltd. v. Padmavathy and Ors. wherein it was held:

'7 ..Income tax, Professional tax which are deducted from the salaried person goes to the coffers of the government under specific head and there is no return. Whereas, the General Provident Fund, Special Provident Fund, L.I.C., Contribution are amounts paid specific heads and the contribution is always repayable to an employee at the time of voluntary retirement, death or for any other reason. Such contribution made by the salaried person are deferred payments and they are savings. The Supreme Court as well as various High Courts have held that the compensation payable under the Motor Vehicles Act is statutory and that the deferred payments made to the employee are contractual. Courts have held that there cannot be any deductions in the statutory compensation, if the Legal Representatives are entitled to lump sum payment under the contractual liability. If the contributions made by the employee which are otherwise savings from the salary are deducted from the gross income

and only the net income is taken for computing the dependency compensation, then the Legal Representatives of the victim would lose considerable portion of the income. In view of the settled proposition of law, I am of the view, the Tribunal can make only statutory deductions such as Income tax and professional tax and any other contribution, which is not repayable by the employer, from the salary of the deceased person while determining the monthly income for computing the dependency compensation. Any contribution made by the employee during his life time, form part of the salary and they should be included in the monthly income, while computing the dependency compensation.'

15. Similar view was expressed by a learned Single Judge of Andhra Pradesh High Court in S. Narayanamma and Ors. v. Secretary to Government of India, Ministry of Telecommunications and Ors. holding:

> *12 .In this background, now we will examine the present deductions made by the tribunal from the salary of the deceased in fixing the monthly contribution of the deceased to his family. The tribunal has not even taken proper care while deducting the amounts from the salary of the deceased, at least the very nature of deductions from the salary of the deceased. My view is that the deductions made by the tribunal from the salary such as recovery of housing loan, vehicle loan, festival advance and other deductions, if any, to the benefit of the estate of the deceased cannot be deducted while computing the net monthly earnings of the deceased. These advances or loans are part of his salary. So far as House Rent Allowance is concerned, it is beneficial to the entire family of the deceased during his tenure, but for his untimely death the claimants are deprived of such benefit which they would have enjoyed if the deceased is alive. On the other hand, allowances, like Travelling Allowance, allowance for newspapers/periodicals, telephone, servant, club-fee, car maintenance etc., by virtue of his vocation need not be included in the salary while computing the net earnings of the deceased. The finding of the tribunal that the deceased was getting Rs.1,401/- as net income every month is unsustainable as the deductions made towards vehicle loan and other deductions were also taken into consideration while fixing the monthly income of the deceased. The above finding of the tribunal is contrary to the principle of 'just compensation' enunciated by the Supreme Court in the judgment in Helen's case. The Supreme Court in Concord of India Insurance Co. v. Nirmaladevi and Ors, 1980 ACJ 55 held that determination of quantum must be liberal and not*

niggardly since law values life and limb in a free country 'in generous scales'."

35. Thus, the claimants are entitled under the head loss of income as insurance agent but 1/4th is also to be deducted. Thus, the claimants have lost source of dependency to the tune of Rs.32,000/- per annum, under this head, are entitled to loss under the head income from LIC Rs.32000/- x 14 = total ***Rs.4,48,000/-.***

36. The Tribunal has awarded ***Rs.10,000/-*** each under the heads "Loss of consortium", "Funeral expenses" and loss of ***"love and affection".*** Total to the tune of ***Rs.30,000/-.*** The amount awarded under these heads is too meager in view of the latest judgment delivered by the apex court. However, I deem it proper to maintain the same. But the Tribunal has fallen in an error in not awarding compensation under the head "Loss of Estate". Therefore, I deem it proper to award ***Rs.10,000/-*** under the head ***"loss of estate".***

37. Having said so, the amount awarded by the Tribunal is too meager, is enhanced and accordingly claimants are held entitled to Rs.11,13,000/- + Rs.8,40,000/- + Rs.4,48,000/-Rs.30,000/- + Rs.10,000/= Total to the tune of ***Rs.24,41,000/-*** in all alongwith 9% interest, as awarded by the Tribunal.

38. The insurer is directed to deposit the enhanced amount along with 9% interest from the date of filing of the claim petition till its realization, within six weeks from today in this Registry, and also to deposit the amount awarded by the Tribunal, if not already deposited. On deposit, the entire amount be released to the claimants, strictly, in terms of the conditions contained in the impugned award, through payees' cheque account.

39. Resultantly, the impugned judgment is modified and the amount of compensation is enhanced, as indicated hereinabove.

40. Accordingly, the appeal is disposed of. Send down the record forthwith, after placing a copy of this judgment.

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

Gumti Devi ...Appellant.
Versus
Pushpa Devi and others ...Respondents.

FAO No. 76 of 2008
Decided on:19.06.2015

Motor Vehicle Act, 1988- Section 149- Claimants had specifically pleaded that driver of the vehicle had given lift to the deceased- owner stated in the reply that deceased was travelling in the vehicle in the capacity of a labourer – driver stated that deceased was travelling in the vehicle as owner of goods- held that in these circumstances, plea of insurance company that the deceased was a gratuitous passenger has to be accepted as correct - owner had committed willful breach of the terms and conditions of the policy and he was rightly saddled with liability. (Para-5 to 9)

For the appellant: Mr. Dibender Ghosh, Advocate.
For the respondents: Mr. Shyam Chauhan, Advocate, for respondents No. 1 to 4.
Mr. B.C. Verma, Advocate, for respondent No. 5.

Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, 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 judgment and award, dated 19.11.2007, made by the Motor Accident Claims Tribunal (III), Shimla (for short "the Tribunal") in MACT No. 74-S/2 of 2005/04, titled as Pushpa Devi and others versus Gumti Devi and others, whereby compensation to the tune of Rs.4,00,000/- with interest @ 7.5 % per annum from the date of the petition till deposition of the amount came to be awarded in favour of the claimants and against the driver and owner-insured (for short "the impugned award").

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

3. The appellant-owner has questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling her with liability.

4. The only question to be determined in this appeal is - whether the Tribunal has rightly held that the deceased was a gratuitous passenger, thus, the owner-insured has committed breach of the terms and conditions of the insurance policy read with the mandate of Sections 147 and 149 of the Motor Vehicles Act, 1988 (for short "MV Act")?

5. The claimants have specifically averred in para 24 of the claim petition that the driver of the offending vehicle had given lift to the deceased.

6. The owner-insured in reply to para 24 has stated that the deceased was travelling in the offending vehicle in the capacity of a labourer, whereas the driver in reply to the said para has stated that the deceased was travelling in the offending vehicle as owner of the goods.

7. It is worthwhile to record herein that the claimants have nowhere averred that the deceased was travelling in the offending vehicle as owner of the goods or had hired the same.

8. Thus, it can be safely said that the owner-insured has committed willful breach of the terms and conditions of the insurance policy.

9. Having said so, the Tribunal has rightly saddled the owner-insured with liability.

10. Viewed thus, the appeal merits to be dismissed and the impugned award is to be upheld. Accordingly, the impugned award is upheld and the appeal is dismissed.

11. At this stage, learned counsel for the claimants-respondents No. 1 to 4 stated at the Bar that the claimants have already received Rs.50,000/- under 'No Fault Liability'. The insurer has satisfied the interim award in view of the principle of 'No Fault Liability'.

12. Learned counsel for the appellant-insured also stated at the Bar that the owner-insured has already deposited Rs.25,000/- before the Registry at the time of filing of the appeal. The owner-insured is directed to deposit the remaining awarded amount (i.e. the

total awarded amount with interest - Rs.50,000/- + Rs.25,000/-) before the Registry within eight weeks.

13. On deposition of the amount, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

14. Send down the record after placing copy of the judgment on the Tribunal's file.

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

National Insurance Company Ltd., ...Appellant
Versus
Shri Satish Kumar & others ...Respondents

FAO No. 337 of 2008
Date of decision: 19.6.2015

Motor Vehicle Act, 1988- Section 149- Driver possessed a valid driving licence to drive the vehicle at the time of accident – insurer was not able to show as to how driver did not have a valid and effective licence at the time of accident- insurer had also failed to prove any breach of the terms and conditions of the policy- therefore, insurer was rightly held liable to pay compensation. (Para-11 to 13)

For the appellant : Mr. Suneet Goel, Advocate.
For the respondents: M/s Anil Jaswal and Vivek Thakur, Advocates, for respondent No. 1.
Nemo for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

By the medium of this appeal, the appellant-insurer has invoked the jurisdiction of this Court as per the mandate of Section 173 of the Motor Vehicles Act, 1988, (for short 'the Act').

2. Challenge in this appeal is to the award, dated 4th March, 2008, made by the Motor Accident Claims Tribunal, Hamirpur, H.P. (hereinafter referred to as "the Tribunal") in MAC Petition No. 82 of 2006, whereby compensation to the tune of Rs.5,93,000/- with interest at the rate of 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 the appellant-insurer came to be saddled with liability (for short, the "impugned award"), on the grounds taken in the memo of appeal.

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

4. The appellant-insurer has questioned the impugned award on the grounds that the Tribunal has fallen in error in saddling it with liability and the driver was not having a valid and effective driving licence at the time of accident.

5. The appellant-insurer has not questioned the findings returned by the Tribunal on the other issues.

6. The parties led evidence. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that on 24.04.2005, at about 10.15 a.m., at Village Sawahal on Hamirpur-Sujanpur highway, driver, namely, Hari Om had driven the offending vehicle i.e. truck bearing registration No. HP-12-A-5843, rashly and negligently and caused the accident in which claimant Satish Kumar sustained injuries.

7. I have gone through the evidence and the documents on the record.

Issue No. 1.

8. The findings recorded on issue No. 1 are not in dispute. Thus, the findings recorded by the Tribunal on this issue are upheld.

9. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

Issue No. 4.

10. The insurer has not led any evidence to prove how the claim petition was bad for non-joinder and mis-joinder of necessary parties. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 3.

11. The driver was having a valid and effective driving licence (Ext. RW-1/A) to drive the offending vehicle at the relevant point of time.

12. Neither the learned Counsel for the appellant-insurer has been able to establish or indicate that the driver was not having a valid and effective driving licence at the time of accident nor the insurer has led any evidence to substantiate the said plea. Accordingly, the findings recorded by the Tribunal on issue No. 3 are upheld.

13. The insurer has also not been able to prove that the driver had committed any breach. Accordingly, it is held that the insurer has to satisfy the award.

Issue No. 2.

14. The injured was 43 years of age at the time of accident. He has undergone pain and sufferings, has to undergo the said in future also. The said accident has shattered his physical frame. The Tribunal has rightly made discussions from paras 16 to 21 of the impugned award and rightly came to the conclusion. Having said so, the amount awarded is meager, cannot be said to excessive, in any way.

15. There is no merit in the appeal. Accordingly, the same is dismissed and the impugned award is upheld.

16. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

17. 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 TARLOK SINGH CHAUHAN, J.

Neelam Kumari .....Petitioner

Versus

Yogender Singh and others .....Respondents.

CMPMO No. 14 of 2015.
Date of Decision: 19th June, 2015

Code of Civil Procedure, 1908- Order 16 read with Sec.151- Petitioner filed an application for examining the marginal witnesses on the ground that it was reported in the summons that the witness had died about 16 years ago and it was necessary to examine his son-defendant No. 6 was also to be examined regarding the signatures of the marginal witnesses-held that mere delay in filing the application is not sufficient to dismiss the same- Rules of Procedure are handmaid of justice and the purpose of prescribing procedure is to advance the course of justice – marginal witness had died and his son is alive- brother of the plaintiff and other defendants are material witnesses- case relates to a dispute between the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy- application allowed subject to the payment of cost of Rs. 40,000/-. (Para-7 to 27)

Cases referred:

Sangram Singh vs. Election Tribunal, Kotah, AIR 1955, S.C. 425
Blyth v. Blyth (1966 (1) All E.R. 524 (HL)
Balwant Singh Bhagwan Singh and another vs. Firm Raj Singh Baldev Kishen, AIR 1969 Punjab and Haryana 197
State of Gujarat vs. Ramprakash P. Puri, 1970 (2) SCR 875
Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774
Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827)
R.N. Jadi & Brothers vs. Subhash Chandra), (2007) 9 Scale 202
Sambhaji and others vs. Gangabai and others (2008) 17 SCC 117
Rajendra Prasad Gupta vs. Prakash Chandra Mishra and others, SC 2011 (1) Scale 469
Mahadev Govind Gharge and others vs. The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka, 2011 (6) Scale 1

For the Petitioner : Mr. Bimal Gupta, Advocate.
For the Respondents : Mr. R. S. Gautam, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (*Oral).*

This petition under Article 227 of the Constitution of India is directed against the order passed by the learned trial Court on 31.10.2014 whereby the applications filed by the petitioner under Order XVI read with Section 151 CPC and another application under Section 151 CPC came to be dismissed.

2. This is unfortunate family dispute. In view of the nature of order I propose to pass, the facts in detail, need not be stated.

3. The defendant No.1 had moved two applications. In the application under Section 151 CPC the defendant had sought the permission to lead additional evidence by

way of oral evidence of Rishi Thakur S/o late Sh. Sukhdev Singh. It was alleged that in the summons issued to the marginal witnesses of the Will dated 26.01.1969 which has been challenged by the plaintiff, it had been reported that he had died about 16 years back and, therefore, it was necessary to examine his son Rishi Thakur, who could depose about the signature of his late father.

4. Another application was filed by the petitioner under Order XVI read with Section 151 CPC for allowing the defendant/petitioner to examine defendant No.6 in evidence. It was alleged that defendant No.6 is the real brother of the plaintiff and other defendants and son of defendant No.2, who had not contested the suit nor stepped into the witness box, but now he was available and ready to depose regarding the signatures of the marginal witnesses as also his father who was executant of the Will.

5. The learned trial Court vide common order rejected these applications mainly influenced by the fact that issues in the case had been struck on 17.3.2011 and after recording the evidence the case had been fixed for final arguments since 16.4.2013.

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

7. It cannot be disputed that there has been inordinate delay on the part of the petitioner in filing the aforesaid applications. But can the rights of the petitioner be defeated only on account of there being delay in filing of the applications?

8. The proposition that Rules of Procedure are handmaid of justice and cannot take away the residuary power in Judges to act ex debito justitiae, where otherwise it would be wholly inequitable, is by now well founded.

9. It must be remembered that the Courts are respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so and further taking into consideration the fact that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done.

10. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

11. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

12. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

13. It is useful to quote the oft-quoted passage of Lord Penzance in 1879 (4) AC 504:

> *"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strongly departs from its*

office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern when it ought to subserve."

14. In the matter of ***Sangram Singh*** vs. ***Election Tribunal, Kotah reported in AIR 1955, S.C. 425***, the Hon'ble Apex Court has observed as under:

"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provide always that justice is done to both sides) less the very means designed for the furtherance of justice be used to frustrate it."

"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course there must be expectations and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso our laws of procedure should be construed, wherever that is reasonably possible in the light of that principle."

15. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See: ***Blyth v. Blyth (1966 (1) All E.R. 524 (HL***).

16. In ***Balwant Singh Bhagwan Singh and another*** vs**.** ***Firm Raj Singh Baldev Kishen*** reported in ***AIR 1969 Punjab and Haryana 197*** it was held that:

"Promptitude and despatch in the dispensation of justice is a desirable thing but not at the cost of justice. All rules of procedure are nothing but handmaids of justice. They cannot be construed in a manner, which would hamper justice. As a general rule, evidence should never be shut out. The fullest opportunity should always be given to the parties to give evidence if the justice of the case requires it. It is immaterial if the original omission to give evidence or to deposit process fee arises from negligence or carelessness."

17. In the matter of ***State of Gujarat*** vs**.** ***Ramprakash P. Puri,*** reported in ***1970 (2) SCR 875,*** the Hon'ble Apex Court has held that:

"Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."

18. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence – processual, as much as substantive. (***See Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774).***

19. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See ***Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827***).

20. The Hon'ble Supreme Court in ***(2007) 9 Scale 202 (R.N. Jadi & Brothers vs. Subhash Chandra***), considered the procedural law vis-à-vis substantive law and observed as under:

> *"9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."*

21. Procedure is only handmaid of Justice:- All the rules of procedure are the handmaids of justice. Any interpretation which eludes substantive justice is not to be followed. Observing that procedure law is not to be a tyrant, but a servant, in ***Sambhaji and others*** vs. ***Gangabai and others (2008) 17 SCC 117,*** the Hon'ble Supreme Court held as under:

> *"6.(14) Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."*

22. In ***2011 (1) Scale 469 Rajendra Prasad Gupta*** vs. ***Prakash Chandra Mishra and others,*** the issue before the Hon'ble Supreme Court was as to whether an application will be maintainable before the trial Court to withdraw the application filed earlier for withdrawal of the suit. The trial Court dismissed the application as not maintainable. The High Court held that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without there being any order on the withdrawal application and as such another application at a later point of time to withdraw the suit was not maintainable. When the matter was taken up in appeal, the Hon'ble Supreme Court disagreed with the views expressed by the High Court. While allowing the appeal, the Hon'ble Supreme Court observed thus:

> *"5. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted."*

23. The Hon'ble Supreme Court in ***2011 (6) Scale 1 Mahadev Govind Gharge and others*** vs. ***The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka***, reiterated the legal position regarding procedural law and observed:

> *"28. Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold....."*

24. In view of the aforesaid exposition of law, it can safely be concluded that the learned trial Court erred in dismissing the applications solely on the ground of delay without taking into consideration the humanist rule that procedure should be the handmaid, not the mistress of legal justice and it always vested with the residuary power to act ex debito justitiae where otherwise it would be wholly inequitable. Apart from that, learned trial Court has completely misconstrued the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act.

25. It has been established on record that the marginal witness Sukhdev Singh had died, however, his son Rishi Thakur was very much alive. Similarly, once the defendant No.6, who is none other than the brother of the plaintiff and other defendants was sought to be examined as a witness, I see no reason how the learned trial Court could have invoked the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act to refuse such permission.

26. Learned trial Court appears to be oblivious to the fact that here was a case inter se the family members and, therefore, was required to be dealt with by exhibiting more compassion and sympathy and by not stretching the rigors of law to the breaking point.

27. Having said so, I find merit in this petition and the order dated 31.10.2014 passed by learned Civil Judge ((Jr. Division), Court No.2, Paonta Sahib, District Sirmaur, is set-aside. But at the same time, this Court cannot ignore the fact that there has been a considerable delay on the part of the petitioner in moving the aforesaid applications. Accordingly, the present petition is allowed, but subject to costs of Rs.20,000/- in each, i.e. Rs.40,000/-, which needless to say, shall be paid to the opposite party. The parties through their counsel are directed to appear before the learned trial Court on ***23.7.2015***. The Registry is directed to send the record forthwith so as to reach well before the date fixed.

28. Interim order dated 08.01.2015 is vacated. The pending application also stands disposed of.

****

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

FAO No. 256 of 2010 a/w FAOs No. 257 to 260, 266 to 274, 297, 298, 301, 337 of 2010, 64,152, 153 of 2011, 4009, 4089, 4093 and 4102 of 2013
Reserved on:29.05.2015
Decided on: 19.06.2015

1. FAO No. 256 of 2010

Oriental Insurance Company ...Appellant.
Versus
Smt. Indiro & others ...Respondents.

2. FAO No. 257 of 2010

Oriental Insurance Company ...Appellant.
Versus
Smt. Kanta & others ...Respondents.

3. FAO No. 258 of 2010

Oriental Insurance Company ...Appellant.
Versus
Smt. Vidya & others ...Respondents.

4. FAO No. 259 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Bimla Devi & others ...Respondents.

5. FAO No. 260 of 2010
Oriental Insurance Company ...Appellant.
Versus
Shri Ashok Kumar & others ...Respondents.

6. FAO No. 266 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Maya & others ...Respondents.

7. FAO No. 267 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Sumitra Devi & others ...Respondents.

8. FAO No. 268 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Kamlesh & others ...Respondents.

9. FAO No. 269 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Lambo & others ...Respondents.

10. FAO No. 270 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Lambo & others ...Respondents.

11. FAO No. 271 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Kanta & others ...Respondents.

12. FAO No. 272 of 2010
Oriental Insurance Company ...Appellant.
Versus
Smt. Veena Devi & others ...Respondents.

13. FAO No. 273 of 2010
Oriental Insurance Company ...Appellant.
Versus
Shri Ashok Kumar & others ...Respondents.

14. FAO No. 274 of 2010
Oriental Insurance Company ...Appellant.
Versus
Shri Ramesh Kumar & others ...Respondents.

15. FAO No. 297 of 2010

Oriental Insurance Company ...Appellant.
Versus
Uttam Kumar & others ...Respondents.

16. FAO No. 298 of 2010

Oriental Insurance Company ...Appellant.
Versus
Smt. Leela Devi & others ...Respondents.

17. FAO No. 301 of 2010

Oriental Insurance Company ...Appellant.
Versus
Des Raj & others ...Respondents.

18. FAO No. 337 of 2010

Oriental Insurance Company ...Appellant.
Versus
Darshna Devi & others ...Respondents.

19. FAO No. 64 of 2011

Oriental Insurance Company ...Appellant.
Versus
Shri Lekh Raj & others ...Respondents.

20. FAO No. 152 of 2011

Oriental Insurance Company ...Appellant.
Versus
Smt. Naseem Begum & others ...Respondents.

21. FAO No. 153 of 2011

Oriental Insurance Company ...Appellant.
Versus
Smt. Naseem Begum & others ...Respondents.

22. FAO No. 4009 of 2013

Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Man Dei & others ...Respondents.

23. FAO No. 4089 of 2013

The Oriental Insurance Company Limited ...Appellant.
Versus
Shri Uttam & others ...Respondents.

.....

24. FAO No. 4093 of 2013

The Oriental Insurance Company Limited ...Appellant.
Versus
Shri Des Raj & others ...Respondents.

25. FAO No. 4102 of 2013

The Oriental Insurance Company Limited ...Appellant.
Versus
Smt. Sumitra & others ...Respondents.

Motor Vehicle Act, 1988- Section 149- 24 persons died and 40 persons were injured in a motor vehicle accident- 25 claim petitions were filed- seating capacity of vehicle was 42+2-

Insurer has to satisfy the award to the extent of risk cover- if the claim petitions are more than the risk covered, then it is for the insured to satisfy the same. (Para-12 to 15)

Motor Vehicle Act, 1988- Section 171- Interest was awarded by MACT @ 12% P.A. in all the petitions except 7 in which interest was awarded @ 7.5 % p.a.- held, that interest has to be awarded as per the prevailing rate- interest awarded @ 9% p.a. in all the claim petitions. (Para-16 to 24)

Cases referred:

United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917

National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

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

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738

Savita versus Binder Singh & others, 2014 AIR SCW 2053

Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982

Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 Supreme Court Cases 433

Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434

State of Haryana and another versus Jasbir Kaur and others, AIR 2003 Supreme Court 3696

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916

FAO No. 257 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAO No. 256 of 2010

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

For the respondents: Mr. Rajiv Rai, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAO No. 258 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAO No. 259 of 2010

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

For the respondents: Mr. Vijay Chaudhary, Advocate, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Nemo for respondent No. 7.

.....

FAO No. 260 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 & 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

.....

FAO No. 266 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1, and 4 to 7.
Mr. Hamender Chandel, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

.....

FAO No. 267 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Nemo for respondent No. 7.

.....

FAO No. 268 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAOs No. 269 & 270 of 2010

For the appellant(s): Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Nemo for respondent No. 7.

FAO No. 271 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAO No. 272 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAO No. 273 of 2010

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

For the respondents: Mr. Vikas Rathore, Advocate, for respondents No. 1 & 2.
Mr. Hamender Chandel, Advocate, for respondent No. 3.
Nemo for respondent No. 4.

.....

FAO No. 274 of 2010

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

For the respondents: Mr. Kulbhushan Khajuria, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAO No. 297 of 2010

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

For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAO No. 298 of 2010

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

For the respondents: Mr. Avinash Jaryal, Advocate, for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.
Nemo for respondent No. 6.

.....

FAO No. 301 of 2010

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

For the respondents: Mr. Nimish Gupta, Advocate, for respondents No. 1 to 5.
Mr. Hamender Chandel, Advocate, for respondent No. 6.
Nemo for respondent No. 7.

.....

FAO No. 337 of 2010

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

For the respondents: Mr. Vijay K. Verma, Advocate, for respondents No. 1 to 3.

Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAO No. 64 of 2011

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

For the respondents: Nemo for respondents No. 1 to 4.
Mr. Hamender Chandel, Advocate, for respondent No. 5.

.....

FAOs No. 152 & 153 of 2011

For the appellant(s): Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Nemo for respondents No. 1 and 3.
Mr. Hamender Chandel, Advocate, for respondent No. 2.

.....

FAO No. 4009 of 2013

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

For the respondents: Mr. Vijay K. Verma, Advocate, for respondents No. 1 to 3.
Mr. Hamender Chandel, Advocate, for respondent No. 4.
Nemo for respondent No. 5.

.....

FAOs No. 4089, 4093 & 4102 of 2013

For the appellant(s): Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

For the respondents: Mr. Parveen Chauhan, Advocate, for respondent No. 1.
Mr. Hamender Chandel, Advocate, for respondent No. 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

This judgment shall govern all the twenty five appeals because these are outcome of one motor vehicular accident.

2. These appeals are outcome of the awards made by the Motor Accident Claims Tribunals (for short "the Tribunals") in various claim petitions, which were filed by the claimants being victims of the vehicular accident for grant of compensation, as per the break-ups given in the respective claim petitions (for short "the impugned awards").

3. The claimants have averred in the claim petitions that the driver, namely Shri Satish Kumar, has driven the offending vehicle, i.e. passenger bus, bearing registration No. HP-48-3321, rashly and negligently on 14.08.2009, at place Kundi at about 2.15 - 2.30 P.M. and caused the accident in which 24 persons sustained injuries and succumbed to the injuries and 40 persons sustained injuries.

4. Out of the said passengers, victims/claimants have filed only 25 claim petitions and compensation came to be awarded in favour of the claimants, details of which are given in the respective impugned awards.

5. The claimants, the owner-insured and the driver have not questioned any of the impugned awards on any count, thus, all the impugned awards have attained finality so far the same relate to them.

6. The insurer has questioned the impugned awards on the ground that the owner-insured and the driver have committed breach for the reason that the offending vehicle was being driven in violation of the route permit and the insurance policy read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988, (for short "the MV Act").

7. Thus, the following points are to be determined in these appeals:

> (i) Whether the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time?
>
> (ii) Whether the owner-insured has committed breach as more than prescribed/permitted passengers were travelling as passengers in the offending vehicle at the time of the accident?

8. The insurer has failed to prove the issue relating to the driving licence of the driver of the offending vehicle. All the Tribunals, while making the impugned awards, have held that the driver of the offending vehicle was having a valid and effective driving licence at the time of the accident.

9. I have perused the records and am of the considered view that there is sufficient evidence on the file to hold that the driver of the offending vehicle was having a valid and effective driving licence to drive the offending vehicle at the relevant point of time. Thus, the insurer has failed to discharge the onus.

10. It is worthwhile to mention herein that the learned counsel for the insurer has not questioned the findings returned by the Tribunals relating to the driving licence of the driver. Accordingly, the findings returned by the Tribunals on this issue are upheld.

11. It was for the insurer to plead and prove that the owner-insured has committed any willful breach, has failed to do so. No doubt, more than prescribed passengers were travelling in the offending vehicle at the time of the accident, but only twenty five persons have laid the claim petitions. The seating capacity of the offending vehicle was '42 + 2' and the factum of the insurance is not in dispute. Thus, the risk of 42 passengers is covered.

12. It is beaten law of land that the insurer has to satisfy the award to the extent of the risk covered and if the claim petitions are more than the risk covered, then it is for the insured-owner to satisfy the same.

13. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons*

only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

14. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

15. This Court in batches of appeals, **FAO No. 257 of 2006,** titled as **National Insurance Company Ltd. versus Smt. Sumna @ Sharda & others,** being the lead case, decided on 10.04.2015, and **FAO No. 224 of 2008,** titled as **Hem Ram & another versus Krishan Chand & another,** being the lead case, decided on 29.05.2015, has laid down the same principle, which is not disputed by the learned counsel for the insurer.

16. Learned counsel for the insurer argued that the amount awarded in all the claim petitions, on the face of it, is excessive and came to be passed in violation of the Second Schedule appended with the MV Act read with the ratio laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** and also not in tune with the insurance policy/agreement and the pleadings of the parties.

17. Perusal of the impugned awards does disclose that interest has been awarded @ 12% per annum in all the claim petitions except seven claim petitions, which are subject matter of FAOs No. 64, 152, 153 of 2011, 4009, 4089, 4093 and 4102 of 2013, in which interest has been awarded @ 7.5% per annum, which is not in tune with Section 171 of the MV Act, which provides that the interest is to be paid as per the prevailing rates.

18. The Apex Court in the case titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 Supreme Court Cases 281,** reduced the rate of interest on compensation to 9% from 12% awarded by the High Court. It is apt to reproduce relevant portion of para 39 of the judgment herein:

> *"39. .....*
>
> *Thereafter, the observations made in the case of Kaushnuma Begum, v. New India Assurance Co. Ltd., (2001) 2 SCC 9 : 2001 SCC (Cri) 268, have been quoted. After so much of discussion on the point of rate of interest and after mentioning the decisions relied upon by both the side or their part, it could not be said that rate of interest was not in dispute before the Court. As indicated earlier the observation is not indicated to have been made in reference to any statement of the Counsel for the party nor it come out that the respective parties may not have advanced arguments for maintaining the rate of interest as awarded and the other party for reducing the rate of interest. In the light of the position indicated above, we do not think it will be possible to shut out the Insurance Company from urging before us that lesser rate of interest should have been awarded in place of 12% as awarded by the High Court. Before us also, learned Counsel for the Insurance Company has referred the decision of this Court reported in A. Robert v. United Insurance Co. Ltd., (1999) 2 SCC 463 : 1982 SCC (Cri) 478, to indicate that interest at the rate of 6% was awarded in that case. Another case cited awarding 6% interest is M. S. Grewal v. Deep Chand Sood, (2001) 8 SCC 151 : 2001 SCC (Cri) 1426 : (2001) 2 ACC 540, particularly para 34 SCC para 39) has been referred. Jefford & Anr. v. Gee, (1970) 1 All ER 1202 : (1970) 2 QB 130 : (1970) 2 WLR 702 (CA), has also been*

referred to indicate that the amount awarded is on account of loss of future earning whereas the interest is payable on being kept out of the money it is therefore submitted that the interest may not be payable on the loss of future earning. Another decision which has been referred to is R. D. Hattangadi v. Pest Control (India) (P) Ltd., (1995) 1 SCC 551 : 1995 SCC (Cri) 250, more particularly para 18 of the judgment where it has been held that no interest is awardable on the amount of future expenditure. It is further observed: (SCC p. 559, para 18)

> *"It need not be pointed out that interest is to be paid over the amount which has become payable on the date of award and not which is to be paid for expenditures to be incurred in future."*

But it not indicated by the learned Counsel for the appellant-Insurance Company as to which is that amount out of the amount awarded which is on account of future expenditure yet to be incurred by the claimants. The interest is to be awarded on the amount which is payable on the date of the award. It is also to be noted that in some cases interest at the rate of 6% was awarded. This case however does not help the appellant Insurance Company. The next case which has been cited is Kaushnuma Begum v. New India Assurance Co. Ltd., (2001) 2 SCC 9 : 2001 SCC (Cri) 268. In this case, interest at the rate of 9% was awarded. The reason indicated in para 24 of the judgment, we quote hereunder : (SCC p. 16)

> *"24. Now, we have to fix up the rate of interest. Section 171 of the M. V. Act empowers the Tribunal to 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 may be specified in this behalf'. Earlier, 12% was found to be the reasonable rate of simple interest. With a change in economy and the policy of Reserve Bank of India the interest rate has been lowered. The nationalized banks are now granting interest at the rate of 9% on fixed deposit for one year. We, therefore, direct that the compensation amount fixed hereinbefore shall bear interest at the rate of 9% per annum from the date of the claim made by the appellants."*

In our view the reason indicated in the case of Kaushnuma Begum (supra) is a valid reason and it may be noticed that the rate of interest is already on the decline. We therefore, reduce the rate of interest to 9% in place of 12% as awarded by the High Court.

(Emphasis added)"

19. The Apex Court in another case titled as **Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892,** held that the Courts should take into consideration the changing socio-economic conditions. It is apt to reproduce para 11 of the judgment herein:

> *"11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people."*

20. The Apex Court in a case titled as **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 Supreme Court Cases 738,** awarded interest @ 6% per annum. It is apt to reproduce para 17 of the judgment herein:

> *"17. The appellants produced Income Tax Returns of deceased-Ritesh Bhanu Shali for the years 2002 to 2008 which have been marked as Ext. P-10-C. The Income Tax Return for the year 2007-2008 filed on 12-03-2008 at Raipur, four months prior to the accident, shows the income of Rs. 99,000/- per annum. The Tribunal has rightly taken into consideration the aforesaid income of Rs. 99,000/- for computing the compensation. If the 50% of the income of Rs. 99,000/- is deducted towards personal and living expenses of the deceased the contribution to the family will be 50%, i.e., Rs.49,500/- per annum. At the time of the accident, the deceased-Ritesh Bhanu Shali was 26 years old, hence on the basis of decision in Sarla Verma applying the multiplier of 17, the amount will come to Rs. 49,500/- x 17 = Rs. 8,41,500/-. Besides this amount the claimants are entitled to get Rs. 50,000/- each towards the affection of the son, i.e., Rs. 1,00,000/- and Rs. 10,000/- on account of funeral and ritual expenses and Rs. 2,500/- on account of loss of sight as awarded by the Tribunal. Therefore, the total amount comes to Rs. 9,54,000/- (Rs. 8,41,500/- + Rs. 1,00,000/- + Rs. 10,000/- + Rs. 2,500/-) and the claimants are entitled to get the said amount of compensation instead of the amount awarded by the Tribunal and the High Court. They would also be entitled to get interest at the rate of 6% per annum from the date of the filing of the claim petition leaving rest of the conditions mentioned in the award intact."*

21. The Apex Court in the case titled as **Smt. Savita versus Binder Singh & others,** reported in **2014 AIR SCW 2053,** modified the order made by the Tribunal and

enhanced the rate of interest to 8% from 6% as awarded by the Tribunal. It is apt to reproduce paras 3.2 and 10 of the judgment herein:

> *"3.2 In the claim petition, the appellant-claimant asked for compensation of 20,20,000/0 along with interest at the rate of 12% per annum fromt he respondents/opposite parties. The parties filed their pleadings before the Tribunal and the following issues were framed:*
>
> *.....*
>
> *10. The order of the High Court and Tribunal is modified. We direct that the claimant/appellant is entitled to a sum of Rs. 6,55,400/- plus interest @ 8 per cent per annum from the date of filing of the claim petition till the date of payment as compensation. Accordingly, we direct that the enhanced amount should be paid to the appellant after deducting the amount already paid, within a period of four weeks from date. For the reasons stated hereinabove, the appeal is partly allowed."*

22. The Apex Court in the case titled as **Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982,** held that the High Court was justified in reducing the rate of interest to 9% per annum from 12% per annum, as awarded by the Tribunal. It is apt to reproduce relevant portion of para 16 of the judgment herein:

> *"16. Further, the High Court has awarded the compensation with interest @ 9% per annum. We concur with this holding of the High Court in the light of the decision of this Court in Municipal Corporation of Delhi, Delhi v. Uphaar Tragedy Victims Association & Ors, (2011) 14 SCC 481 : AIR 2012 SC 100 : 2011 AIR SCW 6418. Accordingly, we award an interest @ 9% per annum on the compensation to be awarded to the appellants- claimants. ....."*

23. The Apex Court in latest judgments in the cases titled as **Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 Supreme Court Cases 433,** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 Supreme Court Cases 434,** awarded interest @ 9% per annum. It is apt to reproduce para 2 of the judgment in **Amresh Kumari's case (supra)** herein:

> *"2. We have heard the learned counsel for the parties. The question whether interest on the amount of compensation determined to be payable to the claimant is to be awarded from the date of the award or from the date of the filing of the claim petition came up for consideration before this court in Mohinder Kaur v. Hira Nand Sindhi, (2015) 4 SCC 434, to which one of us (D.K. Jain, J.) was a party, it was held that the claimant was entitled to interest from the date of filing of the claim petition. Following the said decision, we hold that the appellant would be entitled to simple interest @ 9 per cent, as awarded by the learned Single Judge, from the date of filing of the claim petition i.e. 11-8-1986."*

24. Having said so, I am of the considered view that the interest awarded in all the claim petitions is not in tune with the ratio laid down by the Apex Court read with the mandate of Section 171 of the MV act. Thus, I deem it proper to award interest at the prevailing rate. Accordingly, it is held that the interest @ 9% per annum is granted in all the claim petitions.

25. The next question is - whether the amount awarded is excessive and whether the insurer can question the same?

26. The law developed on the issue is that the insurer cannot question the adequacy of compensation, but, at the same time, the Court has to examine as to what is just compensation and where it appears, on the face of it, to be a booty and borne in disguise, the Court has to interfere.

27. The mandate of Section 168 (1) of the MV Act is to 'determine the amount of compensation which appears to it to be just'.

28. The word "just' has been defined in the **Webster's Encyclopedic Unabridged Dictionary of the English Language, Deluxe Edition,** at page No. 1040, herein:

> "**just,** adj. **1.** guided by truth, reason, justice, and fairness: *We hope to be just in our understanding of such difficult situation.* **2.** done or made according to principle; equitable; proper: *a just reply.* **3.** based on right; rightful; lawful; *a just claim.* **4.** in keeping with truth or fact; true; correct: *a just analysis.* **5.** given or awarded rightly; deserved, as a sentence, punishment, or reward: *a just penalty.* **6.** in accordance with standards or requirements; proper or right: *just proportions.* **7. (**esp. in Biblical use) righteous. **8.** actual, real, or genuine. -*adv.* **9.** within a brief preceding time; but a moment before: *The sun just came out.* **10.** exactly or precisely: *This is just what I mean.* **11.** by a narrow margin: barely: *The arrow just missed the mark.* **12.** only or merely: *he was just a clerk until he became ambitious.* **13.** actually; really; positively: *The weather is just glorious."*

29. In the **Oxford Advanced Learner's Dictionary,** the word "just" has been defined at page No. 702, as under:

> *"**just.** - adv. **1.** exactly, **2.** at the same moment as, **3.** as good,nice, easily, etc., **4.** after, beefore, under, etc. sth, **5.** used to say that you/sb did sth very recently, **6.** at this/that moment, **7.** about/going to do sth, **8.** simply, **9.** (informal) really; completely, **10.** to do sth only, **11.** used in orders to get sb's attention, give permission etc., **12.** used to make a polite request, excuse etc., **13.** could/might/may - used to show a slight possibility that sth is true to will happen, **14.** used to agree with sb.....*
>
> *adj. **1.** that most people consider to be morally fair and reasonable, **2.** people who are just **3.** appropriate in a particular situation."*

30. 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)."*

31. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment herein:

> *"25. Undoubtedly, Section 166 of the MVA deals with "Just Compensation" and even if in the pleadings no specific claim was made under section 166 of the MVA, in our considered opinion a party should not be deprived from getting "Just Compensation" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the Court is duty bound and entitled to award "Just Compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. However, whether or not the claimants would be governed with the terms and conditions of the insurance policy and whether*

> *or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there was rash and negligent driving on the part of the deceased, are essentially a matter of fact which was required to be considered and answered at least by the High Court."*

32. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

> *"6. After considering the decisions of this Court in Santosh Devi as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."*

33. Applying the test, one comes to an inescapable conclusion that the Tribunals have virtually fallen in an error in applying the multiplier in most of the claim petitions. Thus, I deem it proper to reduce the multiplier applied in most of the claim petitions as follows:

1. FAO No. 256 of 2010:

34. The Tribunal, after taking the income of the deceased to be Rs.10,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.80,004/- per annum, and applying the multiplier of '13', held the claimants entitled to compensation to the tune of Rs.10,40,052/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.11,20,052/- .

35. Admittedly, the age of the deceased was 46 years. The age of the widow was 40 years and two of the children was 17 years and 14 years, at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '11' is applicable. Thus, the claimants are held entitled to Rs.80,004/- x 11 = Rs.,80,044/- under the head 'loss of income'. The

claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

36. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.8,80,044/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.9,10,044/-.

2. FAO No. 257 of 2010

37. The Tribunal, after taking the income of the deceased to be Rs.10,000/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.80,004/- per annum, and applying the multiplier of '16', held the claimants entitled to compensation to the tune of Rs.12,80,064/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.13,60,064/- .

38. Admittedly, the age of the deceased was 40 years. The claimants are the widow and the sons and daughters of the deceased. The age of the widow was also 40 years at the relevant point of time. Applying the ratio of the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimants are held entitled to Rs.80,004/- x 14 = Rs.11,20,056/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

39. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.11,20,056/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.11,50,056/-.

3. FAO No. 258 of 2010:

40. The Tribunal, after taking the income of the deceased to be Rs.9,591/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimant to the tune of Rs.76,728/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs. 8,44,0888/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.30,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.9,14,088/- .

41. Admittedly, the age of the deceased was 55 years. The age of the widow was 45 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the judgments in **Sarla Verma and Reshma Kumari's cases (supra),** multiplier of '9' is applicable. Thus, the claimant is held entitled to Rs.76,728/- x 9 = Rs.6,90,552/- under the head 'loss of income'. The claimant is also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

42. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.6,90,552/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.7,20,552/-.

4. FAO No. 259 of 2010:

43. The Tribunal, after taking the income of the deceased to be Rs.22,417/- per month, after deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.1,79,340/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.26,90,100/-

under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.27,70,700/- .

44. Admittedly, the age of the deceased was 45 years at the time of the accident. The claimants are the widow, sons, daughter and mother of the deceased. Keeping in view the age of the deceased read with the judgments in **Sarla Verma and Reshma Kumari's cases (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs.1,79,340/- x 13 = Rs.23,31,420/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

45. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.23,31,420/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.23,61,420/-.

5. FAO No. 260 of 2010:

46. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed the loss to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/- .

47. Admittedly, the age of the deceased was 2 years. The claimants are the parents of the deceased and the age of the father of the deceased was 31 years, when he appeared in the witness box. Keeping in view the age of the deceased read with the age of the claimants and the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

48. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.,80,000/-.

6. FAO No. 266 of 2010:

49. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.39,820/- per annum, and applying the multiplier of '5', held the claimants entitled to compensation to the tune of Rs.1,99,100/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.2,39,100/- .

50. Admittedly, the age of the deceased was 62 years. The multiplier of '5' applied by the Tribunal is just and appropriate in view of the age of the deceased read with the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** needs no interference. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

51. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.1,99,100/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.2,29,100/-.

7. FAO No. 267 of 2010:

52. The Tribunal, after taking the income of the deceased to be Rs. 7,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.56,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.8,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.9,20,000/- .

53. Admittedly, the age of the deceased was 41 years. The claimants are the widow, daughters and sons of the deceased. The age of the widow was 36 years and three children were minor at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs. 56,000/- x 13 = Rs.7,28,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

54. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.7,28,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.7,58,000/-.

8. FAO No. 268 of 2010:

55. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.6,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.7,20,000/- .

56. Admittedly, the age of the deceased was 37 years. The claimants are the widow, minor son and the parents of the deceased. The age of the widow was 37 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 14 = Rs.5,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

57. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.5,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.5,90,000/-.

9. FAO No. 269 of 2010:

58. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed the loss to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to

the tune of Rs.3,60,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.3,90,000/- .

59. Admittedly, the age of the deceased was 2 years. The claimants are the mother, brothers and sisters of the deceased. The age of the mother was 45 years, when she appeared in the witness box. The multiplier of '15' applied by the Tribunal is just and appropriate in view of the age of the deceased read with the law laid down by the Apex Court in **Sarla Verma** and **Reshma Kumari's cases (supra),** needs no interference. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

60. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

10. FAO No. 270 of 2010:

61. The Tribunal, after taking the income of the deceased to be Rs.26,375/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.2,11,008/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs.23,21,088/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection', Rs.5,000/- under the head 'expenses on medicines' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.24,06,088/- .

62. Admittedly, the age of the deceased was 54 years. The claimants are the widow, sons and daughter of the deceased. The age of the widow was 45 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '9' is applicable. Thus, the claimants are held entitled to Rs.2,11,008/- x 9 = Rs.18,99,072/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

63. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.18,99,072/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.19,29,072/-.

11. FAO No. 271 of 2010:

64. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.36,000/- per annum, and applying the multiplier of '16', held the claimants entitled to compensation to the tune of Rs.5,76,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.6,06,000/- .

65. Admittedly, the age of the deceased was 14 years. The claimants are the mother, brother and sisters of the deceased. The age of the mother was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.36,000/- x 15 = Rs.5,40,000/- under

the head 'loss of income'. The claimants are also awarded Rs.0,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

66. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.5,40,000/- + Rs.10,000/- + Rs.10,000/- = Rs.5,60,000/-.

12. FAO No. 272 of 2010:

67. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.4,08,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,38,000/-.

68. Admittedly, the age of the deceased was 6 years. The claimants are the parents and minor sister of the deceased. The age of the father was 35 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

69. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

13. FAO No. 273 of 2010:

70. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/-.

71. Admittedly, the age of the deceased was 5 years. The claimants are the parents of the deceased. The age of the father of the deceased was 31 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

72. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

14. FAO No. 274 of 2010:

73. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.4,08,000/- under the head 'loss of income'. The Tribunal

has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,38,000/-.

74. Admittedly, the age of the deceased was 9 years. The claimants are the parents of the deceased. The age of the father of the deceased was 33 years and that of mother was 30 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

75. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.0,000/- = Rs.3,80,000/-.

15. FAO No. 297 of 2010:

76. The Tribunal, after taking the future income of the deceased to be Rs.10,000/- per month, assessed loss of dependency to the parents to the tune of Rs.24,000/- per annum, and applying the multiplier of '18', held the claimants entitled to compensation to the tune of Rs.4,32,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.20,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.4,62,000/-.

77. Admittedly, the age of the deceased was 6 years. The claimants are the parents and minor sister of the deceased. The age of the father of the deceased was 30 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.24,000/- x 15 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

78. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,80,000/-.

16. FAO No. 298 of 2010:

79. The Tribunal, after taking the income of the deceased to be Rs.15,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.1,20,000/- per annum, and applying the multiplier of '15', held the claimants entitled to compensation to the tune of Rs.18,00,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.30,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.18,80,000/- .

80. Admittedly, the age of the deceased was 42 years. The claimants are the widow, son, daughter and mother of the deceased. The age of the widow was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a

larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '13' is applicable. Thus, the claimants are held entitled to Rs.1,20,000/- x 13 = Rs.15,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

81. Viewed thus, the claimants are held entitled to compensation to the tune ofRs.15,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.15,90,000/-.

17. FAO No. 301 of 2010:

82. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards her personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.6,80,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.50,000/- under the head 'loss of love & affection' and Rs.10,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.7,40,000/- .

83. Admittedly, the age of the deceased was 31 years. The claimants are the husband, minor sons and daughters of the deceased. The age of the husband of the deceased was 36 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 15 = Rs.6,00,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.0,000/- under the head 'loss of estate'.

84. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.6,00,000/- + Rs.0,000/- + Rs.10,000/- = Rs.6,20,000/-.

18. FAO No. 337 of 2010:

85. The Tribunal, after taking the income of the deceased to be Rs.5,551/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.44,400/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.7,54,800/- under the head 'loss of income'. The Tribunal has also awarded Rs.40,000/- under the head 'loss of consortium', Rs.40,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'expenses on last rites', thus, awarded total compensation to the tune of Rs.8,49,800/- .

86. Admittedly, the age of the deceased was 32 years. The claimants are the widow, minor son and mother of the deceased. The age of the widow was 22 years and that of the son was one year at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimants are held entitled to Rs.44,400/- x 15 = Rs.6,66,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.0,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

87. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.6,66,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.6,96,000/-.

19. FAO No. 64 of 2011:

88. The Tribunal, after taking the income of the deceased to be Rs.2,500/- per month and deducting one third towards her personal expenses, assessed loss of dependency to the claimants to the tune of Rs.20,000/- per annum, and applying the multiplier of '17', held the claimants entitled to compensation to the tune of Rs.3,40,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.50,000/- under the head 'loss of love & affection/consortium' and Rs.10,000/- under the head 'funeral expenses', thus, awarded total compensation to the tune of Rs.4,00,000/- .

89. Admittedly, the age of the deceased was 29 years. The claimants are the husband and minor son and daughter of the deceased. The age of the husband of the deceased was 31 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '16' is applicable. Thus, the claimants are held entitled to Rs.20,000/- x 16 =Rs.3,20,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

90. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,20,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,40,000/-.

20. FAO No. 152 of 2011:

91. The Tribunal, after taking the future income of the deceased to be Rs.3,600/- per month, which were the minimum wages payable in the State of Himachal Pradesh at the time of passing the award, after deducting 50% towards his personal expenses, assessed loss of dependency to the mother to the tune of Rs.21,600/- per annum, and applying the multiplier of '15', while keeping in mind the age of the mother as 40 years, held the claimant entitled to compensation to the tune of Rs.3,24,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.25,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'funeral expenses and other conventional charges', thus, awarded total compensation to the tune of Rs.3,64,000/-.

92. Admittedly, the age of the deceased was 14 years. The claimant is the mother of the deceased and her age was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' applied by the Tribunal is just and appropriate, needs no interference. The claimant is awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

93. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.3,24,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,44,000/-.

21. FAO No. 153 of 2011:

94. The Tribunal, after taking the future income of the deceased to be Rs.3,600/- per month, which were the minimum wages payable in the State of Himachal Pradesh at the time of passing the award, after deducting 50% towards her personal expenses, assessed loss of dependency to the mother to the tune of Rs.21,600/- per annum, and applying the multiplier of '15', while keeping in mind the age of the mother as 40 years, held the claimant entitled to compensation to the tune of Rs.3,24,000/- under the head 'loss of income'. The Tribunal has also awarded Rs.25,000/- under the head 'loss of love & affection' and Rs.15,000/- under the head 'funeral expenses and other conventional charges', thus, awarded total compensation to the tune of Rs.3,64,000/-.

95. Admittedly, the age of the deceased was 11 years. The claimant is the mother of the deceased and her age was 40 years at the relevant point of time. Keeping in view the age of the deceased read with the age of the claimant and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' applied by the Tribunal is just and appropriate, needs no interference. The claimant is awarded Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

96. Viewed thus, the claimant is held entitled to compensation to the tune of Rs.3,24,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,44,000/-.

22. FAO No. 4009 of 2013

97. The Tribunal, after taking the income of the deceased to be Rs.5,000/- per month and deducting one third towards his personal expenses, assessed loss of dependency to the claimants to the tune of Rs.40,000/- per annum, and applying the multiplier of '11', held the claimants entitled to compensation to the tune of Rs. 4,40,000/- under the head 'loss of income'. The Tribunal has also awarded, Rs.5,000/- under the head 'loss of estate', Rs.5,000/- under the head 'funeral charges', Rs.5,000/- under the head 'transportation of the dead body', Rs.0,000/- under the head 'loss of consortium', and Rs.50,000/- under the head 'loss of love & affection', thus, awarded total compensation to the tune of Rs.5,15,000/- .

98. Admittedly, the age of the deceased was 52 years at the time of the accident. The claimants are the widow and minor daughters of the deceased. Keeping in view the age of the deceased read with the age of the claimants and the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '9' is applicable. Thus, the claimants are held entitled to Rs.40,000/- x 9 = Rs.3,60,000/- under the head 'loss of income'. The claimants are also awarded Rs.10,000/- under the head 'loss of consortium', Rs.10,000/- under the head 'funeral expenses' and Rs.10,000/- under the head 'loss of estate'.

99. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.3,90,000/-.

23. FAO No. 4089 of 2013:

100. The Tribunal, after taking the income of the claimant-injured to be Rs.,000/- per month and applying the multiplier of '16', held the claimant-injured entitled to compensation to the tune of Rs.88,000/- under the head 'loss of future income', while taking into consideration the 5% permanent disability suffered by the injured. The Tribunal has also awarded Rs.2,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.5,000/- under the head 'medical expenditure', Rs.4,000/- under the head 'attendant charges, Rs.4,000/- under the head 'special diet', Rs.15,000/- under the head 'pain and sufferings' and Rs.25,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs.1,43,000/- .

101. It is apt to record herein that the Tribunal has wrongly calculated the loss of future income as Rs.88,000/- as it should be Rs.48,000/- for the reason that the monthly income of the claimant-injured has been taken as Rs.5,000/- per month. The claimant-injured has suffered 5% permanent disability. Meaning thereby, he has suffered the loss of future income to the extent of 5% of Rs.5,000/- per month, which comes to 250/- per month, i.e. Rs.3,000/- per annum.

102. Admittedly, the age of the claimant-injured was 31 years at the time of the accident. The claimant-injured has suffered 5% permanent disability, thus, has suffered loss of future income to the tune of 5% of Rs.5,000/- per month, i.e. Rs.250/- per month (Rs.3,000/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '15' is applicable. Thus, the claimant-injured is held entitled to Rs.3,000/- x 15 = Rs.45,000/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

103. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.45,000/- + Rs.2,000/- + Rs.5,000/- + Rs.4,000/- + Rs.4,000/- + Rs.15,000/- + Rs.25,000/- = Rs.1,00,000/-.

24. FAO No. 4093 of 2013:

104. The Tribunal, after taking the income of the claimant-injured to be Rs.5,000/- per month and applying the multiplier of '15', held the claimant-injured entitled to compensation to the tune of Rs.2,25,000/- under the head 'loss of future income', while taking into consideration the 25% permanent disability suffered by the claimant-injured. The Tribunal has also awarded Rs.5,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.50,000/- under the head 'medicines & transportation', Rs.5,000/- under the head 'attendant charges, Rs.5,000/- under the head 'special diet', Rs.25,000/- under the head 'pain and sufferings' and Rs.1,00,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs.4,15,000/- .

105. Admittedly, the age of the claimant-injured was 38 years at the time of the accident. The claimant-injured has suffered 25% permanent disability, thus, has suffered loss of future income to the tune of 25% of Rs.5,000/- per month, i.e. Rs.1250/- per month (Rs.15,000/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimant-injured is held entitled to Rs.15,000/- x 14 = Rs.2,10,000/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

106. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.2,10,000/- + Rs.5,000/- + Rs.50,000/- + Rs.5,000/- + Rs.5,000/- + Rs.25,000/- + Rs.1,00,000/- = Rs.4,00,000/-.

25. FAO No. 4102 of 2013:

107. The Tribunal, after taking the income of the claimant-injured to be Rs.3,000/- per month and applying the multiplier of '15', held the claimant-injured entitled to compensation to the tune of Rs.2,43,000/- under the head 'loss of future income', while taking into consideration the 45% permanent disability suffered by the claimant-injured. The Tribunal has also awarded Rs.3,000/- under the head 'loss of earning for the period the claimant-injured remained admitted', Rs.10,000/- under the head 'medicines', Rs.5,000/- under the head 'attendant charges, Rs.5,000/- under the head 'special diet', Rs.1,00,000/- under the head 'pain and sufferings' and Rs.1,00,000/- under the head 'loss of amenities of life', thus, awarded total compensation to the tune of Rs. 4,66,000/- .

108. Admittedly, the age of the claimant-injured was 40 years at the time of the accident. The claimant-injured has suffered 45% permanent disability, thus, has

suffered loss of future income to the tune of 45% of Rs.3,000/- per month, i.e. Rs.1350/- per month (Rs.16,200/- per annum). Keeping in view the age of the claimant-injured and the extent of permanent disability suffered by him read with the dictum of the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** multiplier of '14' is applicable. Thus, the claimant-injured is held entitled to Rs.16,200/- x 14 = Rs.2,26,800/- under the head 'loss of future income'. The compensation awarded under the other heads is just and appropriate, needs no interference.

109. Viewed thus, the claimant-injured is held entitled to compensation to the tune of Rs.2,26,800/- + Rs.3,000/- + Rs.10,000/- + Rs.5,000/- + Rs.5,000/- + Rs.1,00,000/- + Rs.1,00,000/- = Rs.4,49,800/-.

110. Having glance of the above discussions, all the appeals are disposed of and the impugned awards are modified, as indicated hereinabove.

111. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the respective impugned awards after proper identification. Excess amount, if any, be released in favour of the insurer through payee's account cheque.

112. Send down the record after placing copy of the judgment on each of the Tribunal's files.

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

Oriental Insurance Company Ltd. ...Appellant

Versus

Ambi Chand and others. ...Respondents.

FAO No.351 of 2008.
Decided on: 19.06.2015.

Motor Vehicle Act, 1988- Section 166- MACT had deducted 1/3rd of amount towards the personal expenses- deceased was bachelor, therefore, 50% of the amount was to be deducted towards personal expenses- income of the deceased was Rs.4,000/- p.m.- loss of dependency would be Rs.2,000/- p.m.- deceased was 22 years of age at the time of accident- multiplier of '15' has to be applied and the compensation of Rs. 3,60,000/- (Rs.2,000/- x 12 x 15) has to be awarded towards loss of dependency. (Para-4 to 9)

Cases referred:

Sarla Verma (Smt.) and ors. vs. Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120
Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1

For the Appellant: Mr.Ashwani K. Sharma, Advocate.
For the Respondents: Mr.Lalit Sehgal, Advocate, for respondents No.1 to 4.
Mr.G.R. Palsara, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

The appellant/insurer has invoked the jurisdiction of this Court in terms of Section 173 of the Motor Vehicles Act, (for short, the Act), challenging the award, dated 7th

March, 2008, passed by Motor Accident Claims Tribunal-II, Mandi, (for short, the Tribunal), in Claim Petition No.51/2006, titled Ambi Chand and others vs. Kamla Devi and others, whereby compensation to the tune of Rs.5,23,000/-, with interest at the rate of 7.5% per annum, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the insurer/appellant was saddled with the liability, (for short, the impugned award).

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

3. Only the insurer has questioned the impugned award on two grounds - firstly, that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident and secondly, that the amount awarded is excessive.

4. Mr.Ashwani K. Sharma, learned counsel for the appellant/insurer, vehemently argued that the Tribunal has fallen in error in deducting 1/3rd amount, from the total income of the deceased, as his personal expenses. He submitted that the deceased, namely, Duni Chand was a bachelor and 50% ought to have been deducted from his income towards his personal expenses.

5. The argument advanced by the learned counsel for the appellant is correct and the Tribunal has fallen in error in deducting 1/3rd amount from the total income of the deceased, towards his personal expenses. The Apex Court in **Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121,** which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** has also held that in such cases, while determining compensation under the head 'loss of source of dependency', 50% has to be deducted towards personal expenses of the deceased.

6. The claimants have pleaded in the Claim Petition that the deceased, at the time of his death, was earning Rs.4,000/- per month by working as a salesman. It was also pleaded that the deceased was also earning Rs.11,000/- from agricultural sources. However, the claimants have not been able to prove the agricultural income of the deceased.

7. The Tribunal, after scanning the evidence, rightly came to the conclusion that the monthly income of the deceased was Rs.4,000/-. Thus, applying the ratio laid down by the Apex Court in Sarla Verma's case (supra), it can safely be held that the claimants have lost source of dependency to the tune of Rs.2,000/- per month.

8. Keeping in view the fact that the deceased was 22 years of age at the time of accident, read with the latest decision of the Apex Court in **Munna Lal Jain and another vs. Vipin Kumar Sharma and others, JT 2015(5) SC 1,** multiplier of 15 is to be applied, which has been rightly applied by the Tribunal.

9. In view of the above discussion, the claimants are held entitled to compensation to the tune of Rs.3,60,000/- (Rs.2,000/- x 12 x 15), with interest as awarded by the Tribunal.

10. Coming to other argument of the learned counsel for the appellant, apparently, the driver of the offending vehicle was having a valid and effective driving licence at the time of accident. In order to seek exoneration, it was for the insurer to prove that the owner had committed willful breach, in which it has miserably failed. The Tribunal has rightly made discussion while determining issues No.4 and 5 and has rightly saddled the

insurer with the liability. Accordingly, the argument advanced by the learned counsel for the appellant is repelled, being devoid of any force.

11. Having glance of the above discussion, the appeal is partly allowed and the impugned award is modified, as indicated above. The amount be released in favour of the claimants strictly in terms of the impugned award and the excess amount, if any, deposited by the insurer, be released in its favour through payee's account cheque.

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

Ramesh Kumar and another ...Appellants.

Versus

Himachal Pradesh Road Transport Corporation and another ...Respondents.

FAO No. 81 of 2008
a/w CO No. 484 of 2008
Decided on: 19.06.2015

Motor Vehicle Act, 1988- Section 166- Claimants had specifically pleaded that deceased was a house wife and was earning Rs.5,000 to 7,000/- p.m. by agriculturist and horticulturist vocations- they further pleaded that they have to engage a servant for looking after the affairs of the house and orchard by paying Rs. 3,000/- p.m. - it can be held by guess work that income of the deceased was not less than Rs. 4,5000/- p.m.- 1/3rd of the amount is to be deducted towards personal expenses - loss of dependency would be Rs. 3,000/- p.m. and applying multiplier of '8', claimants will be entitled to Rs. 3,000x12x8=2,88,000/- as compensation for loss of dependency. (Para-12 to 14)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellants: Mr. G.S. Rathore, Advocate.

For the respondents: Mr. N.K. Thakur, Senior Advocate, with Mr. Rohit Bharoll, Advocate for cross-objector/respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and order, dated 03.10.2007, made by the Motor Accident Claims Tribunal, Shimla (for short "the Tribunal") in MACC No. 1-S/2 of 2005, titled as Ramesh Kumar and another versus Himachal Pradesh Road Transport Corporation and another, whereby compensation to the tune of Rs.1,83,600/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants (for short "the impugned award").

2. The owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. The claimants and the insurer have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only issue to be determined in this appeal is - whether the amount awarded is adequate?

5. In order to determine this issue, it is necessary to give a resume of the case, the womb of which has given birth to the appeal in hand.

6. It is averred in the claim petition that deceased-Kankhu Devi was 55 years of age when she became the victim of a vehicular accident, which was caused by the driver, namely Shri Amar Singh Negi, while driving bus bearing registration No. HP-25-0767, owned by HRTC, rashly and negligently, on 14.11.2004 near place Narkanda.

7. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 19.06.2006:

> *"1) Whether Smt. Kankhu Devi on 14.11.2004, while travelling on bus No. HP-25-0767 suffered injuries to which she succumbed when the bus met with an accident due to rash and negligent driving by respondent No. 2, as alleged? OPP*
>
> *2) If issue No. 1 is proved, whether the petitioners are entitled for compensation, if so, to what amount and from whom? OPP*
>
> *3) Whether the petition is not maintainable? OPR*
>
> *4) Relief."*

9. Parties led evidence.

10. The Tribunal, after scanning the evidence, oral as well as documentary, decided the claim petition in favour of the claimants and against the respondents.

11. Issues No. 1 and 3 are not in dispute. Thus, the findings returned by the Tribunal on issues No. 1 and 3 are upheld.

12. Issue No. 2 is in dispute so far it relates to adequacy of compensation. The claimants have specifically averred in the claim petition that the deceased was a house wife and was earning Rs.5,000/- - Rs.7,000/- per month by agricultural and horticultural vocations. Further averred that the claimants have to engage a servant for looking after the affairs of the house and the orchard by paying Rs.3,000/- per month to him.

13. Admittedly, the deceased was a house wife, was growing vegetables, was maintaining the household chores and looking after the orchard. The claimants are the sons of the deceased. They have lost the love and affection of their mother and money cannot be a substitute for the loss of love of a mother. It has taken away their entire comforts.

14. The claimants have specifically pleaded that they had to pay Rs.3,000/- per month to the servant for managing their house and orchard. Thus, by guess work, it can be safely said that the deceased would have been earning not less than Rs.4,500/- per month. One third is to be deducted towards her personal expenses in view of the law laid down by the Apex Court in the case titled as **Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another,** reported in **AIR 2009 SC 3104** and upheld by a larger Bench of the Apex Court in the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120**. Thus, it is held that the monthly contribution of the deceased towards her family was Rs.3,000/- per month. The Tribunal has rightly applied the multiplier of '8' in view of the judgments (supra).

15. Viewed thus, the claimants are held entitled to compensation to the tune of Rs.3,000/- x 12 x 8 = Rs.2,88,000/-. The compensation awarded by the Tribunal under the other heads is upheld.

16. Having said so, the claimants are held entitled to total compensation to the tune of Rs.2,88,000/- + Rs.15,000/- + Rs.15,000/- = Rs.3,18,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

17. The respondents are directed to deposit the enhanced amount of compensation before the Registry within eight weeks. On deposition, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification.

18. Having glance of the above discussions, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

Cross Objections No. 484 of 2008

19. In view of the disposal of the appeal, the cross objections are also disposed of accordingly.

20. Send down the record after placing copy of the judgment on the Tribunal's file.

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

FAO No.366 of 2008 with FAO No.367 of 2008.
Decided on: 19.06.2015.

1. FAO No.366 of 2008:	
Rattan Singh and others	...Appellants
VERSUS	
Dodi Devi and others	...Respondents**.**
2. FAO No.367 of 2008:	
Rattan Singh and others	...Appellants
VERSUS	
Vijay Kumar and others	...Respondents**.**

Motor Vehicle Act, 1988- Section 147- Tractor was insured with trolley and additional premium was paid- tractor of the trolley was being used for agriculture purposes- therefore, insurer was wrongly discharged by MACT. (Para-11 to 13)

FAO No.366 of 2008:

For the Appellants: Mr.G.R. Palsara, Advocate.

For the Respondents: Mr.R.L. Chaudhary, Advocate, for respondent No.1.
Mr.Lalit K. Sharma, Advocate, for respondent No.2.
Nemo for respondent No.3.

FAO No.367 of 2008:

For the Appellants: Mr.G.R. Palsara, Advocate.

For the Respondents: Mr.Sandeep Chauhan, Advocate, for respondents No.1 and 2.
Mr.Lalit Sharma, Advocate, for respondent No.3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Both these appeals are the outcome of common award, dated 28th February, 2008, passed by the Motor Accident Claims Tribunal-II, Mandi, (for short, the Tribunal), in Claim Petitions No.16 of 1999, titled Dodi Devi vs. Govind Ram and others, filed by the mother of deceased Rattan Lal, and Claim Petition No.2 of 1999, titled Vijay Kumar and another vs. Deceased Govind Ram through LRs and others, filed by the minor son and daughter of deceased Rattan Lal, whereby compensation to the tune of Rs.2,31,000/-, with interest at the rate of 7.5%, from the date of filing of the Claim Petition till realization, was awarded in favour of the claimants, and the owner-appellant was saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the owner/insured has challenged impugned award by the medium of the instant appeals.

3. The short question involved in these appeals is – Whether the Tribunal has rightly directed the owner/insured to satisfy the impugned award, by exonerating the insurer from the liability. The answer is in the negative for the following reasons.

4. The Claimants have specifically averred in the Claim Petitions that on 8th December, 1998, the deceased Rattan Lal was traveling in a tractor bearing No.HP-33-3431, which was owned by Govind Ram. The Tractor, attached with trolley, met with an accident and Rattan Lal sustained injuries and succumbed to the same, constraining the claimants to file the Claim Petitions claiming compensation to the tune of Rs.10.00 lacs. Both the Claim Petitions were consolidated and tried together by the Tribunal.

5. The owner, the driver and the insurer resisted the Claim Petitions by filing replies.

6. On the pleadings of the parties, the following issues were framed by the Tribunal in Claim Petition No.16 of 1999:

> *"1.Whether deceased Rattan Lal son of the petitioner died in accident which took place on 8-12-1998 at 10.00 P.M. near Chakkar on Mandi-Nerchowki road was riding in tractor bearing No.HP-33-3431 belonging to respondent No.1 and driven by rash and negligent manner? OPA*
>
> *2. If issue No.1 is proved in affirmative whether the petitioner is entitled to compensation and to what extent and from whom? OPA*

3. Whether the respondent No.3 is not liable to pay compensation as the vehicle was driven by unauthorized person without any effective and valid licence? OPR-3

4. Relief."

7. In Claim Petition No.2 of 1999, the following issues were settled by the Tribunal:

"1.Whether deceased Rattan Lal father of the petitioners died in accident which took place on 8-12-1998 at 10 P.M. near Chakkar on Mandi-Nerchowki road was riding in tractor bearing No.HP-33-3431 belonging to respondent No.1 and driven by rash and negligent manner? OPA

2. If issue No.1 is proved in affirmative, whether the petitioners are entitled to compensation and to what extent and from whom? OPA

3. Whether the respondent No.3 is not liable to pay compensation as the vehicle was driven by unauthorized person without any effective and valid licence? OPR-3

4. Relief."

8. Parties led their evidence. The Tribunal, after scanning the entire evidence, held that the Claimants have proved issues No.1 and 2. It was also held that the insurer has failed to prove issue No.3. However, while determining as to who is to be saddled with the liability, the Tribunal saddled the insured with the liability.

9. The findings recorded under issue No.1 are not in dispute, therefore, the same are accordingly upheld.

10. Before issue No.2 is taken up, I deem it proper to deal with issue No.3. The onus to prove this issue was on the insurer, which the insurer has not discharged. Admittedly, the driver of the offending tractor was having a valid and effective driving licence at the time of accident. Accordingly, this issue is decided against the insurer.

11. Coming to issue No.2, the adequacy of compensation is not in dispute. However, the findings recorded by the Tribunal are under challenge to the extent that the owner/insured has been wrongly saddled with the liability. During the course of hearing, it was urged by the learned counsel for the appellant/owner that the insurance policy Ext.RW-2/A was comprehensive one and therefore, the Tribunal has wrongly interpreted the insurance policy Ext.RW-2/A and has wrongly exonerated the insurer.

12. A perusal of the insurance policy Ext.RW-2/A does disclose that the Tractor was insured with trolley and additional premium was paid. It is admitted case that the tractor with trolley was being used for agricultural purpose. It has been admitted by the driver of the offending tractor that the deceased was performing the job of a labourer. Mr.Lalit K. Sharma, learned counsel for the insurer, was not in a position to defend the impugned award on this count.

13. Having said so, the Tribunal has fallen in error in discharging the insurer and directing the owner to satisfy the impugned award. Accordingly, the impugned award is modified by providing that the insurer has to satisfy the impugned award. The insurer is directed to deposit the award amount within 8 weeks from today in the Registry of this Court and on deposit, the Registry is directed to release the same in favour of the claimants strictly in terms of the impugned award.

14. The amount, if any, deposited by the insured/appellant be released in his favour through payees' account cheque. A copy of this judgment be placed on the record of the connected appeal.

15. Both the appeals stand disposed of accordingly.

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

Sucha Singh ...Appellant
Versus
Ritesh Kumar & another ...Respondents

FAO No. 399 of 2008
Date of decision: 19.6.2015

Motor Vehicle Act, 1988- Section 149- Accident had taken place on 12.7.2004- licence expired in the month of February, 2002 and it was renewed w.e.f. 24.11.2004-driver did not have a valid driving licence w.e.f. 1.2.2002 till 24.11.2004 – owner had committed willful breach of the terms and conditions of the policy by employing a driver having no valid driving licence- therefore, insured was rightly held liable to pay compensation (Para-5 to 9)

For the appellant : Mr. Sanjay Dutt Vasudeva, Advocate.
For the respondents: Mr. Ajay Sharma, Advocate, for respondent No. 1.
Mr. Jagdish Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 24th March, 2008, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in MAC Petition No. 59-N/2004, whereby compensation to the tune of Rs.1,50,000/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1 herein and the insured/owner- -cum-driver came to be saddled with liability (for short, the "impugned award"), on the grounds taken in the memo of appeal.

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

3. The insured/owner-cum-driver has questioned the impugned award on the ground that the Tribunal has fallen in an error in directing him to satisfy the awarded amount and discharging the insurer from liability on the grounds taken in the memo of appeal.

4. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly directed the insured/owner-cum-driver to satisfy the impugned award.

5. Learned Counsel for the appellant/insured- owner-cum-driver has argued that the accident had taken place on 12th July, 2004 and the appellant had submitted his driving licence in the month of February, 2002 before the Licensing Authority, Jawali, for its renewal, which was renewed on 24th November, 2004. The appellant/insured-owner-cum-

driver was under legal obligation to submit his driving licence for its renewal as per the provisions of the Motor Vehicles Act, 1988 and the rules framed thereunder, within 30 days of its expiry. But the Licencing Authority has not renewed the Driving License, thus the insurer has to satisfy the impugned award. The argument is misconceived for the following reasons.

6. Admittedly, the driving license was renewed w.e.f. 24th November, 2004 upto 24th November, 2007, which is also recorded in the photocopy of the driving licence Ext. RW-1/B. In the given circumstances, one comes to an inescapable conclusion that the driver was not having a valid and effective driving licence w.e.f. 1st April, 2002 upto 24th November, 2004. Thus, the driver was not having an effective and valid driving licence on the relevant date i.e. the date of the accident.

7. Learned Counsel for the appellant argued that the owner-cum-driver was in breach. The argument is forceful for the simple reason that the driver of the offending vehicle was not having valid and effective driving licence at the relevant point of time. Thus, the owner was in breach.

8. This Court has already dealt with this issue in a batch of two FAOs, the lead case of which was **FAO No. 308 of 2008**, titled as **Partap Chand and another versus Harinder Kumar and another**, decided on 5th June, 2015. It is apt to reproduce paras 6, 7 & 8 of the aforesaid judgment herein:

> *"6. Coming to the appeal filed by the owner/insured, admittedly, the driver of the offending vehicle though was having a driving licence at the time of accident, which occurred on 12th August, 2004, but that had lost its life on 13th June, 2004 and the same came to be renewed only w.e.f. 24th August, 2004.*
>
> *7. The Apex Court in **Ram Babu Tiwari vs. United India Insurance Co.Ltd. & Ors, 2008 AIR SCW 6512,** has held that the licence was not valid in case it was not renewed on the date of its expiry and renewed from a subsequent date. It is apt to reproduce paragraphs 13 and 19 of the said decision hereunder:*
>
> > *"13. The question as to whether the owner of a vehicle had taken care to inform himself as to whether the driver entrusted to drive the vehicle was having a licence or not is essentially a question*
> >
> > *of fact. However, in this case, it stands admitted that as on the date of accident, namely, on 27.1.1996, the driver did not hold any licence. Furthermore, it is beyond dispute that he had a licence only for one year and for about 3 years thereafter, he failed and neglected to renew his licence. His licence was renewed only on and from 7.2.1996.*
> >
> > ....
> >
> > *19. The principle laid down in Kusum Rai (supra) has been reiterated in Ishwar Chandra & Ors. v. Oriental Insurance Co. Ltd. & Ors. [(2007) 10 SCC 650], referring to sub-section (1) of Section 15 of the Act, this Court stated the law, thus :*
> >
> > > *"9. From a bare perusal of the said provision, it would appear that the licence is renewed in terms of the said Act and the rules framed thereunder. The proviso appended to Section 15 (1) of the Act in no uncertain terms states that whereas the original licence granted despite expiry remains*

valid for a period of 30 days from the date of expiry, if any application for renewal thereof is filed thereafter, the same would be renewed from the date of its renewal. The accident took place 28-4-1995. As on the said date, the renewal application had not been filed, the driver did not have a valid licence on the date when the vehicle met with the accident."

8. *Therefore, the driver of the offending vehicle cannot be said to be having a valid and effective driving licence at the relevant point of time and, therefore, the Tribunal has rightly held that the owner had committed breach. In the given circumstances, it can safely be held that the owner has committed the breach for the simple reason that the driver of the offending vehicle was not having any licence, what to speak of valid and effective driving licence, at the relevant point of time. Accordingly, the point raised by the owner-insured is turned down."*

9. Having said so, there is no merit in the appeal. Accordingly, the appeal is dismissed and the impugned award is upheld.

10. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees account cheque.

11. 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.

Smt. Tara Devi & others .....Appellants

Versus

HRTC and others .....Respondents.

FAO (MVA) No. 396 of 2008.
Date of decision: 19.06.2015.

Motor Vehicle Act, 1988- Section 166- Deceased was drawing salary of Rs.7,103/- p.m.- 1/4th of the amount was to be deducted towards personal expenses- thus, loss of dependency is Rs. 5,300/- p.m.- multiplier has to be applied considering the age of the deceased - applying multiplier of '13', claimants are entitled to Rs. 5300x12 =Rs.63,600 x 13 = 8,26,800/-. (Para-11 to 16)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120.
Munna Lal Jain and another versus Vipin Kumar Sharma and others JT 2015 (5) SC 1

For the appellants: Ms. Devyani Sharma, Advocate.
For the respondents: Mr. N.K. Thakur, Sr. Advocate with Mr. Ramesh Sharma, Advocate, for respondents No. 1 and 2.
Mr. Malay Kaushal, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

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

At the very outset, the learned counsel for the appellant stated at the Bar that respondent No. 3 Bhagat Ram has died. She prayed that name of respondent No. 3 may be ordered to be deleted from the array of the respondents since his legal representatives are already on record. Her statement is taken on record. The name of respondent No. 3 is ordered to be deleted from the array of the respondents on the oral request of the learned counsel for the appellant.

2. Subject matter of this appeal is the judgment and award dated 24.3.2008, passed by the Motor Accident Claims Tribunal, II Solan, H.P. in MAC Petition No. 1-S/2 of 2007, whereby compensation to the tune of Rs.6,44,000/- alongwith 9% interest per annum came to be awarded in favour of the claimants and against the respondents and the insurer was saddled with the liability, for short "the impugned award".

3. The claimants have disputed the adequacy of compensation, on the grounds taken in the memo of appeal.

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

5. The claimants filed claim petition before the Tribunal in terms of Section 166 of the Motor Vehicles Act, for short the Act, for the grant of compensation as per the break-ups given in the claim petition on account of death of deceased Ved Prakash in an accident which took place on 1.10.2006 at Chungari Mour on Kasauli-Parwanoo road, caused by respondent No. 2 Mohan Lal, who was driving HRTC Bus bearing Registration No. HP-12-A-4068 rashly and negligently.

6. Respondents have resisted the averments contained in the claim petition and following issues came to be framed.

(i) Whether the accident in which the death of Ved Prakash took place was the result of rash and negligent driving of the Bus No. HP-12-4068 by respondent No.2? ……OPP

(ii) If issue No. 1 proved in affirmative, whether the petitioners are entitled for the compensation, if so, to what extent? ……OPR

(iii) Whether the petition is not maintainable? …OPR

(iv) Whether the petition is bad for non-joinder of necessary party? …….. OPR

(v) Relief.

7. Claimants have examined as many as five witnesses, including Smt. Tara Devi widow of the deceased, who herself stepped into the witness box as PW4.

8. Respondents have not examined any witness.

9. The Tribunal, after scanning, thrashing and marshaling the evidence, held that the claimants are entitled to compensation to the tune of Rs.6,44,000/- with interest at the rate of 9% per annum from the date of filing the petition till its realization.

10. The insurer, owner and driver have not questioned the findings returned by the Tribunal on issues No. 1, 3 and 4, thus the findings returned on these issues are upheld.

11. Now coming to issue No. 2. Admittedly, the deceased was a government employee, has drawn his last salary as Rs.7103/- vide Ext. PW4/A. The claimants are widow, two daughters and one minor son and 1/4th was to be deducted from the income of the deceased, in view of 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***.

12. The Tribunal has fallen in an error in deducting 1/3rd. Thus, it is held that the claimants have lost source of dependency to the tune of Rs.5300/- per month.

13. The Tribunal has also fallen in an error in applying the multiplier of "11" in view of the Schedule appended to the Act, read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*
>
> > *"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."*
>
> *13. xxxxxxx xxxxxxxx xxxxxxxxxx*

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

14. In view of the Schedule appended to the Act read with the judgment supra, the multiplier of "13" was to be applied. Accordingly, the multiplier of "13" is applicable and is applied.

15. The claimants have also pleaded that the deceased was earning some income from the agricultural sources but has failed to prove the same. The Tribunal has rightly refused to grant the said prayer.

16. Viewed thus, the claimants are entitled to Rs.5300 x 12 = Rs.63,600 x 13 = 8,26,800/- with Rs.10,000/- as funeral expenses, Rs.20,000/- for loss of happiness of married life and Rs.20,000/- for love and affection. Accordingly, the amount awarded is enhanced to Rs.8,26,800/-+Rs.50,000= Rs.8,76,800/- with 9% interest, as awarded by the Tribunal.

17. The insurer is directed to deposit the entire amount in the Registry within eight weeks from today. On deposit, the same be released in favour of the claimants, through payees' cheque account, strictly, in terms of the conditions contained in the impugned award.

18. Resultantly, the impugned award is modified as indicated hereinabove and the appeal is disposed of accordingly.

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

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

Cr. Appeal No. 10/2010
with Cr. Appeal No. 326/2010
Reserved on: 17.6.2015
Decided on: 19.6.2015

1.	**Cr. Appeal No. 10/2010**	
	Tarsem Lal	..... Appellant
	Versus	
	State of Himachal Pradesh	.....Respondent
2.	**Cr. Appeal No. 326/2010**	
	State of Himachal Pradesh	..... Appellant
	Versus	
	Rajesh Kumar	.....Respondent

N.D.P.S. Act, 1985- Section 50- Accused was found in possession of 5.6 k.g of charas- consent memo did not mention that accused had a legal right to be searched before a Magistrate or a Gazetted Officer- consent memo further inquired from the accused whether the accused wanted to be searched before Magistrate or a Gazetted Officer or police officer- only two options namely to be searched before Magistrate or a Gazetted Officer can be given as per law - consent was collective and should have been given individually – option was given prior to the search of the vehicle and no option to be searched was given prior to the

search of the person- held, that requirements of Section 50 of the Act were not complied with. (Para- 25 to 27)

Cases referred:
State of Delhi v. Ram Avtar (2011) 12 SCC 207
State of Rajasthan v. Parmanand (2014) 5 SCC 345

For the appellant(s)	:	Mr. Chandranarayana Singh, legal aid counsel, in Cr. Appeal No. 10/2010 and Mr. M.A. Khan, Additional Advocate General, in Cr. Appeal No. 326/2010.
For the respondent(s)	:	Mr. M.A. Khan, Additional Advocate General in Cr. Appeal No. 10/2010 and Mr. Daleep Khachi, vice counsel, in Cr. Appeal No. 326/2010.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

Since both the appeals have arisen out of the same judgment, both the appeals were taken up together and are being disposed of this common judgment.

2. Cr. Appeal No. 10/2010 has been instituted against Judgment dated 31.12.2009 by the learned Special Judge, Fast Track Court, Chamba, District Chamba, in Sessions Trial No. 17/2009, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985, was convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ` 1.00 Lakh, in default of payment of fine, to further undergo rigorous imprisonment for six months. Cr. Appeal No. 326/2010 has been filed by the State against the same judgment, whereby respondent-accused Rajesh Kumar was acquitted.

3. Case of the prosecution, in a nutshell, is that police party headed by Yudhbir Singh set up a Naka at Toll Tax barrier near police post Banikhet. At about 3.00 am, a car bearing No. PB-02-AU-6363 came from Banikhet Bus stand side. Car was stopped by the police party. Accused Rajesh Kumar was driving the car. Tarsem Lal was lying on the backseat of the car. He had covered himself with a blanket. He was asked to remove the blanket. A bag of blue colour was found kept on his lap. He was asked to come out of vehicle. He was hesitant to come out of vehicle. Police became suspicious that the accused might be carrying some narcotic substance. ASI Yudhbir Singh informed the accused person of their legal right to be searched before a Magistrate or a Gazetted Officer. Accused consented to be searched by the Police. Memo was prepared to this effect. The bag was checked and it contained Charas which weighed 5.6 kg. Two samples of 25 gms each were separated which were put in an empty cigarette packets and sealed with seal impression 'K'. Balance Charas was also put in different parcel and sealed with seal impression of 'K'. Vehicle was also taken into possession. Rukka was sent to the police station, on the basis of which FIR No. 23/2009 was recorded. Case property was produced before the SHO Hakam Singh. He resealed the same with seal 'H' and deposited with MHC. Special Report was also sent to the Superintendent of Police, Chamba. Challan was put up in the Court after completing all codal formalities.

4. Prosecution examined as many as sixteen witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They denied the

allegations. Accused-Tarsem Lal was convicted and sentenced by the learned trial Court as noticed above. Hence, Cr. Appeal No. 10/2010. Accused-Rajesh Kumar was acquitted by the learned trial Court. Hence, Cr. Appeal No. 326/2010 by the State.

5. Mr. Chandranarayana Singh, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. M.A. Khan, Additional Advocate General appearing on behalf of the State, has vehemently argued that the prosecution has proved its case against the accused.

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

8. PW-1 Suneel Kumar testified that he was serving at the Army Cantonment Barrier. He was on duty alongwith Tilak Raj at the Barrier. Police laid Naka a little ahead of the Cantonment Barrier towards Banikhet. A car bearing registration number of Punjab came from Chamba side. It was stopped. There were three persons in the car. There was a bag in the car. Third person managed to run away from the car. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that there were only two persons occupying the car, one was driver and another occupant was on the backseat. He did not see person lying in backseat covered with blanket. He did not know that recovered bag was on the lap of the Tarsem. However bag was recovered from the backseat. He admitted that police gave option to both the accused to be searched by a Magistrate or a Gazetted Officer as it was their right. Accused consented to be searched by the police party. He admitted his signatures on Ext. PW-1/A. He also admited that Tilak Raj and Roop Lal put their signatures on Ext. PW-1/A and Ext. PW-1/B as witnesses. He also admitted that recovered bag was searched in the presence of witnesses and accused. It contained Charas in the shape of sticks. It was weighed. Charas weighed 5.6 kg. He denied that two samples of 25 gms each were separated from the Charas and put in cigarette packets and parceled and sealed in his presence. He also denied that seals were fixed on the parcels in his presence. He also denied that sample seal was taken in his presence. Volunteered that his signatures were taken later on, on sample mark A-1 by the police. He admitted his signatures on site plan mark A-2. He also admitted his signatures on Ext. PW-1/B as well as on Ext. P1, P2, P3 and P4. He denied the suggestion that parcel was sealed in his presence. He denied that seal after use was given to him. He admitted that he had appended his signatures on Ext. PW-1/A, PW-1/B, PW-1/C and PW-1/D after going through their contents. He was also cross-examined by the learned advocate appearing on behalf of the accused. In his cross-examination by the learned counsel for the accused, he admitted that police chowki was situated at a distance of 10 yards from the Barrier. He admitted that accused were taken to Police Chowki. He also admitted that Boru was taken to Police Chowki. He remained on duty at Barrier. He was called about 10 minutes after taking accused to the police chowki and his signatures were obtained. When he was called to police post, by that time, parcels had already been prepared and other papers had also been filled in by that time. His signatures were obtained thereafter. He came back to the Barrier. He denied the suggestion that police told him that they had recovered Bhang and he should put his signatures. Volunteered that police first recovered Bhang and took him to police Chowki and asked him to put his signatures. Police did not give any option to the accused in his presence whether they wanted to be searched by a Magistrate or a Gazetted Officer or by the police party.

9. PW-2 Roop Singh deposed that on 1.2.2009 he was associated with the police party headed by ASI Yudhbir Singh. He was present at Cantonment Barrier Banikhet and Tilak Raj and Suneel Kumar were also present on duty at Cantonment Barrier. Police

checked the vehicle. Two persons were occupying the vehicle. Persons occupying the car were directed to come out of the vehicle. ASI Yudhbir Singh gave option to the accused by uttering the words, "*that he was suspecting that you were possessing contraband and your vehicle was required to be searched and whether you wanted to give your search before the Magistrate, or to the gazetted officer of police or to the police party present on the spot."* Accused consented to be searched by the police party. Consent memo Ext. PW-1/A was prepared. Thereafter, Yudhbir Singh gave his personal search. Bag was found to be in lap of the accused Tarsem, which was searched in the presence of witnesses which contained Boru of white colour which was tied with string. Boru was searched and found to contain Charas in the shape of sticks. It weighed 5.6 kg. Out of recovered Charas, two samples of 25 grams each were drawn and put in cigarette packets and sealed with seal 'K'. Balance Charas alongwith Boru and bag was parceled and sealed with same seal 'K'. NCB form was filled in. Seal, after use, was handed over to Suneel Kumar. Seizure memo was prepared. Case property was produced while recording statement of PW-2. He also admitted in his cross-examination that police Chowki was about 10 meters from the cantonment barrier. He admitted that Rukka was sent before commencing the proceedings. He also admitted that the road remains busy throughout day and night. He also admitted that there was no provision of light in the rain shelter. Volunteered that there was provision of light outside rain shelter. He was not in a position to narrate the exact time which was spent by the Tilak Raj and Suneel Kumar alongwith the police party when the proceedings were carried out. He could not tell even by guess work whether they remained present for 10, 20 or 30 minutes alongwith the police party. He did not even by guess work at what time rukka was sent to the police station.

10. PW-3 Sanjay Kumar also deposed the manner in which accused were nabbed. Search, seizure and sealing process was completed at the spot. Rukka was given to him after preparing seizure memo and after filling NCB form.

11. PW-4 Om Parkash is a formal witness.

12. PW-5 Shekhar deposed that on 2.2.2009, MHC Ashok Kumar handed over to him one sample parcel duly sealed with seals alongwith sample seals, NCB form vide RC No. 14/2009 for being taken to FSL Junga. He delivered the parcel on 3.2.2009 and obtained receipt on the RC and returned the RC to MHC on his return.

13. PW-6 Ashok Kumar deposed that he was posted as IO in Police Station Dalhausie since 2006. He was officiating as MHC on 2.2.2009. He handed over one parcel alongwith NCB forms, docket, copy of FIR and seizure memo to Shekhar Kumar for being taken to FSL Junga for examination vide RC No. 14/2009.

14. PW-7 Bhajan Singh deposed that on 1.2.2009, Hakam Singh deposited with him three parcels sealed with three seals of 'K' and three seals of 'H' each alongwith NCB form, sample seals for being kept in Malkhana. Entries were made in the Malkhana Register. He kept the case property in the Malkhana vide entry at Sr. No. 76/09. He proved copy of Malkhana register Ext.PW-7/A. He admitted in his cross-examination that there was no reference of deposit of NCB form in the Malkhana Register. Volunteered that he did not record in the Malkhana Register as it was not a case property.

15. PW-8 Pritam Chand and PW-9 Sanjeev Bhatiya are formal witnesses.

16. PW-10 Manmohan Singh deposed that he handed over his car at about 3-4 pm on 31.1.2009.

17. PW-11 Hakam Singh deposed that he recorded FIR Ext. PW-11/A after receiving Rukka. ASI Yudhbir Singh handed over to him two sample parcels containing 25 grams Charas each and one big parcel containing 5.6 kgs Charas. Again stated that 5.50 kgs. They were sealed with seal 'K' and NCB form for resealing purpose. He resealed all the parcels with seal 'H' and handed over case property to MHC Dalhausie to be kept in Malkhana.

18. PW-12 Mazid Mohammad also deposed the manner in which accused was nabbed and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that option to be searched by a Magistrate or a Gazetted Officer was given prior to conducting search of vehicle.

19. PW-13 Anuj Kumar also deposed the manner in which accused was nabbed and codal formalities of seizure and sampling were completed at the spot. In his cross-examination, he has admitted that in his presence, IO has given option to the accused to be searched by a Magistrate or a Gazetted Officer or police persons at the spot.

20. PW-14 Raj Kumar is a formal witness.

21. PW-15 Rajesh Kumar deposed that ASI Yudhbir Singh handed over to Hakam Singh a big parcel said to have contained 5.6 kg Charas, sealed with three seals of 'K', two sample parcels said to have contained 25 grams Charas each sealed with three seals of 'K' and NCB form for resealing purpose. Hakam Singh resealed all the parcels with three seals of 'H' and prepared resealing memo Ext. PW-11/B to that effect.

22. PW-16 Yudhbir Singh has also deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. Accused were given option when the police was suspicious that they possessed narcotic substance, that whether they wanted to be searched by a Magistrate or a Gazetted Officer or by the police party on the spot. Accused consented to be searched by the police party. He handed over case property to Hakam Singh after completing all the codal formalities. In his cross-examination, he has admitted that in the site plan, Ext. PW-16/B, rain shelter has not been shown. He also admitted that Suneel and Tilak Raj did not remained present with him throughout the proceedings. Again stated that they remained present with him during the course of proceedings. Option was given to the accused persons only once that too at the time of search of vehicle and no fresh option was given to the accused at the time of conducting personal search.

23. We have gone through the consent memo Ext. PW-1/A. It does not state that accused had a legal right to be searched before a Magistrate or a Gazetted Officer. There is another illegality in Ext. PW-1/A. Accused have been asked to give their option in writing whether they wanted to be searched before a Magistrate or a Gazetted Officer or police officer. Requirement of law is that the option is to be given by the accused whether he wants to be searched before a Magistrate or a Gazetted Officer. There are only two options. PW-2 HC Roop Singh has also deposed that the accused were told by the IO whether they wanted to give search before a Magistrate or a Gazetted Officer or to the police party present at the spot. PW-13 Anuj Kumar has stated that IO gave option to the accused to be searched by a Magistrate or a Gazetted Officer or police persons at the spot. PW-16 Yudhbir Singh IO has also deposed that accused were asked to give their personal search before a Magistrate or a Gazetted Officer or the police present at the spot. Moreover, accused have been collectively asked to give their option to be searched by a Magistrate or a Gazetted Officer. Consent is required to be obtained individually.

24. PW-12 Mazid Mohammad has also stated that option to be searched by a Magistrate or a Gazetted Officer was given prior to search of vehicle and option was given only once that too before conducting search of the vehicle. Similarly, PW-16 IO Yudhbir Singh has also admitted that no fresh option was given to the accused at the time of conducting their personal search. Case of the prosecution is that there were only two occupants in the car, however, PW-1 Suneel Kumar has categorically stated in his examination-in-chief that there were three occupants and third one ran away from the spot. Proceedings, as per prosecution case, were carried out in the rain shelter. Site plan is Ext. PW-16/A PW-16 Yudhbir Singh has admitted in his cross-examination that rain shelter has not been shown in the site plan. There was no light also as per statement of PW-2 Roop Singh. PW-2 did not remember how long Tilak Raj and Suneel Kumar remained on the spot. He could not tell even by rough estimate whether they remained at the spot for 10, 20 or 30 minutes. Similarly, PW-16 Yudhbir Singh initially stated in his cross-examination that Suneel and Tilak Raj did not remain present with him throughout the proceedings. Later on stated that they were present with him during the course of entire proceedings. Police party spent 6-7 hours for carrying out the proceedings. Surprisingly, PW-2 also says that Rukka was sent before commencement of the proceedings. Rukka was to be sent after completing all the formalities at the spot, on the basis of which FIR was registered.

25. Case property has been produced while recording statement of PW-2. Who has produced the case property in the Court is not stated. We have gone through the extract of Malkhana Register Ext. PW-7/A. There is no entry when FSL report was received back. There is no entry when the case property was dispatched from the Malkhana, in the Malkhana Register, for the purpose of production of the same before the Court. There is no entry when the case property was returned in the Malkhana. There is no DDR at the time of producing the case property before the Court and its re-deposit in the Malkhana. Thus, it casts doubt whether the case property is the same which was seized from the accused, sent to FSL for examination and produced before the Court or it was case property of some other case. There is no reference whether NCB form was deposited alongwith case property in the Malkhana. In the cases under NDPS Act, question how and where samples were stored and when they have been dispatched or received in Malkhana, is a matter of great importance.

26. Their Lordships of the Hon'ble Supreme Court in **State of Delhi v. Ram Avtar** reported in (2011) 12 SCC 207 have held that merely asking accused whether he wished to be searched by a Magistrate or a Gazetted Officer without informing that he enjoys a right in this behalf, is no compliance of Section 50 of the Narcotic Drugs & Psychotropic Substances Act. Their Lordships have held as under:

> " 9. One of the earliest and significant judgments of this Court, on the issue before us is the case of State of Punjab v. Balbir Singh, [(1994) 3 SCC 299] where the Court considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words "if the person to be searched so desires", the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it

obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that non-compliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.

10. This view was followed by another Bench of this Court in the case of Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, [(1994) 6 SCC 569], wherein the Court stated that the searching officer was obliged to inform the person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other purposes, but cannot be made a ground for a valid conviction under this Act.

11. In the case of Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, [(1995) 3 SCC 510], the Court followed the principles stated in Balbir Singh's case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

12. Then the matter was examined by a Constitution Bench of this Court, in the case of State of Punjab v. Baldev Singh [(1999) 6 SCC 172], where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment . The relevant portions of this conclusion are as under:

> "57. On the basis of the reasoning and discussion above, the following conclusions arise:
>
> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section (1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> XXX XXX XXX (4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the official concerned so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of the judicial process may come under a cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for the law and may have the effect of unconscionably compromising the administration of

> justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards provided by Section 50 at the trial, would render the trial unfair.
>
> XXX XXX XXX (6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but hold that failure to inform the person concerned of his right as emanating from sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law."

13. Still in the case of Ahmed v. State of Gujarat, [(2000) 7 SCC 477), a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

14. In the case of K. Mohanan v. State of Kerala, [(2010) 10 SCC 222] another Bench of this Court while following Baldev Singh's case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

15. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to Joseph Fernandez v. State of Goa, [(2000) 1 SCC 707], Prabha Shankar Dubey v. State of Madhya Pradesh, [(2004) 2 SCC 56], Krishna Kanwar v. State of Rajasthan, [(2004) 2 SCC 608, Manohar Lal v. State of Rajasthan, [(1996) 11 SCC 391], Karnail Singh v. State of Haryana, [(2009) 8 SCC 539].

16. In the case of Prabha Shankar Dubey (supra), this Court while referring to Baldev Singh's case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows:

> `By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You

would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?'

Keeping the afore-referred language in mind, the Court applied the principle of substantial compliance, and held that the plea of non- compliance with the requirements of Section 50 of the Act was without merit on the facts of that case.

17. The Court held as under:

"12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

13. Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act."

18. Similarly, in Manohar Lal's case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

19. In the case of Union of India v. Satrohan, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in Ahmed's case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609] (hereinafter referred to as `Vijaysinh Chandubha Jadeja'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

20. In the case of Vijaysinh Chandubha Jadeja v. State of Gujarat, [(2007) 1 SCC 433], a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting. Accordingly, a Constitution Bench was constituted and in the case of Vijaysinh Chandubha Jadeja (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory.

21. It will be useful to refer the relevant parts of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra). In para 23, the Court said

> `In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case'.

After further referring to the conclusions arrived at by the Constitution Bench in Baldev Singh's case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) this case concluded as under:

> "31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

22. An analysis of the above judgments clearly show that the scope of the provisions of Section 50 of the Act are no more res integra and stand concluded by the above judgments particularly the Constitution Bench judgments of this Court in the cases of Baldev Singh (supra) and Vijaysinh Chandubha Jadeja (supra).

23. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

24. In fact, the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

25. Having stated the principles of law applicable to such cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped.

He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under :

> "Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai."

26. The High Court while relying upon the judgment of this Court in the case of Baldev Singh (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of Joseph Fernandez (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression `duly' used in Section 50 of the Act connotes not `substantial' but `exact and definite compliance'. Vide Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

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

27. 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."

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28. Prosecution has failed to prove that contraband was recovered from the conscious and exclusive possession of the accused-respondent. He was merely a driver. Accordingly the present appeal fails and is accordingly dismissed. Bail bonds of the accused-respondent namely Rajesh Kumar are discharged.

Cr. Appeal No. 10/2010

29. Cr. Appeal No. 10/2010 is allowed. Judgment of conviction dated 31.12.2009 by the learned Special Judge, Fast Track Court, Chamba, District Chamba, in Sessions Trial No. 17/2009, whereby appellant-accused Tarsem Lal has been convicted and sentenced, is set aside. Accused-Tarsem Lal is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. He be released forthwith, if not required by the police in any other case. Fine amount, if any deposited by the accused, be also refunded to him. Registry is directed to prepare the release warrant of the accused-Tarsem Lal and send the same immediately to the concerned Superintendent of Jail. Pending applications, in both the appeals, if any, are disposed of.

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

United India Insurance Company ...Appellant.
Versus
Sh. Lalli alias Laloo and another ...Respondents.

FAO No. 255 of 2008
Decided on: 19.06.2015

Motor Vehicle Act, 1988- Section 149- Owner specifically stated that he had engaged the driver after examining his driving licence and after knowing that he was driver of tractor in the same village- held, that owner had performed his duty which he was supposed to do- insurance policy covered 1+1 which means that risk of driver and passenger was covered- only the claimant had filed the claim, therefore, insurance company is liable to satisfy the award and it was rightly saddled with liability.(Para-9 to 15 and 22)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court 1531
Lal Chand versus Oriental Insurance Co. Ltd., 2006 AIR SCW 4832
Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217,
United India Insurance Company Limited versus K.M. Poonam & others, 2011 ACJ 917
National Insurance Company Limited versus Anjana Shyam & others, 2007 AIR SCW 5237

For the appellant: Mr. P.S. Chandel, Advocate.
For the respondents: Nemo for respondent No. 1.
Mr. Lalit Sehgal, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

A vehicular accident, which was caused by the driver, namely Shri Bir Singh, while driving tractor, bearing registration No. HP-16-0243, rashly and negligently on 30.08.2001 at about 10.45 P.M. near Village Ratoli on Rajgarh-Solan Road, has given birth to the appeal in hand calling in question the award, dated 01.03.2008, made by the Motor Accident Claims Tribunal-II, Sirmaur District at Nahan (for short "the Tribunal") in MAC

Petition No. 40-N/2 of 2005, titled as Shri Lalli alias Laloo versus Nagender Chauhan and another (for short "the impugned award").

2. The claimant, namely Shri Lalli alias Laloo, being the victim of the vehicular accident, filed a claim petition before the Tribunal seeking compensation to the tune of Rs.7,90,000/-, as per the break-ups given in the claim petition.

3. The respondents in the claim petition, i.e. the owner-insured and the insurer appeared and resisted the claim petition on the grounds taken in the respective memo of objections.

4. Following issues came to be framed by the Tribunal on 13.10.2006:

> *"1) Whether the petitioner had sustained injuries on 30.8.2001 at about 10.45 P.M. at place near village Ratoli on Rajgarh Solan road due to the rash and negligent driving of tractor No. HP-16-0243 being driven by Shri Bir Singh (since deceased) as alleged? ..OPP*
>
> *2) If issue No. 1 is proved, to what amount of compensation the petitioner is entitled to and from whom? ..OPP*
>
> *3) Whether the driver of the offending tractor was not possessed of a valid and effective driving licence at the time of accident? ..OPR-2*
>
> *4) Whether the offending tractor was being driven in contravention of terms and conditions of the Insurance Policy at the relevant time? ..OPR-2*
>
> *5) Whether this petition is collusive with respondent No. 1?..OPR-2*
>
> *6) Relief."*

5. Parties led evidence.

6. The Tribunal, after scanning the oral as well as documentary evidence decided the claim petition in favour of the claimant-injured and directed the insurer to satisfy the award.

7. The insurer has questioned the impugned award only on two grounds:

> (i) That the driver of the offending vehicle was not having a valid and effective driving licence; and
>
> (ii) That three persons were travelling in the offending vehicle at the time of the accident, thus, their risk was not covered in terms of the insurance contract.

8. Both the arguments, though attractive, are devoid of any force for the following reasons:

9. Parties have led evidence and the owner-insured, while appearing in the witness box as RW-1, has specifically stated that he had engaged the driver-Bir Singh after examining his driving licence and after knowing the fact that he was also driving the tractor of one Bhagat Ram in the same village.

10. Thus, it can be safely said that the owner-insured has performed his duties, which he was supposed to do in view of the mandate of the insurance contract read with the mandate of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "the MV Act").

11. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** the laid down principles, how the insurer can avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment herein:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.*
>
> *(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.*
>
> *(v).....*
>
> *(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of the Act."*

12. The Apex Court in a case titled as **Lal Chand versus Oriental Insurance Co. Ltd.,** reported in **2006 AIR SCW 4832,** where the owner-insured had performed his job whatever he was required to do and satisfied himself that the driver was having valid driving licence, held the insurer liable. It is apt to reproduce paras 8, 9 and 11 of the judgment herein:

> *"8. We have perused the pleadings and the orders passed by the Tribunal and also of the High Court and the annexures filed along with the appeal. This Court in the case of United India Insurance Co. Ltd. v. Lehru & ors.,*

reported in 2003 (3) SCC 338, in paragraph 20 has observed that where the owner has satisfied himself that the driver has a licence and is driving competently there would be no breach of Section 149(2)(a)(ii). He will, therefore, have to check whether the driver has a driving licence and if the driver produces a driving licence, which on the face of it looks genuine, the owner is not expected to find out whether the licence has in fact been issued by a competent authority or not. The owner would then take test of the driver, and if he finds that the driver is competent to drive the vehicle, he will hire the driver.

9. In the instant case, the owner has not only seen and examined the driving licence produced by the driver but also took the test of the driving of the driver and found that the driver was competent to drive the vehicle and thereafter appointed him as driver of the vehicle in question. Thus, the owner has satisfied himself that the driver has a licence and is driving competently, there would be no breach of Section 149(2)(a)(ii) and the Insurance Company would not then be absolved of its liability.

10. .....

11. As observed in the above paragraph, the insurer, namely the Insurance Company, has to prove that the insured, namely the owner of the vehicle, was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by a duly licensed driver or one who was not disqualified to drive at the relevant point of time."

13. It would also be profitable to reproduce para 10 of the judgment rendered by the Apex Court in **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** herein:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver.

> *However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran Singh case. If despite such information with the owner that the licence possessed by his driver is fake, no action is taken by the insured for appropriate verification, then the insured will be at fault and, in such circumstances, the Insurance Company is not liable for the compensation."*

14. Having said so, I am of the considered view that the Tribunal has rightly made discussion in paras 31 and 32 of the impugned award.

15. Viewed thus, the owner-insured has not committed any willful breach and the Tribunal has rightly saddled the appellant-insurer with liability to satisfy the award.

16. The next question to be determined is - whether the risk of the claimant-injured was covered in terms of the terms and conditions contained in the insurance contract? The answer is in the affirmative for the following reasons:

17. The factum of insurance is admitted. The risk of '1+1' is covered in terms of the insurance agreement, Ext. R-1. Meaning thereby, the policy covers the risk of the driver and one passenger. Thus, the insurer is to be saddled with liability of one passenger.

18. Only one person, i.e. the claimant-injured has filed claim petition before the Tribunal. Thus, his risk is covered. Had there been any other claim than the risk covered, it was for the owner-insured to satisfy the liability.

19. My this view is fortified by the judgment of the Apex Court in the case titled as **United India Insurance Company Limited versus K.M. Poonam & others,** reported in **2011 ACJ 917.** It is apt to reproduce para 24 of the judgment herein:

> *"24. The liability of the insurer, therefore, is confined to the number of persons covered by the insurance policy and not beyond the same. In other words, as in the present case, since the insurance policy of the owner of the vehicle covered six occupants of the vehicle in question, including the driver, the liability of the insurer would be confined to six persons only, notwithstanding the larger number of persons carried in the vehicle. Such excess number of persons would have to be treated as third parties, but since no premium had been paid in the policy for them, the insurer would not be liable to make payment of the compensation amount as far as they are concerned. However, the liability of the Insurance Company to make payment even in respect of persons not covered by the insurance policy continues under the*

provisions of sub-section (1) of Section 149 of the Act, as it would be entitled to recover the same if it could prove that one of the conditions of the policy had been breached by the owner of the vehicle. In the instant case, any of the persons travelling in the vehicle in excess of the permitted number of six passengers, though entitled to be compensated by the owner of the vehicle, would still be entitled to receive the compensation amount from the insurer, who could then recover it from the insured owner of the vehicle."

20. It is also apt to reproduce para 15 of the judgment of the Apex Court in the case titled as **National Insurance Company Limited versus Anjana Shyam & others,** reported in **2007 AIR SCW 5237,** herein:

"15. In spite of the relevant provisions of the statute, insurance still remains a contract between the owner and the insurer and the parties are governed by the terms of their contract. The statute has made insurance obligatory in public interest and by way of social security and it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner, and meet the claims of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amounts outside the contract of insurance itself or in respect of persons not covered by the contract at all. In other words, the insured is covered only to the extent of the passengers permitted to be insured or directed to be insured by the statute and actually covered by the contract. The High Court has considered only the aspect whether by overloading the vehicle, the owner had put the vehicle to a use not allowed by the permit under which the vehicle is used. This aspect is different from the aspect of determining the extent of the liability of the insurance company in respect of the passengers of a stage carriage insured in terms of Section 147(1)(b)(ii) of the Act. We are of the view that the insurance company can be made liable only in respect of the number of passengers for whom insurance can be taken under the Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in the accident in a case of overloading."

21. The Tribunal has granted meager amount of compensation. But, the claimant-injured has not questioned the same, the same is reluctantly upheld.

22. Having said so, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the appeal is dismissed and the impugned award is upheld.

23. Registry is directed to release the awarded amount in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award after proper identification.

24. Send down the record after placing copy of the judgment on the Tribunal's file.

****

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

FAOs (MVA) No. 301 and 637 of 2008.
Judgment reserved on 5.6.2015.
Date of decision: 19th June,2015.

1.	***FAO No.301 of 2008.***	
	Smt. Vidya Devi	.....Appellant
	Versus	
	Shri Naresh Kumar and another	...Respondents.
2.	***FAO No.637 of 2008.***	
	Naresh Kumar	.....Appellant
	Versus	
	Smt. Vidya Devi and another	...Respondents.

Motor Vehicle Act, 1988- Section 166- Tribunal had assessed the income of the deceased as Rs.3,000/- per month and loss of dependency as Rs.1,000/-- deceased was agriculturist and horticulturist by profession and it can be safely held that he would have earning Rs.6,000/- p.m.- loss of dependency has to be taken as 50%- deceased was 21 years old at the time of accident - applying multiplier of '14', claimant will be entitled to Rs. 3000x12x14=Rs.5,04,000/-+ Rs. 1000/-costs=Rs. 5,05,000/-. (Para-16 to 18)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120
Munna Lal Jain and another versus Vipin Kumar Sharma and others JT 2015 (5) SC 1

For the appellant(s): Mr.J.L. Bhardwaj, and Mr. Vikram Thakur, Advocate, vice Mr. M.A. Khan, Advocate, for the appellants in both the appeals.

For the respondent(s): Mr. Vikram Thakur, Advocate, vice Mr. M.A. Khan, Advocate, for respondent No. 1 in FAO No. 301 of 2008 and Mr. J.L. Bhardwaj, Advocate, for respondent No. 1 in FAO No. 637 of 2008.
Mr. Lalit K. Sharma, Advocate, for respondent No. 2 in FAO No. 301 of 2008 and Mr. G.C. Gupta, Sr. Advocate, with Ms. Meera Devi, Advocate, for respondent No. 2 in FAO No. 637 of 2008.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

These two appeals are outcome of a common judgment and award dated 1.3.2008, passed by the Motor Accident Claims Tribunal, Fast Track Court Shimla, H.P. in MAC No.62-S/2 of 2005/2001, whereby compensation to the tune of Rs.2,03,000/-

alongwith 9% interest and cost to the tune of Rs.1000/- came to be awarded in favour of the claimant and the insured was saddled with the liability.

2. Both these appeals are being taken up together for disposal in the given circumstances.

3. The claimant has filed FAO No. 301 of 2008 for enhancement of compensation and the insured has filed FAO No.637 of 2008, for exonerating him from the liability and saddling the insurer with the liability.

4. Claimant Smt. Vidya Devi, being the victim of a vehicular accident filed claim petition before the Tribunal for the grant of compensation on the grounds taken in the memo of claim petition. It is averred in the claim petition that his son, namely, Sh. Vidya Sagar 21 years of age was agriculturist and horticulturist by profession, hired truck No. HP-51-2587 from Kumarsain to Rampur for bringing the karyana articles for his shop, which he was running in his village Khaneti. The said truck is stated to be owned by Shri Naresh Kumar respondent No. 1 and Shri Gopal Singh was driving the said vehicle. The said vehicle met with an accident due to carelessness and negligence of driver Gopal Singh and FIR No. 24/2001 dated 21.3.2001 came to be registered in police station Kumarsain. It is further stated that the whole family is facing starvation as well as remains under deep grief and shock and the claimant has been deprived of the source of income hope/help in the old age and love and affection of her son.

5. Respondents have resisted the averments contained in the claim petition and following issues came to be framed.

(i) Whether the driver of the truck bearing No. HP-51-2587 was driving the said truck on 21.3.2001 at about 1 AM near Sainj, Tehsil Kumarsain, Distt. Shimla in rash and negligent manner resulting in death of Vidya Sagar, as alleged? OPP.

(ii) If issue No. 1 is proved, whether the petitioner is entitled for compensation, if so from whom? OPP

(iii) Whether the truck in question was being driven without Route permit, registration certificate etc. at the time of accident, as alleged? OPR-2.

(iv) Whether the driver of the said truck was not having valid and effective driving licence at the time of accident, as alleged? OPR-2.

(v). Relief.

6. Claimant examined as many as six witnesses and stepped herself into the witness box as PW1.

7. The respondents have not examined any witness except ASI Sham Lal as (RW-1).

8. The findings returned by the Tribunal on issue No. 1 are not in dispute. The question of quantum as well as who is to be saddled with the liability, is in dispute, in both these appeals.

9. The claimant, by the medium of FAO No. 301 of 2008, has prayed that the amount awarded is too meager thus, has disputed the adequacy of compensation.

10. Owner Naresh Kumar has questioned the impugned award by the medium of FAO No. 637 of 2008 on the ground that the vehicle was insured and the driver was having a valid and effective driving license, thus the insurer was to be saddled with the liability.

11. I have gone through the record and the evidence on the file. The Tribunal has rightly decided issue No. 1 in favour of the claimant and is also not in dispute. Thus, the findings so returned on the said issue are upheld.

12. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 & 4.

13. It is worthwhile to mention herein that the respondents have not pressed both these issues before the Tribunal, thus came to be decided against the respondents. Respondent No. 2, i.e., the insurer had to discharge the onus, failed to do so. Insured has not questioned the findings.

14. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving license, in order to seek exoneration, has not led any evidence and has failed to discharge the onus. Thus, it can be safely held that the driver was having a valid and effective driving license.

15. It was for the insurer to plead and prove that the owner has committed any willful breach and the vehicle was being driven in violation of the route permit and the Registration certificate, has not discharged the said onus. Accordingly, both these issues are decided in favour of the claimant and against the owner, driver and insurer.

16. Now adverting to issue No. 2. The Tribunal has fallen in an error in taking the income of the deceased as Rs.3,000/- per month and loss of source of dependency to the tune of Rs.1,000/-. Admittedly, the deceased was 21 years of age at the time of the accident. It is pleaded that he was agriculturist and horticulturist by profession and was earning not less than Rs.12,000/- per month. By a guess work, it can be safely held that he would have been earning Rs.6,000/- per month. He was an unmarried youth and would have contracted marriage. After all, the mother has lost a budding son, helping hand in her old age and source of income, therefore, has lost source of dependency to the tune of 50% of Rs.6000/-, i.e., Rs.3000/- per month, in view of 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***.

17. Thus, the claimant has lost source of dependency to the tune of Rs.3000/- per month. The age of the deceased was 21 years at the time of accident, the just and appropriate multiplier to be applied is "14" in view of ***Sarla Verma,*** supra read with ***Munna Lal Jain and another versus Vipin Kumar Sharma and others*** reported in ***JT 2015 (5) SC 1***. It is apt to reproduce paras 12 and 14 of the said judgment herein:

> *"12. The remaining question is only on multiplier. The High Court following Santosh Devi (supra), has taken 13 as the multiplier. Whether the multiplier should depend on the age of the dependants or that of the deceased, has been hanging fire for sometime; but that has been given a quietus by another three-Judge Bench decision in Reshma Kumari (supra). It was held that the multiplier is to be used with reference to the age of the deceased. One reason appears to be that there is certainty with regard to the age of the deceased but as far as that of dependants is concerned, there will always be room for dispute as to whether the age of the eldest or youngest or even the average, etc., is to be taken. To quote:*

"36. In Sarla Verma, this Court has endeavoured to simplify the otherwise complex exercise of assessment of loss of dependency and determination of compensation in a claim made under Section 166. It has been rightly stated in Sarla Verma that the claimants in case of death claim for the purposes of compensation must establish (a) age of the deceased; (b) income of the deceased; and (c) the number of dependants. To arrive at the loss of dependency, the Tribunal must consider (i) additions/deductions to be made for arriving at the income; (ii) the deductions to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference to the age of the deceased. We do not think it is necessary for us to revisit the law on the point as we are in full agreement with the view in Sarla Verma."

13. xxxxxxx xxxxxxxx xxxxxxxxxx

14. The multiplier, in the case of the age of the deceased between 26 to 30 years is 17. There is no dispute or grievance on fixation of monthly income as Rs.12,000.00 by the High Court."

18. Viewed thus, the claimant is entitled to Rs.3000x12x14=Rs.5,04,000/-+Rs.1000/-costs = Rs.5,05,000/-. Accordingly, the amount awarded is enhanced to Rs.5,05,000/- with 9% interest, as awarded by the Tribunal.

19. The question is who is to be saddled with the liability? The Tribunal has fallen in an error in saddling the insured with the liability for the reasons that the vehicle was duly insured. It was for the insurer to satisfy the award. Accordingly, the insurer is saddled with the liability. The insurer is directed to deposit the entire amount within six weeks from today. On deposit, Registry is directed to release the amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' cheque account.

20. The statutory amount deposited by the insured be released to the claimant as costs.

21. The impugned award is modified as indicated hereinabove and the appeals are disposed of accordingly.

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

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

Abhay Shankar Shukla .....Petitioner.

Versus

SJVN Ltd. & ors. .....Respondents.

CWP No. 2522 of 2015.
Reserved on: 18.6.2015
Decided on: 20.6.2015.

Constitution of India, 1950- Article 226- Petitioner was transferred from Corporate Office Shimla to STPL, Patna- the persons who were working for more period than the petitioner

were not transferred- wife of the petitioner had undergone renal (kidney) transplant in the year 2000- daughter of the petitioner is studying in 10+2 at Shimla- petitioner has worked only for three years at Shimla and has been transferred while the people working for more than 9-10 years have not been transferred- therefore, petition allowed and the transfer order of the petitioner quashed, liberty granted to the respondent to transfer the person on the basis of length of services at a particular place. (Para-4 to 6)

For the petitioner: Mr. Sunil Mohan Goel, Advocate.
For the respondents: Mr. Rajiv Jiwan, Advocate, for respondent No. 1.
Ms. Kiran Thakur, Advocate, for respondents No. 2,3 & 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The petitioner was appointed as Accounts Officer in the respondent-Corporation. He joined at Corporate Office, Shimla as Dy. General Manager (Finance) in the month of April, 2012. He was transferred from Corporate Office Shimla to STPL, Patna, Bihar vide Office order dated 22.4.2015. The respondent Corporation has framed the transfer policy. The following are the objectives of the transfer policy:

"**OBJECTIVES:**

1.1 Transfer Policy has been formulated with the following objectives:

a). To provide stability of tenure to an employee at the place of posting for a specified period.

b). To bring about transparency and clarity to the employees with respect to their transfers from one project to another or from project to Corporate Office.

c). To encourage specialization in a particular field while also making available wider exposure for the growth of all individuals.

d). To meet the organizational requirements while accommodating the aspirations of the individual."

2. The mode of transfer is laid down at para 4.0 and tenure at 5.0, which read as follows:

"**4.0 MODE OF TRANSFER:**

4.1 Transfer will be effected in the following heads:

a) From Corporate Office to Project/plants and Vice-Versa.

b) Within the same Project/plant.

c) One Project/plant to another project/plant.

d) From Non-family Station to Family Station.

5.0 TENURE:

5.1 The normal tenure of posting will be as under for all stations:

Executives and Supervisors- 3 years.
Workmen- 5 years."

3. The petitioner has brought to the notice of the Court that respondents No. 2, 3 and 4 have worked at the same place for a period of 18.04, 9.11 and 10.7 years, respectively. The explanation given by the respondent-Corporation for retaining the private respondents is that Sh. S.L. Sharma is the senior most officer, who is heading the Finance Department of Corporate Finance Department at Shimla. Sh. Anand Upadhyaya

AGM(Finance) is heading the Finance Department of Rampur Hydro Electric Station. Sh. Sanjay Sood, AGM(Finance) is heading the Compilation Section, being the senior most qualified Chartered Accountant.

4. Mr. Sunil Mohan Goel, submitted at the Bar that the details of the officers who have worked for more than 9-10 years were called. The name of the petitioner was not in the list. However, despite that he has been transferred vide order dated 22.4.2015 to STPL, Bihar.

5. The respondent-Corporation should have transferred the senior most incumbent taking into consideration that the M/S STPL Patna has been formed as a subsidiary company of SJVN Ltd. for construction and generation of 1320 MW thermal power in the State of Bihar. The daughter of the petitioner is studying in 10+2 standard at Shimla. The wife of the petitioner has undergone renal (kidney) transplant in the year 2000. The specialized treatment is not available at Patna. Mr. Rajiv Jiwan, Advocate, submitted that the respondent-Corporation is ready and willing to provide lease property to the petitioner, as per the Circular dated 11.11.2013 at Delhi. However, the fact of the matter is that the petitioner has been discriminated against by the respondent-Corporation, as noticed hereinabove, by sending him to Patna and retaining persons with longer period of service at Shimla.

6. Although the scope of judicial review in transfer matters is very limited, however, in the instant case, the respondent-Corporation has retained the incumbents who have worked for more than 9-10 years at same station. The petitioner has merely worked for 3 years at Shimla and has been transferred to STPL, Patna. The action of the respondent-Corporation of transferring the petitioner is illegal and arbitrary and also violative of Articles 14 and 16 of the Constitution of India.

7. Accordingly, the Writ Petition is allowed. Annexure P-1 dated 22.4.2015, qua the petitioner, is quashed and set aside. However, liberty is reserved to the respondent-Corporation to transfer the incumbents on the basis of length of service at a particular place. Pending application(s), if any, shall also stand disposed of.

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

Ashwani Gupta ...Petitioner

Versus

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

CWP No. 7502 of 2014
Judgment reserved on: 15.6.2015
Date of Decision : June 20, 2015

Constitution of India, 1950- Article 226- Petitioner filed a Writ Petition seeking relief that respondent No. 5 be held to be disqualified from holding the office of MLA and he be restrained from acting as MLA- held, that power under Article 226 is in the widest possible terms but this power cannot be used to set aside the election- election can be set aside only by raising election dispute and only Election Tribunal can set aside the election under properly filed election petition under Representation of the People Act- writ petition dismissed as not maintainable. (Para-7 to 24)

Cases referred:
K. Venkatachalam vs. A. Swamickan and another (1999) 4 SCC 526.
Kurapati Maria Das vs. Dr. Ambedkar Seva Samajan and others (2009) 7 SCC 387
Gurdeep Singh Dhillon vs. Satpal and others (2006) 10 SCC 616
N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency AIR 1952 SC 64
Durga Shankar Mehta vs. Raghuraj Singh, AIR 1954 SC 520
Hari Vishnu Kamath vs. Syed Ahmad Ishaq, AIR 1955 SC 233
Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405
Krishna Ballabh Prasad Singh vs. Sub Divisional Officer Hilsa-cum- Returning Officer and others (1985) 4 SCC 194
Indrajit Barua and others vs. Election Commission of India and others AIR 1986 SC 103
Jaspal Singh Arora vs. State of Madhya Pradesh (1998) 9 SCC 594
Election Commission of India through Secretary vs. Ashok Kumar and others (2000) 8 SCC 216

For the Petitioner	:	Mr. Dinesh Bhanot, Advocate.
For the respondents	:	Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals, Mr. J.K.Verma and Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 and 4. Mr. Ashok Sharma, ASGI, for respondent No. 2. Ms. Nishi Goel, Advocate for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioner, who claims himself to be RTI candidate, has filed this petition allegedly as probono publico and has sought following reliefs:

> "(a). The respondent No.5 may kindly be held to be disqualified from holding the office of the member State Legislative Assembly by issuing a writ of quo warranto or any other appropriate writ, order or direction.
>
> (b) Restrained respondent No.5 from functioning as an MLA.

2. This Court on 15.10.2014 issued notices which were confined to the official respondents whereas no notice was issued to the elected candidate, who has been arrayed as respondent No.5. The allegations as set out in the petition are that respondent No.5 at the time of nomination was a Government contractor and had many subsisting contracts and therefore, had incurred disqualification for being elected as a member of the State Legislative Assembly because this fact was suppressed by him while filling up his nomination. It is further alleged that the Returning Officer i.e. respondent No.4 did not follow the provisions contained in Section 9-A and 125-A of the Representation of the People Act, 1951 and illegally permitted respondent No.5 to get elected as a member of State Legislative Assembly.

3. Respondent No.1 in response to the petition filed its reply wherein preliminary objection regarding maintainability of this petition has been raised. It is averred that Article 329 of the Constitution debars any Court of the land to entertain a suit or proceedings calling in question any election to Parliament or State Legislature and the only

mode and manner of challenge to the election of a candidate to either Parliament or State Legislature can only be by way of election petition.

4. The respondents No. 2 to 4 have filed their separate reply wherein these respondents too have relied upon the provisions of Article 329(b) of the Constitution of India and Part-VI of the Representation of the People Act, 1951 to canvass that no election can be called in question except by way of an election petition presented within 45 days from the date of declaration of result of the returned candidate. It has further been averred that the lack of qualification and disqualification at the time of contesting any election is a ground to be raised in an election petition under Section 100 (1) of the Act of 1951 and not by way of present writ petition.

5. Since the respondents have raised preliminary objection regarding very maintainability of this petition, we propose to deal only with this question.

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

7. The petitioner in order to justify the maintainability of the petition has vehemently argued that Article 226 of the Constitution is couched in widest possible terms and there being no express bar to the jurisdiction of this Court, therefore, the present writ is maintainable. In support of his argument, he has relied upon the judgment of the Hon'ble Supreme Court in ***K. Venkatachalam vs. A. Swamickan and another (1999) 4 SCC 526***.

8. While the respondents on the other hand would canvass that in view of the clear cut provisions as contained in Article 329 of the Constitution of India read with the Representation of the People Act, 1951 (for short 'RP Act') and also taking into consideration the disputed questions of fact, the writ petition is not maintainable.

9. In ***K. Venkatachalam's*** case (supra) it was held by the Hon'ble Supreme Court as follows:

> "20. *In all these cases there is a common message that when the poll or re-poll process is on for election to the Parliament or Legislative Assembly, High Court cannot exercise its jurisdiction under 226 of the Constitution and that remedy of the aggrieved parties is under the Act read with Article 329(b) of the Constitution. The Act provides for challenge to an election by filing the election petition under Section 81 on one or more grounds specified in sub-section(l) of Sections 100 and 101 of die Act. There cannot be any dispute that there could be a challenge to the election of the appellant by filing an election petition on the ground improper acceptance of his nomination inasmuch as the appellant was hot an elector on the electoral roll of Lalgudi Assembly Constituency and for that matter also by any non-compliance, with the provisions of the Constitution or of the Act. If an election petition had been filed under Section 81 of the Act High Court would have certainly declared the election of the appellant void. It was, therefore, submitted that respondent could not invoke the jurisdiction of the High Court under Article 226 of the Constitution in view of Article 329(b) of the Constitution read with Sections 81 and 100 of the Act and only an election petition was maintainable to challenge the election of the appellant. That right the respondent certainly had to challenge the election of the appellant. Election petition under Section 81 of the Act had to be filed within forty-five days from the date of election of the returned candidate, that is the appellant in the present case. This was not done.There is no provision under the Act that an election petition could be filed beyond the period of*

limitation prescribed under Section 81 of the Act. That being so the question arises if the respondent is without any remedy particularly when it is established that the appellant did not have the qualification to be elected to the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency.

26. The question that arises for consideration is if in such circumstances High Court cannot exercise its jurisdiction under Article 226 of the constitution declaring that the appellant is hot qualified to be member of the Tamil Nadu Legislative Assembly from Lalgudi Assembly Constituency. On the finding recorded by the High Court it is clear that the appellant jn his nomination form impersonated a person known as `Venkatachalam s/o Pethu', taking advantage of the fact that such person bears his first name. Appellant would be even criminally liable as he filed his nomination on affidavit impersonating himself If in such circumstances he is allowed to continue to sit and vote in the Assembly his action would be fraud to the constitution.

27. In view of the judgment of this Court in the case of Election Commission of India v. Saka Varikata Rao, AIR (1953) SC 210 it may be that action under Article 192 could not be taken as the disqualification which the appellant incurred was prior to his election. Various decisions of this Court, which have been referred to by the appellant that jurisdiction of the High Court under Article 226 is barred challenging the election of a returned candidate and which we have noted above, do not appear to apply to the case of the appellant now before us. Article 226 of the Constitution is couched in widest possible term and unless there is clear bar to jurisdiction of the High Court its powers under Article 226 of the Constitution can be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when recourse cannot be had to the provisions of the Act for the appropriate relief. In circumstances like the present one bar of Article 329(b) will not come into play when case falls under Articles 191 and 193 and whole of the election process is over. Consider the case where the person elected is not a citizen of India. Would the Court allow a foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?

28. We are, therefore, of the view that the High Court rightly exercised its jurisdiction in entertaining the writ petition under Article 226 of the Constitution and declared that the appellant was not entitled to sit in Tamil Nadu Legislative Assembly with consequent restraint order on him from functioning as a member of the Legislative Assembly, The net effect is that the appellant ceases to be a member of the Tamil Nadu Legislative Assembly. Period of the Legislative Assembly is long since over. Otherwise we would have directed respondent No. 2, who is Secretary to Tamil Nadu Legislative Assembly, to intimate to Election Commission that Lalgudi Assembly constituency seat has fallen vacant and for the Election Commission to take necessary steps to hold fresh election from that Assembly Constituency. Normally in a case like this Election Commission should invariably be made a party."

10. A perusal of the underlined portion of the judgment undoubtedly goes to show that the Hon'ble Supreme Court held that Article 226 of the Constitution is couched in widest possible terms and unless there was a clear bar to the jurisdiction of the High Court its power under Article 226 of the Constitution could be exercised when there is any act which is against any provision of law or violative of constitutional provisions and when

recourse cannot be had to the provisions of the Act for the appropriate relief. It was specifically held that the bar under Article 329 (b) of the Constitution would not come into play.

11. But then the aforesaid judgment was itself explained and distinguished by the Hon'ble Supreme Court in a later decision in ***Kurapati Maria Das*** vs. ***Dr. Ambedkar Seva Samajan and others (2009) 7 SCC 387*** in the following manner:

> "25. *"Learned counsel Shri Gupta, however, invited our attention to some other decisions of this Court reported as K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] where a writ of quo warranto was sought against the member of the Legislative Assembly on the ground that his name was not found in the voters' list of that particular constituency from where he was elected. Our attention was invited to paragraphs 27 and 28. In paragraph 27 after referring to the decision of the Election Commission of India v. Saka Venkata Rao [AIR 1953 SC 210] and considering the Article 192, the Court observed that Article 226 is couched in widest possible language and unless there is a clear bar to the jurisdiction of the High Court, its powers under Article 226 can be exercised when there is any act which is against any provision of law or vioative of constitutional provisions and when the recourse cannot be had to the provisions of the Act for appropriate relief. Then the Court observed: (A. Swamickan case, SCC p. 544, para 27)*
>
> > *"27...."In circumstances like the present one, bar Under Article 329 (b) will not come into play when the case falls under Articles 191 and 193 and the whole process of election is over. Consider the case where a person elected is not a citizen of India. Would the court allow the foreign citizen to sit and vote in the Legislative Assembly and not exercise jurisdiction under Article 226 of the Constitution?"*
>
> *In paragraph 28, the Court went on to hold that the High Court had rightly exercised its jurisdiction in entertaining the writ petition under Article 226. This case has been very heavily relied on in the impugned judgment of the Division Bench.*
>
> *26. Shri L. Nageshwar Rao further points out that the factual scenario in that case was different. That was a case where admittedly the name of the elected candidate was not in the voters' list and the elected candidate had tried to use similar name in the voters' list which was admittedly not that of the elected candidate. There was no necessity of any proof, as a voter list was an admitted document and it clearly displayed that the name of the Legislator was not included in the list. Therefore, the Court observed in that case in paragraph 27 which we have quoted above to the effect: (Swamickan case, SCC p. 544, para 27)*
>
> > *"27....."In circumstances like the present one, bar Under Article 329 (b) will not come into play when the case false under Articles 191 and 193 and the whole process of election is over."*
> >
> > *(emphasis supplied)*
>
> *27. We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the Scheduled Caste. Therefore, the Caste status of the appellant was a disputed question of*

fact depending upon the evidence. Such was not the case in K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526]. Every case is an authority for what is actually decided in that. We do not find any general proposition that even where there is a specific remedy of filing an Election Petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

28. Again as we have stated earlier, there was no dispute and no challenge to the findings of the High Court that K. Venkatachalam, the petitioner in case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] was not a Legislator in electoral roll of the constituency for the general elections for December, 1984 and he blatantly and fraudulently represented himself to be a Legislator of the constituency using the similarity with the name of another person. The situation in the present case is, however, entirely different in the sense that here the petitioner very seriously asserted that firstly, he was not a Christian and, secondly, that he belongs to the Scheduled Caste.

33. There is yet another distinguishing feature in case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526]. In that case there is a clear finding that the elected person therein played a fraud with the Constitution inasmuch as that he knew that his name was not in Electoral Roll of that constituency and he impersonated for some other person taking the advantage of the similarity of names. The appellant herein asserts on the basis of his Caste Certificate that he still belongs to Scheduled Caste. We are, therefore, of the clear opinion that the case of K. Venkatachalam v. A Swamickan & Anr. [1999 (4) SCC 526] is not applicable to the present case and the High Court erred in relying upon that decision."

12. The Hon'ble Apex Court further held that the writ petition to set aside an election under the garb of writ of quo- warranto was not maintainable. It is apt to reproduce the following observations:

"22. *There is no dispute that Rule 1 of the Andhra Pradesh Municipalities (Decision on Election Disputes) Rules, 1967, specifically provides for challenging the election of Councillor or Chairman. It was tried to be feebly argued that this was a petition for quo warranto and not only for challenging the election of the appellant herein. This contention is clearly incorrect. When we see the writ petition filed before the High Court, it clearly suggests that what is challenged is the election. In fact the prayer clauses (b) and (c) are very clear to suggest that it is the election of the appellant which is in challenge.*

23. Even when we see the affidavit in support of the petition in paragraph 8, it specifically suggested that the Ward No. 8 was reserved for the persons belonging to the Scheduled Castes from where the appellant contested the election representing himself to be a person belonging to the Scheduled Caste. Paragraph 9 speaks about the election of the appellant as the Chairperson. Paragraph 30 also suggests that the complaint has been made against the appellant that he had usurped the public office by falsely claiming himself to be a person belonging to the Scheduled Caste. In paragraph 33, it is contended that the first petitioner had no remedy to question the election of the 9th respondent by way of an election petition. Therefore, though apparently it is suggested in the writ petition was only for the writ of quo warranto, what is

prayed for is the setting aside of the election of the appellant herein on the ground that he did not belong to the Scheduled Caste.

24. It is further clear from the writ petition that the writ-petitioners were themselves aware of the situation that the writ of quo-warranto could have been prayed for only on invalidation or quashing of the election of the appellant, firstly as a Councillor and secondly, as a Chairman and that was possible only by an Election Petition. The two decisions quoted above, in our opinion, are sufficient to hold that a writ petition of the nature was not tenable though apparently the writ petition has been couched in a safe language and it has been represented as if it is for the purpose of a writ of quo warranto."

13. The Hon'ble Supreme Court thereafter placed reliance upon an earlier decision rendered in ***Gurdeep Singh Dhillon*** vs***. Satpal and others (2006) 10 SCC 616*** wherein after quoting Article 243-ZG (b) the Court observed that the shortcut of filing the writ petition and invoking constitutional jurisdiction of the High Court under Articles 226/227 was not permissible and the only remedy available to challenge the election was by raising the election dispute under the local statute.

14. Article 329 of the Constitution of India reads thus:

"***329. Bar to interference by courts in electoral matters.***- *Notwithstanding anything in this Constitution*

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any court;

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

15. It would be seen that under Article 329 (b), there is a specific prohibition against any challenge to an election either to the house of Parliament or to the House of the Legislature except by an election petition presented to such authority and in such manner as may be provided for in a law made by the appropriate Legislature. Parliament has by enacting the R P Act, 1951 provided for such a forum for questioning such elections hence, under Article 329 (b) no forum other than such forum constituted under the R P Act can entertain a complaint against any election.

16. In ***N.P. Ponnuswami vs. Returning Officer, Namakkal Constituency AIR 1952 SC 64*** the Hon'ble Supreme Court held that "*the law of elections in India does not contemplate that there should be two attacks on matters connected with election proceedings, one while they are going on by invoking the extraordinary jurisdiction of the High Court under Article 226 of the Constitution (the ordinary jurisdiction of the courts having been expressly excluded), and another after they have been completed by means of an election petition."*

17. A Constitution Bench in ***Durga Shankar Mehta vs. Raghuraj Singh, AIR 1954 SC 520*** observed that "*the non obstante clause with which Article 329 of the Constitution begins debars any other Court in the land, to entertain a suit or a proceeding calling in question any election to the Parliament or the State Legislature. It is the Election Tribunal (now the High Court) alone that can decide such disputes and the proceeding has to be initiated by an election petition and in such manner as may be provided by a statute...."*

18. To similar effect are the observations made by the Hon'ble Supreme Court in ***Hari Vishnu Kamath vs. Syed Ahmad Ishaq, AIR 1955 SC 233*** wherein it was observed as under:

> *".....These are instances of original proceedings calling in question an election, and would be within the prohibition enacted in Article 329 (b). But when once proceedings have been instituted in accordance with Article 329 (b) by presentation of an election petition, the requirements of that article are fully satisfied. Thereafter when the election petition is in due course heard by a Tribunal (now the High Court) and decided, whether its decision is open to attack, and if so, where and to what extent, must be determined by the general law applicable to decisions of Tribunals. .....The view that Article 329 (b) is limited in its operation to initiation of proceedings for setting aside an election and not to the further stages following on the decision of the Tribunal is considerably reinforced, when the question is considered with reference to a candidate whose election has been set aside by the Tribunal."*

19. In the celebrated case of ***Mohinder Singh Gill and another vs. The Chief Election Commissioner, New Delhi and others (1978) 1 SCC 405*** the Constitution Bench of the Hon'ble Supreme Court held that under Article 329 (b) the sole remedy for an aggrieved party, if he wants to challenge any election, is an election petition and this exclusion of all other remedies includes constitutional remedies like Article 226 because of the non-obstante clause. It was further held that paramount policy of the Constitution-makers in declaring that no election shall be called in question except the way it is provided for in Article 329 (b) and the Representation of the People Act, 1951, shows that the Constitution and the Act should be read as an integrated scheme.

20. In ***Krishna Ballabh Prasad Singh vs. Sub Divisional Officer Hilsa-cum-Returning Officer and others (1985) 4 SCC 194,*** the Hon'ble Supreme Court held that the bar under Article 329(b) against filing of the writ petition operates only after process of election comes to an end and it shall be apt to reproduce para-5 which reads thus:

> *"5. We are of opinion that the process of election came to an end only after the declaration in Form 21-C was made and the consequential formalities were completed. The bar of clause (b) of Article 329 of the Constitution came into operation only thereafter and an election petition alone was maintainable. The writ petition cannot be entertained."*

21. In ***Indrajit Barua and others vs. Election Commission of India and others AIR 1986 SC 103***, a Constitution Bench of the Hon'ble Supreme Court was again confronted with the proposition as to whether a writ petition under Article 226 could be maintained for challenging the election to the State Legislature. The Hon'ble Supreme Court after placing reliance upon ***Hari Vishnu Kamath*** case (supra) and Constitution Bench decision in ***Durga Shankar Mehta*** case (supra) observed as follows:

> *"6. These are clear authorities – and the position has never been assailed – in support of the position that an election can be challenged only in the manner prescribed by the Act. In this view of the matter, we had concluded that writ petitions under Article 226 challenging the election to the State Legislature were not maintainable and election petitions under Section 81 of the Act had to be filed in the High Court. The Act does not contemplate a challenge to the election to the Legislature as a whole and the scheme of the Act is clear. Election of each of the returned candidates has to be challenged by filing of a separate election petition. The proceedings under the Act are quite strict and clear provisions have been made as to how an election petition has to be filed*

and who should be parties to such election petition. As we have already observed, when election to a Legislature is held it is not one election but there are as many elections as the legislature has members. The challenge to the elections to the Assam Legislative Assembly by filing petitions under Article 226 of the Constitution was, therefore, not tenable in law."

22. In ***Jaspal Singh Arora vs. State of Madhya Pradesh (1998) 9 SCC 594*** the election of President of the Municipal Council had been challenged by medium of the writ petition and it was held :

"3. These appeals must be allowed on a short ground. In view of the mode of challenging the election by an election petition being prescribed by the M.P. Municipalities Act, it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition and also the fact that an earlier writ petition for the same purpose by a defeated candidate had been dismissed by the High Court."

23. In ***Election Commission of India through Secretary vs. Ashok Kumar and others (2000) 8 SCC 216***, after taking into consideration the entire law on the subject, it was held as under:

"28. *Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over- enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.*

30. To what extent Article 329 (b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that Representation of the People Act, 1951 provides for only one remedy; that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. The non-obstante clause with which Article 329 opens, pushes out Article 226 where the dispute takes the form of calling in question an election (see para 25 of Mohinder Singh Gill case). The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided ---- one during the course of the proceedings and the other at its termination, for such two-pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.

32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

(1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

(2) Any decision sought and rendered will not amount to "calling in question an election" if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

(3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

(4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

(5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the court's indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

24. In view of the aforesaid exposition of law, we have no hesitation to hold that in view of the non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election. The election rights and remedies being statutory cannot be ignored and the petitioner cannot be permitted to resort to a short cut method of filing a writ petition and the only remedy available to challenge the election is by raising an election dispute in accordance with law.

25. In view of the aforesaid discussion, it can safely be concluded that the present writ petition in view of the specific bar as contained under Article 329 (b) of the

Constitution is not maintainable. Consequently, the same is dismissed as such. The parties are left to bear their own costs.

****

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

Bachitar Singh & ors. .....Petitioners.

Versus

Divisional Commissioner Mandi & ors. .....Respondents.

CWP No. 8873 of 2014.
Reserved on: 18.6.2015.
Decided on: 20.6.2015.

Constitution of India, 1950- Article 226- Land was allotted to the father of the petitioner No.1- no objection was raised by the respondent to the allotment of the land- however, a Revision Petition was filed which was allowed without a speaking order- a Writ Petition was filed which was allowed and the petitioners were permitted to approach Divisional Commissioner, Mandi who dismissed the application filed by the petitioners- a Revision was filed after 17 years – such revision was not maintainable- authorities had not adverted to the question of delay- hence, petition allowed and the order set aside. (Para-4 to 8)

Cases referred:

Gram Panchayat, Kakran vrs. Addl. Director of Consolidation and another, (1997) 8 SCC 484

State of H.P. & ors. vrs. Raj Kumar Brijender Singh and ors., (2004) 10 SCC 585

State of Andhra Pradesh and another vrs. T.Yadagiri Reddy and others, (2008) 16 SCC 299

Bhup Singh vrs. The Director of Consolidation & ors., Latest HLJ 2008 (HP) 516

Ramesh Chand and another vrs. Director of Consolidation & ors., 2008(2) Shim. LC 176

For the petitioners: Mr. Surinder Saklani, Advocate.

For the respondents: Mr. Parmod Thakur, Addl. AG for respondent No.1.
Mr. Naveen K. Bhardwaj, Advocate, for respondents No. 2 to 5.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.(oral)

The consolidation proceedings were carried out in Village Mohin in the year 1992-93. The father of the petitioner No. 1 was allotted Kh. No. 1867/1440 (old) 1127 (new), Kh. No. 1870/1400 (old) 1170 (new), measuring 0-32-00 hectares and Kh. No. 1498 (old) 1215 (new) measuring 0-00-45 hectares. The total land allotted to the father of the petitioner No. 1 after the consolidation was 0-34-96 hectares. Kh. No. 1498 (old) and 1215(new) measuring 0-00-45 hectares is adjoining to the house of the petitioners and they are using the same as their courtyard. A scheme was framed for carrying out the consolidation proceedings in the area. The parties were put in their respective possessions of their land in the year 1992-93 itself.

2. The respondents No. 2 to 5 did not raise any objection to the allotment of Kh. No. 1498 (old) and 1215 (new) to the father of petitioner No. 1 under Section 30 of the H.P.

Holdings (consolidation and Prevention of Fragmentation) Act, 1971. The respondents No. 2 to 5 instituted a revision before the learned Divisional Commissioner on 3.8.2010. He decided the same against the petitioners on 21.1.2011 without a speaking order. The petitioners assailed the decision dated 21.1.2011 before this Court. This Court permitted the petitioners to approach the Divisional Commissioner, Mandi seeking correction of the order by moving appropriate application. The appropriate application was filed on 22.6.2013. However, the fact of the matter is that the appeal was dismissed on 27.8.2014 and the order dated 21.1.2011 was upheld.

3. The consolidation proceedings, as noticed hereinabove, were concluded in the year 1992-93. The revision has been filed after almost 17 years. It was not maintainable. The learned Divisional Commissioner and Financial Commissioner, while passing the orders dated 21.1.2011 and 27.8.2014 could not be oblivious to the gross delay in filing the petitions. The learned Divisional Commissioner, while passing the order dated 21.1.2011, without making reference to record, has come to the conclusion that the private respondents were in possession of the suit land and the same has been wrongly allotted to the petitioners. It is not believable that the private respondents were not aware of the allotment of Kh. No. 1498 (old) and 1215 (new) in favour of the petitioners in the year 1992 and they came to know only in the year 2010.

4. Their lordships of the Hon'ble Supreme Court in the case of ***Gram Panchayat, Kakran vrs. Addl. Director of Consolidation and another,*** reported in ***(1997) 8 SCC 484***, have held that even if limitation prescribed under Rule 18 of the E.P. Holdings (Consolidation and Prevention of Fragmentation) Rules, 1949, is not directly attracted, the application must be filed within a reasonable time.

5. Their lordships of the Hon'ble Supreme Court in the case of ***State of H.P. & ors. vrs. Raj Kumar Brijender Singh and ors.,*** reported in ***(2004) 10 SCC 585,*** have held that though the Financial Commissioner can exercise *suo motu* power and pass appropriate orders under Section 20 of the Himachal Pradesh Ceiling on Landholdings Act, 1972, but this expression does not mean that there would be no time limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. Their lordships have held as under:

> "6. We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section 3 provides that such a power may be exercised at any time but this expression does not mean there would be no time limit or it is in infinity. AU that is meant is, that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power *suo moto* action could be exercised. For example, in this case, as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his *suo moto* power, well it could be open for the State to submit that the facts and the circumstances were such that it would be within reasonable time but as we have already noted the order of the Collector which has been interfered with, was passed in January 1976 and the

appeal preferred by the State was also withdrawn sometime in March 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by the reason of which it could be said that exercise of *suo moto* power after 15 years of the order interfered with, was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo moto in a suitable case even though an appeal preferred before lower appellate authority is withdrawn may be by the State. Thus, the view taken by the High Court, is not sustainable. But the order of the Financial Commissioner suffers from vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power in sub-section (3) of Section 20."

6. Their lordships of the Hon'ble Supreme Court in the case of ***State of Andhra Pradesh and another vrs. T.Yadagiri Reddy and others,*** reported in ***(2008) 16 SCC 299,*** have held that action was to be taken within a reasonable time, though the words "at any time" were used in the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 and moreover, when the rights of the parties were crystallized. Their lordships have held as follows:

"68. This Court has considered the nature of that power in the case of *Ibrahimpatnam Taluk Vyavasaya Coolie Sangham Vs. K. Suresh Reddy and Others* (cited supra) and observed in para 9:-

"9. ..... Use of the words "at any time" in sub-Section (4) of Section 50-B of the Act only indicates that no specific period of limitation is prescribed within which the suo moto power could be exercised reckoning or starting from a particular date advisedly and contextually. Exercise of suo moto power depended on facts and circumstances of each case. In cases of fraud, this power could be exercised within a reasonable time from the date of detection or discovery of fraud. While exercising such power, several factors need to be kept in mind such as effect on the rights of the third parties over the immovable property due to passage of considerable time, change of the provisions of other Acts (such as Land Ceiling Act)....."

From this, the Learned Senior Counsel argued that since there is no period of limitation prescribed for this power, the Collector would be justified in initiating an action. In our opinion the argument is firstly, premature. No such action have ever been proposed. Secondly, the Court has further observed that such action has to be within reasonable time though the words "at any time" are used in the provision. In the same para, the Court further observed:

"9. ..... Use of the words "at any time" in sub-section (4) of Section 50-B of the Act cannot be rigidly read letter by letter. It must be read and construed contextually and reasonably. If one has to simply proceed on the basis of the dictionary mean sing of the words "at any time", the suo moto power under sub-Section (4) of Section 50-B of the Act could be exercised even after decades and then it would lead to anomalous position leading to uncertainty and complications

> seriously affecting the rights of the parties, that too, over immovable properties. Orders attaining finality and certainty of the rights of the parties accrued in the light of the orders passed must have sanctity. Exercise of suo moto power "at any time" only means that no specific period such as days, months or years are not prescribed reckoning from a particular date. But, that does not mean that "at any time" should be unguided and arbitrary. In this view, "at any time" must be understood as within a reasonable time depending on the facts and circumstances of each case in the absence of prescribed period of limitation."
>
> The observations are extremely fitting in the present case. Here also, after the Certificates have been issued, 25 long years have elapsed. The rights of the parties have already been crystallized. Not only this, but, it is the report of Shri Rao that the said lands have now been converted and sold for to as many as approximately 1100 persons, by way of residential plots. We do not think that there is any justification at this stage to use a suo moto power and to cancel the Certificates, so as to put the clock back. That would be, in our opinion, a completely unnecessary exercise, not warranted by any of the Sections. In that view, even this argument has to be rejected."

7. This Court in the case of ***Bhup Singh vrs. The Director of Consolidation & ors.,*** reported in ***Latest HLJ 2008 (HP) 516,*** has held that even if no period of limitation has been prescribed under section 54 of the Act and the expression 'at any time' has been used but the power is to be exercised within a reasonable period. The Court has held as under:

> "4. Even if no period of limitation has been prescribed under section 54 of the Act and the expression :at any time' has been used but the power is to be exercised within a reasonable period. In the present case, the consolidation proceedings were concluded in the year 1986-87 but the revision petition has been preferred by respondent No.2 before the Additional Director Consolidation of holdings of 12th August, 1997. Consequently, it is held that the revision petition preferred after a period of 10 years before the Additional Director Consolidation of Holdings was not maintainable. Moreover, Additional Director Consolidation of Holdings had not assigned any reason for exercising the revisional power after a period of 10 years. Respondents No.2 could file the revision petition within a period 3-5 years. The other wholesome principle for filing the revision within the reasonable time is that the settled things should not be permitted to be unsettled."

8. The Division Bench of this Court in the case of ***Ramesh Chand and another vrs. Director of Consolidation & ors.,*** reported in ***2008(2) Shim. LC 176,*** has also explained 'reasonable time' as under:

> "4. The issue was as to whether the Director, Consolidation of Holdings, Himachal Pradesh has exercised his powers under Section 54 of the 'Act 1971' within reasonable time or not. Such issue has already been adjudicated upon by the Supreme Court in Chairman, Indore Vikas Pradhikaran v. Pure Industrial Coke & Chemicals Ltd. and others, 2007(8) SCC 705. The term 'reasonable time' used under Section 54 of the 'Act 1971' by the Director, Consolidation of Holdings shall be

deemed to be settled in terms of the decision of the Supreme Court in State of H.P. and others v. Raj Kumar Brijender Singh and others (2004 (10) SCC 585), whereby, the Hon'ble Supreme Court while expressing its view under Section 20(3) of H.P. Ceiling on Land Holdings Act, 1972 has observed that reasonable time as indicated in Section 20(3) of the said Act would depend upon the facts and circumstances of each case. For convenience, relevant paragraph 6 of the decision Raj Kumar Brijender Singh (supra) is quoted as below:-

> "We are now left with the second question which was raised by the respondents before the High Court, namely, the delayed exercise of the power under sub-section (3) of Section 20. As indicated above, the Financial Commissioner exercised the power after 15 years of the order of the Collector. It is true that sub-section (3) provides that such a prayer may be exercised at any time but this expression does not mean there would be no time-limit or it is in infinity. All that is meant is that such powers should be exercised within a reasonable time. No fixed period of limitation may be laid but unreasonable delay in exercise of the power would tend to undo the things which have attained finality. It depends on the facts and circumstances of each case as to what is the reasonable time within which the power of suo motu action could be exercised. For example, in this case/as the appeal had been withdrawn but the Financial Commissioner had taken up the matter in exercise of his suo motu power, it could well be open for the State to submit that the facts and circumstances were such that it would be within reasonable time but as we have already noted that the order of the Collector which has been interfered with was passed in January 1976 and the appeal preferred by the State was also withdrawn sometime in March, 1976. The learned counsel for the appellant was not able to point out such other special facts and circumstances by reason of which it could be said that exercise of suo motu power after 15 years of the order interfered with was within a reasonable time. That being the position in our view, the order of the Financial Commissioner stands vitiated having been passed after a long lapse of 15 years of the order which has been interfered with. Therefore, while holding that the Financial Commissioner would have power to proceed suo motu in a suitable case even though an appeal preferred before the lower appellate authority is withdrawn, may be, by the State. Thus the view taken by the High Court is not sustainable. But the order of the Financial Commissioner suffers from the vice of the exercise of the power after unreasonable lapse of time and such delayed action on his part nullifies the order passed by him in exercise of power under sub-section (3) of Section 20."

9. Accordingly, the Writ Petition is allowed. The order dated 21.1.2011 (annexure P-5) and 27.8.2014 (Annexure P-9) and subsequent proceedings carried out by the authorities are quashed and set aside. Pending application(s), if any shall also stand disposed of.

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

Balbir Singh. ...Petitioner.

Versus

State of Himachal Pradesh and another. ...Respondents.

CWP No. 2351/2015
Reserved on: 18.6.2015
Decided on: 20.6.2015

Constitution of India, 1950- Article 226- Petitioner filed a Civil Writ Petition before the High Court which was allowed and a supernumerary post was created- case of the petitioner was considered by the Departmental Promotion Committee and his name was recommended for promotion on notional basis- petitioner claimed that he has not been paid the actual salary though he was ready to work on the higher post- held, that petitioner has been kept away from discharging the duties of the higher post- he was always ready and willing to work on the higher post- thus, petition allowed and the respondent directed to pay salary from the date of promotion till the date of superannuation.

Case referred:
Union of India and others vs. K.V. Jankiraman and others, (1991) 4 SCC 109

For the Petitioner: Mr. Anshul Attri, Advocate vice Mr. Neeal Kamal Sood, Advocate.
For the Respondents: Mr. Ramesh Thakur, Asstt. Advocate General.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge:

In sequel to the judgment dated 28.11.2011 rendered in CWP No. 9837/2011, supernumerary post of District Public Relation Officer/Information Officer was created. Case of the petitioner was duly considered by the Departmental Promotion Committee. His name was recommended for promotion to the post of District Public Relation Officer/Information Officer in the pay scale of Rs. 7220-11660 (pre-revised) and Rs. 10300-34800 + 5000 grade pay (revised) with effect from 26.7.2000 to 31.5.2007 on notional basis. Copy of the office order dated 16.7.2012 promoting the petitioner to the post of District Public Relation Officer/Information Officer is Annexure P-12.

2. Case of the petitioner, in a nutshell, is that he has not been paid the actual salary with effect from 26.7.2000 to 31.5.2007 though he was always ready and willing to work on the higher post. Case of the respondent-State is that since the petitioner has not worked on the higher post, he will not be entitled to the salary of the post under FR 17.

3. This question is no more *res integra* in view of the law laid down by their Lordships of the Hon'ble Supreme Court in ***Union of India and others*** vs. ***K.V. Jankiraman and others***, (1991) 4 SCC 109. Their Lordships have held as under:

> **"25. We are not much impressed by the contentions advanced on behalf of the authorities. The normal rule of "no work no pay" is not applicable to cases such as the present one where the employee although he is willing to work is kept away from work by the authorities for no fault of**

his. This is not a case where the employee remains away from work for his own reasons, although the work is offered to him. It is for this reason that F.R. 17(1) will also be inapplicable to such cases."

4. In the instant case also, petitioner has been kept away from discharging the duties of the higher post. He was always ready and willing to work on the higher post. He has approached the courts of law repeatedly for the redressal of his grievance.

5. Accordingly, the writ petition is allowed. Annexure P-12 dated 16.7.2012 is modified to the extent by applying the principles of severability that the petitioner shall be paid the salary of District Public Relation Officer/Information Officer from 26.7.2000 till the date of his superannuation, i.e. 31.5.2007. The pension of the petitioner would be worked out on the basis of actual salary paid to the petitioner of the higher post with effect from to 31.5.2007. Pending application(s), if any, also stands disposed of. No costs.

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

M/s Samsung India Electronics Pvt. Ltd. ..... Petitioner.

Vs.

State of H.P. & ors. ..... Respondents

CWP No. 1596 of 2015.
Judgement reserved on: 15.6.2015.
Date of decision: 20.6.2015.

Himachal Pradesh Value Added Tax Act, 2005- Section 16(xiii)- Petitioner was paying tax @ 5% on the sale of cell phone chargers and other accessories instead of 13.75%- a show cause notice was issued to it to revise the assessment order- petitioner filed a Writ Petition challenging the show cause notice- held that petitioner has an alternate remedy of filing an appeal under the H.P. VAT Act 2005 -mere illegal or irregular exercise of powers will not make the order without jurisdiction - when an effective remedy is available Court should not entertain the Writ Petition- Writ Petition dismissed for the lack of maintainability.

(Para-6 to 16)

Cases referred:

State of Punjab vs. Nokia India Pvt. Ltd. AIR 2015 SC 1068.

Janardhan Reddy & others vs. The State of Hyderabad & others AIR 1951 SC 217

Sarwan Kumar and another vs. Madan Lal Aggarwal (2003) 4 SCC 147

Assistant Commissioner, Income Tax, Rajkot vs. Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171

Union of India and others vs. Major General Shri Kant Sharma and another 2015 AIR SCW 2497

Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others (2011) 2 SCC 782

Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another vs. Sri Seetaram Rice Mill (2012) 2 SCC 108

Cicily Kallarackal vs. Vehicle Factory 2012 (8) SCC 524

Union of India vs. Brigadier P.S. Gill (2012) 4 SCC 463

For the petitioner : Mr. Tarun Gulati, Advocate with Mr. Sanjeev Bhushan and Mr. Shashi Mathews, Advocates.

For the respondents : Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma, Addl. Advocate General, Mr. J.K. Verma and Mr. Vikram Singh Thakur, Dy. Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By medium of this petition, the petitioner has called in question the show cause notice issued by respondent No. 4 on 22.12.2014 under section 16(8) of the Himachal Pradesh Value Added Tax Act, 2005 (for short, H.P. VAT Act, 2005). The petitioner has been asked to personally appear alongwith the relevant documents for the years 2010-2012 to 2014-2015 (up to 30.11.2014) for the reason that petitioner was paying VAT at the rate of 5% on the sale of cellphone chargers and other accessories instead of 13.75%. The petitioner is further aggrieved by the show cause notice dated 30.12.2014 issued under section 46 of the Act by respondent No. 3, which seeks to revise the assessment order dated 16.11.2012 for the year 2011-2012 on the ground that the assessment order is not legal and proper as the same needs to be revised on the grounds that tax on sale of battery charger was levied at 5% whereas the same should have been levied at 13.75% in view of the judgement of Hon'ble Supreme Court in **State of Punjab** vs. **Nokia India Pvt. Ltd. AIR 2015 SC 1068.**

2. The case initially came up before this court on 5.3.2015, on which date the learned counsel for the petitioner was asked to address arguments on the issue of maintainability of the writ petition and the matter was ordered to be listed on 10.3.2015. On 10.3.2015, the petitioner sought adjournment to lay motion for amendment of the writ petition and the case was ordered to be listed on 1.4.2015. On 1.4.2015 notice on the application for amendment was issued and the respondents prayed one week's time to file reply to the application. Thereafter, the matter was ordered to be listed from time to time to consider the application for amendment. By way of amendment, the petitioner has sought to lay challenge to the order passed by respondent No.3 on 3.3.2015 whereby it has been directed to pay a sum of Rs.81,16,112/- (Rupees eighty one lacs sixteen thousands and one hundred twelve) into the appropriate government treasury within 30 days.

3. The learned counsel for the petitioner does not dispute that there is an alternate remedy available by way of an appeal under the H.P. VAT Act 2005, but contends that the same would not operate as a bar for entertainment of a petition under Articles 226, 227 of the Constitution of India. He would contend that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion and this has been so held by this Bench while deciding **CWP No. 4779 of 2014** titled **M/s Indian Technomac Company Ltd.** vs. **State of H.P. & ors. decided on 4.8.2014.** He would further contend that in an appropriate case in spite of availability of alternative remedy, a writ court would still exercise its discretionary jurisdiction of judicial review in the following cases:-

(1) where the writ petitioner seeks enforcement of the Fundamental Right; or

(2) where there is a failure of principle of natural justice; or

(3) where order or proceedings are wholly without jurisdiction or vires of the Act is challenged; or

(4) where the statutory authority has not acted in accordance with the provisions of the enactment in question; or in defiance of the Fundamental principles of judicial procedure.

4. The learned counsel for the petitioner has further argued that the impugned notice dated 22.12.2014 issued by respondent No.4 proposing to levy penalty is without jurisdiction as no notice was issued to assess tax at higher rate and therefore, in the absence of assessment at higher rate, question of imposition of penalty would not arise. He further argued that the impugned order dated 3.3.2015 passed under section 16 pursuant to notice under section 16(8) does not impose penalty but seeks to assess tax at higher rate and in absence of notice in form –XXIX under section 21 read with Rule 67, no assessment could be made and therefore, the impugned order is without jurisdiction as it was issued without following the prescribed procedure. The respondent No. 3, who had passed the impugned order, cannot be regarded as an Assessing Authority under rule 73 and therefore, also the impugned order is without jurisdiction. It is further argued that subsequent judgement of the Hon'ble Supreme Court in **Nokia's** case (supra) cannot be used to change the course of past assessment.

5. On the other hand, the learned Advocate General has strenuously argued that the writ petition is not maintainable since the alternative and efficacious remedy by way of statutory appeal is available to the petitioner under section 45 of the H.P. VAT Act, 2005. He further submits that the writ petition has been filed just to avoid the deposit of tax, which is a pre-condition for the maintainability of the appeal under section 45 (5) of the H.P. VAT Act, 2005. He therefore, prayed for dismissal of the writ petition at the threshold.

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

6. It is not in dispute that respondents No. 3 and 4 are authorities constituted under the H.P. VAT Act, 2005, and therefore, even if it is assumed that there is an illegal or irregular exercise of jurisdiction the same would not result in the order being without jurisdiction. Even if there has been some defect in the procedure followed during the hearing of the case, it does not follow that the authority has acted without jurisdiction. It may make the order irregular or defective, but the order cannot be a nullity so long as it has been passed by an authority which was competent to pass the order. There is basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction and if there is non-compliance of rules of procedure, the same cannot be a ground for granting one of the writs prayed for. In either case, the defect, if any, can according to the procedure established by law be corrected only by a court of appeal or revision.

7. In **Janardhan Reddy & others** vs. **The State of Hyderabad & others AIR 1951 SC 217,** the Hon'ble Supreme Court has held as follows:-

> "6. ……. *But, for the purpose of the present case, it is sufficient to point out that even if we assume that there was some defect in the procedure folld. at the trial, it does not follow that the trial Ct. acted without jurisdiction. There is a basic difference between want of jurisdiction & an illegal or irregular exercise of jurisdiction, & our attention has not been drawn to any authority in which mere non-compliance with the rules of procedure has been made a ground for granting one of the write prayed for. In either case, the 'defect, if any, can according to the procedure established by law be corrected only by a Ct. of appeal or revision. Here, the appellate Ct. which was competent to deal with the matter has pronounced its judgment against the petitioners. & the*

manner having been finally decided is not one to be reopened in a proceeding under Art. 32 of the Constitution."

8. Now in so far as the contention of the petitioner that a subsequent judgement i.e. **Nokia's** case (supra) cannot be used to change the course of past assessment is concerned, it is more than settled that the judgements of the courts declare the law as it was always. Though the courts some time order that the judgements would have prospective effect, but in absence of such restrictions, the law declared by the courts is deemed to be always the law so interpreted i.e. the law as it stood right from the beginning as per its decision.

9. In **Sarwan Kumar and another** vs. **Madan Lal Aggarwal (2003) 4 SCC 147,** the Hon'ble Supreme Court has held as follows:-

"20. ……..When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. In Gian Devi Anand's case (supra) the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled being erroneous. Interpretation given by the Delhi High Court was not legal. The interpretation given by this Court declaring that the commercial tenancies heritable would be the law as it stood from the beginning as per the interpretation put by this Court. It would be deemed that the law was never otherwise."

10. Similarly in **Assistant Commissioner, Income Tax, Rajkot** vs. **Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171,** the Hon'ble Supreme Court has held as follows:-

"35. In our judgment, it is also well- settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a `new rule' but to maintain and expound the `old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

36. Salmond in his well-known work states;

"The theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are res judicatae or accounts that have been settled in the meantime". (emphasis supplied)

11. In so far as the maintainability of the writ petition is concerned, the facts herein are similar to the ones in **M/s Indian Technomac Company Ltd.** case (supra), wherein this court was confronted with the proposition regarding the maintainability of the petition when an alternative remedy existed under the H.P. VAT Act, 2005 and this court held as follows:-

"6. Before we deal with the question of maintainability of the writ petitions, we deem it proper to make a brief reference to the averments contained in the leading writ petition, (CWP No.4779 of 2014), which are, by and large, similar in the other writ petitions. It is averred in the writ petition that the Assessing Authority has not heard the petitioners before making the impugned orders, and thus, have been passed without providing sufficient opportunity of being heard to the writ petitioners. It is also pleaded that the impugned orders have been passed in a biased manner, under the dictation of high officials. It is further pleaded that the impugned orders have been passed without jurisdiction, though, during the course of hearing, as discussed hereinabove, no such argument was advanced to substantiate the fact that the Assessing Authority passed the impugned orders without jurisdiction or that the said Authority has acted with bias.

7. Now, coming to the core question of maintainability of the writ petitions, in terms of the HP VAT Act, 2005, the Assessing Authority is vested with the authority to pass orders and against such orders, provision of appeal is envisaged, and the orders passed in the appeal, are further appealable to the Tribunal. Section 48 of the HP VAT Act, 2005 further provides that the order of the Tribunal can be assailed by way of revision before the High Court.

8. We deem it proper to reproduce Sections 45, 46 and 48 of the HP VAT Act, 2005 here under:

> *"**45**. **Appeal**. - (1) An appeal from every original order passed under this Act or rules made thereunder shall lie-*
>
> *(a) if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner;*
>
> *(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters;*
>
> *(c) if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, to the Tribunal.*
>
> *(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be further appealable to the Tribunal.*
>
> *(3) Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer in-charge of check-post or barrier or any other officer not below the rank of an Excise and Taxation Officer, if not challenged in appeal or revision, shall be final.*

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the Appellate Authority may allow, for reasons to be recorded in writing.

(5) No appeal under sub-section (1) shall be entertained by an Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax (including interest payable) or of the penalty, if any, imposed or both as the case may be:

Provided that if such Authority is satisfied that the dealer is unable to pay the tax (including interest payable) assessed or the penalty, if any, imposed or both, he may, for reasons to be recorded in writing, entertain an appeal without the tax (including interest payable) or penalty or both having been paid in full or after part payment of such tax (including interest payable) or penalty or both.

(6) Subject to such rules of procedure as may be prescribed, an Appellate Authority may pass such order on appeal as it deems just and proper.

***46. Revision**.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:*

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated.

(2) The State Government may, by notification, confer on any officer powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification and such officer shall be deemed to be the Commissioner for the purposes of sub-section (1).

(3) The tribunal, on application made to it against an order of the Commissioner under this section within sixty days from the date of the communication of the order, for the purpose of satisfying itself as to the legality or propriety of such order, may call for and examine the record of any such case and may pass such orders thereon as it thinks just and proper.

(4) No order shall be passed under this section, which adversely affects any person unless such person has been given a reasonable opportunity of being heard.

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***48. Revision to High Court**. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.*

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.

(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:

Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(4) The application for revision under sub-section (1) or the application for stay under sub-section (3) shall be heard and decided by a bench consisting of not less than two judges.

(5) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

9. Provision of sub section (1) of Section 45 of the HP VAT Act, 2005 clearly provides that if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, the appeal against such order shall lie to the Deputy Excise and Taxation Commissioner; if the order is made by the Deputy Excise and Taxation Commissioner, the same can be appealed before the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters; and if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, the same is appealable before the Tribunal. Sub Section (2) of Section 45 of the HP VAT Act, 2005 further provides that an order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be appealable before the Tribunal.

10. Admittedly, the impugned orders, in the present cases, have been issued by the Assistant Excise and Taxation Commissioner-cum-Assessing Authority. Therefore, remedy of appeal is available to the petitioners as per Section 45 of the HP VAT Act, 2005.

11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court, without availing the remedy(ies) provided, must be deprecated, unless express case is made out.

12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> "23. ..... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."
>
> *9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)*
>
> > "11.....The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."
>
> *10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).*
>
> *11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:*
>
> > *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."*
> >
> > xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxxxx
>
> *14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by*

excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee."

13. The Apex Court in **Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1 SCC 603,** has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd.

Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)

> *"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

> *'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New*

Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

> *"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> *'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)*

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta,*

(1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15. The decisions referred to by the learned counsel for the petitioners have been discussed by the Apex Court in the decisions of **Union of India and another vs. Guwahati Carbon Limited, Nivedita Sharma vs. Cellular Operators Association of India and others** and **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal**, referred to hereinabove.

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17. It also appears that these writ petitions are aimed at to give a slip to law for the reason that the petitioners have to deposit the tax liability, alongwith interest payable, as assessed, and penalty, if any, imposed, in terms of Section 45(5) of HP VAT Act, 2005, referred to above, which provides that no appeal has to be entertained unless it is accompanied by satisfactory proof of the payment of tax including interest payable alongwith penalty, if any, imposed, subject to exception provided by proviso to sub section (5) of Section 45 of the HP VAT Act, 2005.

18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

12. The judgement in **M/s Indian Technomac Company Ltd.** case (supra), has attained finality, inasmuch as, the same has been upheld by the Hon'ble Supreme Court vide its order dated 22.8.2014 in SLP (C) Nos. 22626-22641 of 2014.

13. At this stage, we may also take note of recent decision of the Hon'ble Supreme Court in **Union of India and others** vs. **Major General Shri Kant Sharma and another 2015 AIR SCW 2497,** wherein the Hon'ble Supreme Court was confronted with the similar proposition regarding maintainability of writ petition when alternative remedy was available to the aggrieved party under the Armed Forces Tribunal Act and the Hon'ble Supreme Court after making a reference to the judgements as cited in **M/s Indian Technomac Company Ltd.** case (supra) and in addition thereto after taking into consideration the judgement rendered by it in *Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others (2011) 2 SCC 782, Executive Engineer, Southern Electricity Supply Company of Orissa Limited (SOUTHCO) and another vs. Sri Seetaram Rice*

Mill (2012) 2 SCC 108, Cicily Kallarackal vs. Vehicle Factory 2012 (8) SCC 524 and Union of India vs. Brigadier P.S. Gill (2012) 4 SCC 463 culled out the following principles:

> "34. ….(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra (AIR 1997 SC 1125) and S.N. Mukherjee) (AIR 1990 SC 1984).
>
> (ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).
>
> (iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).
>
> (iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma)."

14. Thereafter the Hon'ble Supreme Court further took into consideration the provisions of Article 141 of the Constitution of India and held as follows:-

> "35. ….Article 141. Law declared by Supreme Court to be binding on all courts.-The law declared by the Supreme Court shall be binding on all courts within the territory of India.
>
> 36. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited(SOUTHCO) this Court observed that it should only be for the specialized tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.
>
> In Chhabil Dass Agrawal this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
>
> In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.
>
> In view of Article 141(1) the law as laid down by this Court, as referred above, is binding on all courts of India including the High Courts."

15. The aforesaid exposition of law makes it abundantly clear that where an effective alternative remedy is available to the aggrieved person, a writ petition should not be entertained.

16. Like in **M/s Indian Technomac Company Ltd.** case (supra), this petition also appears to be aimed at to give a slip to law for the reason that the petitioner has to deposit the tax liability alongwith interest payable as assessed and penalty, if any imposed in terms of section 45(5) of the H.P. VAT Act, 2005, which clearly provides that no appeal would be entertained unless it is accompanied by a statutory proof of the payment of tax

including interest payable alongwith penalty, if any subject to the exception provided by proviso to sub-section (5) of section 45 of H.P. VAT Act, 2005.

17. Having said so, we are of the considered view that the writ petitioner has not only an alternative and efficacious, rather a proper remedy under the provisions of H.P. VAT Act, 2005 and therefore, the present petition is not maintainable. Accordingly, the same is dismissed in limine. However, it is made clear that the observations made hereinabove shall not cause any prejudice to the petitioner in case it intends to file an appeal(s) before the prescribed authority and the period spent by the petitioner for prosecuting this petition shall be excluded by the appellate authority while computing the period of limitation.

18. In view of the aforesaid discussion, the writ petition is dismissed in limine alongwith all pending application(s), if any. The parties are left to bear their own costs.

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

1. Cr. Appeal No. 13 of 2008.
2. Cr. Appeal No.272 of 2008
3. Cr. Revision No. 57 of 2008.

Judgment reserved on: 2.6.2015.
Date of Judgment: June 22, 2015.

1.Cr.Appeal No. 13 of 2008.

Dharam Pal and another. .....Appellants.

Vs.

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

For the appellants. Mr.Onkar Jairath, Advocate.
For the respondent: Mr.V.S.Chauhan, Addl. A.G. with Mr.Vikram Singh Thakur Dy. A.G

2.Cr.Appeal No. 272 of 2008

State of HP. ...Appellant

Vs.

Dharam Pal and others ....Respondents.

For the appellant: Mr.V.S.Chauhan, Addl. Advocate General with Mr.Vikram Singh Thakur, Dy. Advocate General.
For respondents 1&2: Mr.Onkar Jairath, Advocate.
For respondent No.3 Mr.Ajay Sharma, Advocate.
For respondent No.4 Mr.Rakesh K.Dogra, Advocate.

3.Cr.Revision No. 57 of 2008.

Prithvi Raj S/o Parma Nand ...Revisionist.

Vs.

Dharam Pal and others. ...Non-revisionists.

For the revisionist: Mr.N.K.Thakur, Sr. Advocate with Mr.Rohit Bharoll, Advocate.
For Non-revisionist No.6 Mr.V.S.Chauhan, Addl. A.G. with Mr.Vikram Singh Thakur, Dy.A.G.
For Non-revisionist-1&2: Mr.Onkar Jairath, Advocate.
For Non-revisionist-3: Mr.Ajay Sharma, Advocate.
For Non-revisionists-4&5: Mr.Rakesh K.Dogra, Advocate.

Indian Penal Code, 1860- Sections 302, 323, 324, 427 and 201- Accused and the deceased went to attend the marriage where accused and deceased had a scuffle – injuries were caused to the deceased with sharp edged weapon- accused pelted stone on the car and damaged window panes- injured was brought to the Civil Hospital where he was declared brought dead- PW-1 specifically stated that when they had placed injured in the car and were taking him to the Hospital, accused did not allow him to take the deceased to the Hospital and they pelted stones on the car- this was corroborated by other witnesses- mere fact that accused had been acquitted for the commission of other offences is no ground to acquit them- related witnesses cannot be called to be interested witnesses- minor contradictions in the testimonies are not sufficient to discredit, the testimonies of the prosecution witnesses when they are examined after considerable lapse of time.

(Para-10 to 17)

Cases referred:

Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs. State of Haryana, AIR 1971 SC 2505
State of HP Vs. Tara Dutt, AIR 2000 SC 297
Sangharabonia Sreenu Vs. State of A.P., 1997 (4) Supreme 214
Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat, 2011 (6) SCC 312
Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh, AIR 1991 SC 1853
Bhajju @ Karan Singh Vs. State of Madhya Pradesh, 2012 (4) SCC 327
Ramesh Harijan Vs. State of Uttar Pradesh, 2012 (5) SCC 777
Bhagwan Singh Vs. State of Haryana, AIR 1976 SC 202
Ravindra Kumar Vs. State of Orissa, AIR 1977 SC 170
Syad Akbar Vs. State of Karnataka, AIR 1979 SC 1848
Surendra Tiwari Vs. State of MP, AIR 1971 SC 1853
State of Rajasthan Vs. Kalki and another, AIR 1981 SC 1390
Anjlus Dungdung Vs. State of Jharkhand, 2005 (9) SCC 765
Nanhar Vs. State of Haryana, 2010 (11) SCC 423
State (Delhi Administration) Vs. Gulzarilal Tandon, AIR 1979 SC 1382
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
Babbo and others Vs. State of Madhya Pradesh, AIR 1979 SC 1042

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Criminal Appeal No. 13 of 2008 titled Dharam Pal and another Vs. State of HP, Criminal Appeal No. 272 of 2008 titled State of HP Vs. Dharam Pal and others and Criminal Revision No. 57 of 2008 titled Prithvi Raj Vs. Dharam Pal and others are filed against the same judgment and sentence passed by learned Additional Sessions Judge Fast Track Court Una District Una HP in Sessions case No. 12 of 2007 titled State of HP Vs. Dharam Pal and others decided on 31.12.2007. In order to avoid conflict judgment Criminal Appeal No. 13 of 2008, Criminal Appeal No.272 of 2008 and Cr. Revision No. 57 of 2008 are consolidated for disposal.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of case as alleged by prosecution are that on dated 21.6.2007 at about 11.30 pm at village Badhmana Tehsil Amb District Una HP accused persons in

furtherance of common intention committed murder of Sunil Dutt by way of causing his death. It is further alleged by prosecution that on the same date, time and place accused persons in furtherance of common intention caused simple injuries to Ritender Singh, Sitender, Atul Kumar and Mukal Sood by way of beating them. It is further alleged by prosecution that accused persons in furtherance of common intention voluntarily caused hurt to Ritender Singh with sharp edged weapon. It is further alleged by prosecution that at the same date, time and place accused persons committed mischief by causing damage to maruti car of Jiwan Singh bearing registration No. HP-19A-4696. It is further alleged by prosecution that marriage of one Raj Kumar resident of Amb took place on dated 21.6.2007 at village Badhmana Tehsil Amb District Una. It is further alleged by prosecution that marriage party reached at village Badhmana at about 10 PM and marriage was also attended by the friends of Raj Kumar namely Mukal Sood, Ritender Singh, Sitender and Atul Kumar and deceased Sunil Kumar. It is further alleged by prosecution that they have gone to village Badhmana in a car bearing registration No. HP-19-4696 and reached at Badhmana at about 10.30 PM. It is further alleged by prosecution that thereafter they met with bridegroom and his father who asked them to take dinner and thereafter all of them except Vineet Kumar went to the house of bride to take meals. It is further alleged by prosecution that there was rush at the dinning place and they were asked by the people from bride side to sit in the verandah on the roof of bride house. It is further alleged by prosecution that co-accused Dharam Pal along with his two children and two other persons were also sitting on the roof of house. It is further alleged by prosecution that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of their football team. It is further alleged by prosecution that thereafter co-accused Dharam Pal did not respond and thereafter deceased Sunil Kumar asked co-accused Dharam Pal whether he was angry with him upon which co-accused Dharam Pal told to deceased Sunil Kumar that he was not angry and he shook hands with deceased Sunil Kumar. It is further alleged by prosecution that thereafter there was a call for dinner and the persons sitting on the roof of house started coming down and while coming down co-accused Dharam Pal pushed deceased Sunil Kumar due to which altercation took place between them and there was a scuffle between Dharam Pal and Ritender Singh but they were separated by PW4 Gurpiara. It is further alleged by prosecution that thereafter co-accused Dharam Pal called other persons present in the court yard and thereafter co-accused Ajit Kumar, Sanjiv Kumar @ Happy and some other persons came there and thereafter co-accused Dharam Pal and co-accused Ajit Kumar beaten deceased Sunil Kumar and co-accused Kewal Krishan and Sanjeev Kumar have beaten Mukal Sood, Ritender Singh Sitender and Atul Kumar. It is further alleged by prosecution that thereafter co-accused Dharam Pal caused injury to deceased Sunil Kumar with sharp edged weapon in his chest and blood started oozing out from the chest of deceased Sunil Kumar. It is further alleged by prosecution that thereafter Mukal Sood, Satinder and Atul Kumar brought deceased Sunil Kumar to road side and as soon as the injured was placed in a car co-accused Dharam Pal, co-accused Ajit Kumar, co-accused Kewal Krishan and one Rajiv Kumar resisted and pelted stones on car and broken window panes of car. It is further alleged by prosecution that thereafter injured was brought to civil hospital Chintpurni but hospital was closed and thereafter injured was brought to civil hospital Amb where the doctor declared him dead and informed police officials. Charges were framed by learned Additional Sessions Judge Una on dated 10.10.2007. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined following oral witnesses in support of its case:

Sr.No.	Name of Witness
PW1	Mukal Sood

PW2	Satinder Kumar
PW3	Atul
PW4	Gurpiara
PW5	Jagish Ram@ Kaka
PW6	Ratinder Singh
PW7	Dhani Ram
PW8	Rajesh Kumar
PW9	H.C. Rajesh Kumar
PW10	Sh. Ashok Kumar
PW11	H.C. Pawan Kumar
PW12	Dr. S.K. Bansal
PW13	Sh. Kuldeep Chand
PW14	Sh. Makhan Singh
PW15	Sh. Krishan Dutt
PW16	Dr. R.K. Garg
PW17	Dr. M.K. Pathak
PW18	M.H.C. Kusha Dutt
PW19	HHC Ashwani Kumar
PW20	HHC Sarup Lal
PW21	Inspector Mehar Chand

4. Prosecution also produced following piece of documentary evidence in support of its case:-

Sr.No.	Description:
Ex. PW 1/A	Statement of Mukal Sood u/s 154 Cr.P.C.
Ex. PW 1/B	Memo recovery Maruti Car No. Hp.19-a-4696 along with RC /IC and key.
Ex. PW 8/A	Memo recovery of blood
Ex. PW 9/A	Memo recovery of pant and shirt
Ex. PW 10/A	Memo recovery of pant, shirt and vest.
Ex. PW 10/B	Memo regarding disclosure statement of co-accused Ajit Kumar.
Ex. PW 11/A	Memo recovery blood stained knife (iron)
Ex. PW 12/A	Report FSL, Junga
Ex. PW 12/B	Post Mortem Report
Ex. PW 12/C	Application for conducting post Mortem
Ex. PW 13/A	Rough sketch of weapon of offence
Ex. PW 16/A	Application for medical examination of Mukal Sood.
Ex. PW 16/B	MLC of Mukal Sood.
Ex. PW 16/C&D	Application for medical and MLC of Satinder
Ex. PW 16/E&F	Application and medical of Atul Kumar.
Ex. PW 16/G&H	Application and MLC of Ritender Singh.
Ex. PW 16/J&K	Application for medical and MLC of Dharam Pal
Ex. PW 16/L	MLC of Ajit Kumar

Ex. PW 20/A	Mechanical report of accidental vehicle.
Ex. PW 21/A	Rapat No. 25 dated 22.6.2007
Ex. PW 21/B	Death Report(Form No 25,35)
Ex.PW 21/C & 21/E	Statement of Mukal Sood u/s 154 Cr.P.C
Ex. PW 21/D	FIR
Ex. PW 21/F,G	Site Plans
Ext PW21/H&J	Information of arrest.
Ex. PW 21,1/4K	Application for taking blood sample.
Ex.PW 21,1/4 L to R	Statements of PW Mukal Sood Ratinder Singh, Satinder, Atul Kumar, Gurpiara, Jagdish and Dhani Ram u/s 161 Cr.P.C
Ex. PW 21/S & 1/T	Report FSL Junga
Ex. PW 21/U	Statement of Makhan Singh u/s 161 Cr.P.C.
Ex. PW 21/V	Site Plan of House of Gurbux Singh
Ex. PW 21/Wto Z	Seal impression
Ext PW21/1 to 25	Photographs & negatives of photographs.

5. Learned trial Court acquitted co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan qua criminal offence punishable under Sections 302, 323 and 324 IPC. Learned trial Court convicted co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan qua criminal offence punishable under Section 427 IPC. Learned trial Court acquitted co-accused Gurbax Singh and co-accused Rukam Deen qua criminal offence punishable under Section 201 IPC. Learned trial Court after hearing convicted persons upon quantum of sentence observed that co-accused Dharam Pal and co-accused Ajit Kumar were arrested on dated 23.6.2007 and co-accused Kewal Krishan was arrested on dated 26.6.2007. Learned trial Court further held that all the convicted persons were in judicial custody for more than six months. Learned trial Court sentenced all the convicted persons to imprisonment for the period which they have already undergone in judicial custody and in addition learned trial Court sentenced all convicted persons to pay fine to the tune of Rs.2,000/- each. Learned trial Court further directed that in default of payment of fine convicted persons would go simple imprisonment for a period of one month.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court Criminal Appeal No. 13 of 2008, Criminal Appeal No. 272 of 2008 and Criminal Revision No. 57 of 2008 were filed.

7. We have heard learned Advocates and learned Additional Advocate General and we have also gone through the entire record carefully.

8. Point for determination before us is whether learned trial court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Mukal Sood has stated that he is running a shop of ready made garments at Amb. He has stated that on dated 21.6.2007 he along with his friends Rocky, Bantu, Atul, Vaneet and Sunil went to the house of his friend namely Raj Kumar at Amb to attend his marriage at about 7.30 pm. He has stated that when they reached there at that time marriage party had already moved for village Badhmana. He has stated that thereafter

they went to village Badhmana and reached Badhmana at about 10.30 pm. He has stated that firstly they met the bridegroom and his father who asked them to take dinner in the house of bride. He has stated that thereafter they all went to the house of bride. He has stated that there was rush at the dinning place and they were asked by the people from bride side to go to upstairs and wait there for some time. He has stated that brother of bridegroom and co-accused Dharam Pal and 2/3 other persons were sitting upon the roof of house and they shook hands with the brother of bridegroom. He has stated that deceased Sunil Kumar told them that co-accused Dharam Pal was the captain of football team in their school. He has stated that thereafter deceased Sunil Kumar went near to co-accused Dharam Pal and inquired from him whether he was angry with deceased Sunil Kumar upon which co-accused Dharam Pal told that he was not angry with deceased Sunil Kumar. He has stated that thereafter co-accused Dharam Pal started moving downward to take meal and after him deceased Sunil Kumar and Bantu also started moving downward to take meal. He has stated that after two minutes he heard that fight took place and he rushed towards the spot of quarrel and saw that Bantu and co-accused Dharam Pal were quarrelling with each other while deceased Sunil Kumar was trying to separate them. He has stated that thereafter co-accused Dharam Pal raised cries and thereafter 10/15 boys came on the roof and without listening anything started beating them. He has stated that those persons beaten him, Rocky, Bantu, Atul and Sunil. He has stated that in the meanwhile he saw that deceased Sunil Kumar was sitting on the chair and Sunil Kumar told him that co-accused Dharam Pal had given serious injury to him with sharp edged weapon. He has stated that Sunil Kumar told him to take him to hospital for medical treatment. He has stated that he had not seen who had caused injury to deceased Sunil Kumar. He has stated that thereafter they placed the injured in a car. He has stated that when they started moving from the place of incident co-accused Dharam Pal, co-accused Kewal Krishan and younger brother of Dharam Pal present in Court did not allow them to take the injured to hospital and they broken window panes of the vehicle with the help of stones. He has stated that one of the accused person dragged deceased Sunil Kumar out side the car and they again managed to place deceased Sunil Kumar in the car. He has stated that thereafter deceased Sunil Kumar was brought to hospital at Chintpurni. He has stated that hospital at Chintpurni was closed and they brought deceased Sunil Kumar to hospital at Amb. He has stated that deceased Sunil Kumar was declared dead. He has stated that thereafter police officials visited at the spot and recorded his statement Ext PW1/A which bears his signature. He has stated that during the investigation car having registration No. HP-19A-4696 with broken window panes took into possession vide seizure memo Ext PW1/B which bears his signature. He has stated that he did not see anybody inflicting injury upon deceased Sunil Kumar. Witness was declared hostile by prosecution and witness was cross-examined. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar have inflicted injury upon deceased Sunil Kumar with sharp edged weapon. He has denied suggestion that he had suppressed the facts of causing injury to deceased Sunil Kumar by co-accused Dharam Pal. He has denied suggestion that he had compromised the matter with accused persons. He has stated that 300/400 persons were present in the marriage ceremony. He has denied suggestion that accused persons did not hurl any bricks upon car.

9.2 PW2 Satinder Kumar has stated that he is running a cloth shop at Amb. He has stated that on dated 21.6.2007 he along with Ratinder, Atul, Sunil, Vaneet and Mukal Sood went to village Badhmana to attend the marriage of his friend Raj Kumar. He has stated that they reached at village Badhmana at about 10.30 pm. He has stated that they firstly met Raj Kumar and his father and thereafter they went to bride house to take meals. He has stated that when they reached in the house of bride they were told that there was no space for taking meal and they were requested to go to upper portion of house and sat on the chair. He has stated that he and deceased Sunil Kumar asked co-accused Dharam Pal

as to why he was not talking with them. He has stated that thereafter co-accused Dharam Pal told that there was nothing and he shook hands with him. He has stated that in the meanwhile there was a call for dinner upon which co-accused Dharam Pal came down from upper portion of house. He has stated that thereafter his brother Bantu also came down. He has stated that thereafter quarrel took place between co-accused Dharam Pal and deceased Sunil Kumar and one person separated them. He has stated that some noise came that quarrel took place but he does not know what happened. He has stated that thereafter he saw that deceased Sunil Kumar was in injured condition and he was sitting on the chair. He has stated that he does not know who had inflicted injuries upon deceased Sunil Kumar. He has stated that thereafter injured was brought to a car and took him to hospital for medical treatment. He has stated that co-accused Dharam Pal, brother of co-accused Dharam Pal and co-accused Kewal Krishan pelted stones upon car and obstructed them and they broken window panes of the car. He has stated that thereafter they took injured to hospital at Chintpurni but the hospital was closed and thereafter injured was brought to civil hospital at Amb where deceased Sunil Kumar was declared dead by medical officer. He has stated that during investigation he produced his car to the investigating agency along with documents which were took into possession vide seizure memo Ext PW1/B which bears his signature. He has stated that he does not know who had caused injury to deceased Sunil Kumar. Witness was declared hostile by prosecution. He has denied suggestion that co-accused Dharam Pal had caused injury upon deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that co-accused Dharam Pal had pushed deceased Sunil Kumar with his shoulder. He has denied suggestion that he had entered into compromise with co-accused Dharam Pal. He has stated that he identified co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan in Court. He has denied suggestion that co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan did not hurl any stones on the car. He has denied suggestion that he deposed falsely regarding pelting stones by accused persons.

9.3. PW3 Atul has stated that he is shopkeeper at Amb. He has stated that on dated 21.6.2007 he along with Ratinder, Satinder, Sunil Kumar, Vaneet and Mukal Sood went to village Badhmana to attend the marriage of Raj Kumar in a car and they reached there at about 10 pm. and after meeting with Raj Kumar and his father they went to the house of bride to take meals. He has stated that there was rush of people who were taking meals on the ground floor of the house and they were asked to sit upon upper portion of house. He has stated that on the upper portion of house co-accused Dharam Pal, his children and 3/4 other persons were already sitting on the upper portion of house. He has stated that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of football team in the school but co-accused Dharam Pal was not talking with them. He has stated that thereafter co-accused Dharam Pal came and shook hands with deceased Sunil Kumar. He has stated that thereafter a call came to take meal and thereafter co-accused Dharam Pal came down along with Bantu and Sunil Kumar. He has stated that in the meanwhile he heard noise that quarrel took place and he came down and separated co-accused Dharam Pal and Bantu. He has stated that thereafter somebody slept deceased Sunil Kumar. He has stated that thereafter some persons came at upper portion of house and also beaten them. He has stated that deceased Sunil Kumar had sustained serious injuries and he was brought down and was placed in car. He has stated that as soon as deceased Sunil Kumar was placed in car co-accused Dharam Pal and other persons did not allow them to go ahead. He has stated that thereafter co-accused Dharam Pal and co-accused Ajit Kumar and some other persons whom he does not know pelted stones on car. He has stated that ultimately they took deceased Sunil Kumar to hospital. He has stated that hospital at Chintpurni was closed and thereafter deceased Sunil Kumar was brought to hospital at Amb. He has stated that he does know who had caused injury to deceased Sunil

Kumar. Witness was declared hostile. He has denied suggestion that co-accused Dharam Pal had caused injury upon deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that he had not disclosed the name of co-accused Dharam Pal as assailant in order to save him. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar did not try to stop car.

9.4 PW4 Gurpiara has stated that he is working with M/s Ashok Kumar Satish Kumar merchant at Amb. He has stated that Raj Kumar is his nephew and his marriage took place on dated 21.6.2007. He has stated that on dated 21.6.2007 he went to village Badhmana with marriage party and reached there at about 9.30 pm. He has stated that after receipt of marriage party from the side of bride they were requested to take dinner. He has stated that after taking dinner he along with one of his relative who was about 75 years of age went to the upper portion of house. He has stated that 4/5 persons were already sitting on upper portion of house. He has stated that Banti and Pawan started quarrelling and he asked them not to quarrel. He has stated that he was told by Banti that his sandal was lost. He has stated that in the meantime number of persons came to upper portion of house from down side and they were quarrelling with each other. He has stated that he does not know what happened thereafter. Witness was declared hostile and was cross examined. He has stated that he heard noise of breaking of window of panes car. He has admitted that in the morning they heard that Sunil Kumar had died. He has denied suggestion that he had suppressed material facts from the Court just to save accused persons. He has stated that he came back in the morning from house of bride.

9.5 PW5 Jagdish Ram has stated that he is running a shop at Amb. He has stated that on dated 21.6.2007 there was marriage of his brother Raj Kumar. He has stated that marriage party had gone to village Badhmana and they reached there at about 9.30 pm. He has stated that he was also one of the members of marriage party. He has stated that after some marriage ceremony they were asked to take dinner in the house of bride. He has stated that since there was no space for dinner they were asked to wait and sat on upper portion of house. He has stated that numbers of people were sitting on the upper portion of house including co-accused Dharam Pal and co-accused Ajit Kumar. He has stated that co-accused Kewal Krishan was not present on the upper portion of house. Witness was declared hostile. He has denied suggestion that deceased Sunil Kumar was sitting on the chair in an injured condition. He has denied suggestion that co-accused Kewal Krishan was sitting on upper portion of house along with co-accused Dharam Pal. He has denied suggestion that co-accused Dharam Pal had caused injury to deceased Sunil Kumar with sharp edged weapon. He has denied suggestion that he has resiled from his earlier statement in order to save accused persons. He has admitted that co-accused Dharam Pal and his two small children were present.

9.6 PW6 Ratinder Singh has stated that he is working as Assistant Secretary co-operative society Amb. He has stated that on dated 21.6.2007 he along with his brother Satinder, Atul, Mukal Sood, Vineet Kumar and Sunil Kumar went to village Badhmana to attend marriage of Raj Kumar. He has stated that they reached at about 10 pm at village Badhmana and met bridegroom and his father and went to the house of bride to take meals. He has stated that there was crowd of people who were taking meals and they were sent upstairs to wait for taking meals. He has stated that on upper portion of house co-accused Dharam Pal, co-accused Kewal Krishan, one Jagdish and other persons were already sitting there. He has stated that deceased Sunil Kumar told that co-accused Dharam Pal was the captain of football team of their school but he was not talking with deceased Sunil Kumar. He has stated that in the meanwhile co-accused Dharam Pal came to deceased Sunil Kumar and shook hands with him. He has stated that thereafter call came for dinner and co-

accused Dharam Pal and others went downward to take dinner. He has stated that thereafter he along with Sunil Kumar, Atul, Satinder and Mukal also went downward for taking meals and when they were going downward then co-accused Dharam Pal came upward and pushed Sunil Kumar who fell down. He has stated that thereafter he and co-accused Dharam Pal started hot exchanges and thereafter they came to the blows. He has stated that in the meanwhile Gurpiara came on the roof and separated them. He has stated that his sandal was lost somewhere. He has stated that thereafter Atul and Satinder handed over sandal to him. He has stated that thereafter they were going downward through stairs then Happy, Kewal Krishan and Ajit came upward and they started beating deceased Sunil Kumar and four other persons have also beaten them. He has stated that he does not know what happened thereafter. He has stated that deceased Sunil Kumar was sitting on the chair and he requested to bring car to take deceased Sunil Kumar to hospital. He has stated that thereafter he brought car. He has stated that Mukal, Atul and Satinder brought deceased Sunil Kumar to the car. He has stated that co-accused Dharam Pal, co-accused Ajit Kumar and co-accused Kewal Krishan started pelting stones on the car. He has stated that thereafter they placed deceased Sunil Kumar in car with great struggle and took him to hospital at Chintpurni which was locked. He has stated that thereafter deceased Sunil Kumar was brought to Amb hospital. He has stated that during investigation police officials took into possession car vide memo Ext PW1/B. He has stated that he did not see any injury given to deceased Sunil Kumar. Witness was declared hostile. He has denied suggestion that co-accused Dharam Pal or his brother Ajit Kumar have given injury on the chest of deceased Sunil Kumar. He has denied suggestion that co-accused Dharam Pal had given blows to deceased Sunil Kumar with sharp edged weapon in his presence. He has denied suggestion that he had resiled from his earlier statement because he has compromised with accused persons. He has denied suggestion that he deposed falsely regarding pelting of stones on the car by accused persons.

9.7. PW7 Dhani Ram has stated that he is working as Chowkidar in Gram Panchayat Amb. He has stated that Raj Kumar is his younger son. He has stated that on dated 21.6.2007 marriage of his son Raj Kumar was solemnized at village Badhmana. He has stated that marriage party reached at about 10 pm. He has stated that some friends of his son were also present in the marriage party but he does not know their names. He has stated that after performing some marriage ceremony they went to the house of bride for taking meal. He has stated that some people have started consuming meal but due to rush other persons were asked to take meal after some time. He has stated that after taking meal he along with some other members of marriage party proceeded towards 'Dera' (Place for the stay of marriage party). He has stated that he heard noise and fight and thereafter he was asked by his brother-in-law to go and see what had happened. He has stated that he did not see anything. He has admitted that marriage was attended by the friends of his son namely Ratinder, Satinder, Atul, Sunil, Vaneet and Mukal Sood. He has admitted that he heard noise and fight from the roof of house. He has denied suggestion that he was informed that co-accused Dharam Pal and co-accused Ajit Kumar caused injury upon deceased Sunil Kumar with sharp edged weapon. He has stated that he could not state that co-accused Dharam Pal, co-accused Ajit Kumar and one Happy along with other persons pelted stones on the car in which deceased Sunil Kumar was taken to hospital. He has stated that stones were pelted on the car but he does not know who pelted stones. He has stated that he does not know that Ratinder and Satinder were also beaten by accused persons. He has admitted that co-accused Dharam Pal and co-accused Ajit Kumar are his relatives and he has good relation with them. He has denied suggestion that he deposed falsely in order to save accused persons being his relatives.

9.8 PW8 Rajesh Kumar son of Amar Singh has stated that he was associated in the investigation of present case. He has stated that in his presence the investigating agency collected blood from the pillar and from leg of chair from the house of Gurbax Singh and thereafter the same was placed in small bottle which was sealed with seal impression 'M'. He has stated that thereafter blood taken from the leg of chair was placed in match box and sealed with seal impression 'M'. He has stated that memo Ext PW8/A was prepared which bears his signature.

9.9 PW9 Rajesh Kumar HC has stated that he was posted as Head Constable in police station Amb in the year 2005. He has stated that on dated 22.6.2007 he was associated in the investigation of present case. He has stated that on the same day Satinder Singh produced car having registration No. HP-19A-4696 along with documents and key. He has stated that front panes of the car were broken. He has stated that there were pieces of glass, stones and one shoe of right foot in the car. He has stated that Investigating Officer took into possession all the articles vide seizure memo Ext PW1/B. He has stated that stones Ext P3, pieces of glass Ext P4 and shoes Ext P5 are the same which were took into possession by Investigating Officer in his presence. He has stated that on dated 23.6.2007 co-accused Ajit Kumar had produced his clothes to investigating agency in his presence which were took into possession vide memo Ext PW9/A. He has stated that pant Ext P6 and shirt Ext P7 are the same which were produced by co-accused Ajit Kumar before investigating agency. He has denied suggestion that nothing was produced in his presence. He has denied suggestion that clothes Ext P6 and Ext P7 did not belong to co-accused Ajit Kumar. He has denied suggestion that he deposed falsely being police official.

9.10. PW10 Ashok Kumar has stated that on dated 23.6.2007 he joined investigation in the present case. He has stated that in his presence police officials took into possession clothes of co-accused Ajit Kumar. He has stated that clothes of co-accused Dharam Pal were also took into possession by investigating agency in his presence. He has stated that co-accused Dharam Pal produced shirt, pant and undergarments which were torn from left shoulder. He has stated that clothes of co-accused Dharam Pal were sealed by investigating agency in a sealed parcel with seal impression 'MC' and memo Ext PW10/A was prepared. He has stated that shirt Ext P8, pant Ext P9 and undergarments Ext P10 are the same which were produced before investigating agency by co-accused Dharam Pal. He has stated that co-accused Ajit Kumar had made disclosure statement to investigating agency in his presence that he had concealed knife in the bushes and he could recover the same. He has stated that disclosure statement bears his signature. He has denied suggestion that co-accused Ajit Kumar did not give any disclosure statement to investigating agency regarding recovery of knife. He has denied suggestion that co-accused Dharam Pal and co-accused Ajit Kumar did not produce any clothes to investigating agency in his presence.

9.11. PW11 Pawan Kumar has stated that on dated 22.6.2007 he was associated in the investigation of present case. He has stated that Satinder Kumar produced his car along with documents and key to the investigating agency. He has stated that in the car there were stones, broken pieces of glass and shoes which were took into possession by investigating agency vide recovery memo Ext PW1/B. He has stated that stones Ext P3, pieces of glass Ext P4 and shoes Ext P5 are the same. He has stated that co-accused Ajit Kumar led police officials to the bushes behind the house of Gurbax Singh and thereafter knife stained with blood was recovered. He has stated that photographs were also obtained and sketch of knife was also prepared. He has stated that knife Ext P11 was recovered at the instance of co-accused Ajit Kumar. He has denied suggestion that alleged place of recovery

was field. He has denied suggestion that alleged place of recovery was approachable to all. He has denied suggestion that no recovery was effected in his presence.

9.12. PW12 Dr.S.K.Bansal has stated that he was posted as medical officer District Hospital Una since 2002. He has stated that on dated 22.6.2007 at about 4.30 pm he conducted post mortem of deceased Sunil Kumar and observed as follow: "Moderately built, moderately nourished, intact body of adult male rigor mortis present, Post mortem staining present over dependant parts. 2.5" wound with clear cut margins present in left fifth intercostals' space. Wound was gapping margins were retracted, copious blood present at wound site. Wound was penetrating in nature 10 CM deep. Cranium and spinal cord within normal limits. 2.5" cut wound present over left side chest, left lung had 1.5cm ruptured wound at level of apex of heart. Apex PF heart has a punctured wound of 1cm x 0.5cm in size about two liters of clotted blood was present in thoracic cavity surrounding the heart and abdomen within normal limits." He has stated that deceased Sunil Kumar died due to rupture of left lung and heart leading to massive loss of blood and due to hemorrhage shock. He has stated that time between injury and death within few minutes and time within death and post mortem within 24 hours. He has stated that no poison was detected in the viscera as per report of chemical analyst Ext PW12/A. He has stated that he issued post mortem report Ext PW12/B which bears his signature. He has stated that injury on the person of deceased Sunil Kumar is not possible with knife Ext P11 shown to him in Court. He has denied suggestion that width of wound has been wrongly written as 2.5" in place of 2.5 cm. He has admitted that Dr. Umesh Gautam was also member of the board and he also signed post mortem report Ext PW12/B. He has admitted that dead body was having only one injury which was possible with one blow.

9.13. PW13 Kuldeep Chand has stated that he is agriculturist by profession and Ex-Pradhan Gram Panchayat Indora. He has stated that on dated 26.6.2007 he was associated in the investigation of present case. He has stated that co-accused Ajit Kumar was present in police station. He has stated that knife was recovered at the instance of co-accused Ajit Kumar. He has stated that knife was placed in a cloth parcel and sealed with seal impression 'J'. He has stated that knife Ext P11 is the same. He has denied suggestion that behind the house of Gurbax Singh there is open field. He has denied suggestion that place of recovery was open and approachable to all. He has denied suggestion that no recovery was effected in his presence. He has denied suggestion that he deposed falsely at the instance of police officials.

9.14. PW14 Makhan Singh has stated that he is labourer by profession. He has stated that he is residing at village Darwari. He has stated that Jaswant Singh and Gurbax Singh are running a tent house at Jallo-de-bar. He has stated that he was engaged by Jaswant Singh and Gurbax Singh to fix tent in the house of Jaswant Singh. He has stated that marriage party reached at about 10 pm in the house of Jaswant Singh at village Badhmana. He has stated that he arranged lights in the passage. He has stated that when they were in the field they heard noise of fight amongst marriage party on roof of the house of Jaswant Singh. He has stated that place where the fight was going was not visible from the field where he was present. He has stated that he did not visit the place of fight. He has stated that thereafter marriage party left the place and they went upstairs and saw that some blood was lying on the leg of chair. He has stated that he does not know who washed blood from that place. He has denied suggestion that at the time of fight he was present at the spot. He has denied suggestion that he was arranging chairs and meals on the roof of house. He has denied suggestion that in his presence some boys took injured to down side from the roof and placed injured in car. He has denied suggestion that when injured was placed in car then accused persons hurled stones on the car. He has denied suggestion that

father of bride had washed blood from chair, pillar and roof of the house through co-accused Rukam Deen. He has stated that he does not know accused persons present in Court. He has denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.15. PW15 Krishan Dutt has stated that he joined investigation in present case. He has stated that on dated 26.6.2007 co-accused Ajit Kumar was in police custody. He has stated that in his presence he disclosed that he had concealed knife behind bushes at village Badhmana. He has stated that disclosure statement Ext PW10/B was prepared by investigating agency which bears his signature. He has stated that deceased Sunil Kumar was his relative. He has stated that he did not attend marriage in which alleged occurrence took place. He has denied suggestion that co-accused Ajit Kumar did not give any disclosure statement. He has denied suggestion that he deposed falsely because he is relative of deceased Sunil Kumar. He has stated that co-accused Ajit Kumar was not known to him earlier.

9.16. PW16 Dr.R.K.Garg has stated that he was posted at CHC Amb in the year 2000. He has stated that he medically examined Mukal son of Sandeep Sood on dated 22.6.2007 at 7.10 pm and found following injuries. (1) 10 cm long abrasion with bruises was seen on the back of neck extending up to lateral side of neck. (2) Left elbow had multiple small wound on the postrial side. Swelling was present. X-ray was advised. (3) Blunt trauma to the left knee joint on lateral side. He has stated that injured person refused to get X-ray conducted. He has stated that all the injuries were opined as simple caused with blunt object with probable duration of 10 to 24 hours. He has stated that he issued MLC Ext PW16/B which bears his signature. He has stated that on the same day as per request of investigating agency he also medically examined Satinder and found following injuries. (1). Right hand ring finger has penetrating wound on both sides. Wound had stated crushed formation. (2) Two lines parallel bruises was seen on the upper arm biceps region. (3) A small abrasion on the both fore arm 4 to 6 cms and lungs were present. (4) Blunt trauma to the left ear with hearing loss. He has stated that injuries No. 1 to 3 were simple in nature caused with blunt weapon with probable duration of 12 to 24 hours. He has stated that as per N&T Surgeon injury No.4 was simple in nature. He has stated that he issued MLC Ext. PW16/D. He has stated that on the same day on the application of investigating agency he also examined Atul Kumar and observed that multiple small bruise area were seen on the back. He has stated that all injuries were simple in nature caused with blunt weapon. He has issued MLC Ext PW16/F. He has stated that on the same day he also examined Ratinder Singh and observed (1) 1 cm long cut and incised wound on the right elbow (2) 1 cm long cut and incised wound on the left thigh upper area were present. He has stated that both injuries were simple caused with sharp edged weapon. He has stated that probable duration was 12 to 24 hours. He has stated that he issued MLC Ext PW16/H which bears his signature. He has stated that injuries on the persons of Mukal, Atul and Satinder could be caused during scuffle with fist and kick blows. He has stated that injuries on the person of Ratinder Singh could be caused if person strike against sharp object iron angle during scuffle. He has stated that injuries on the person of Ratinder Singh were superficial and skin deep. He has stated that possibility of self inflicted injuries on the person of Ratinder Singh could not be ruled out. He has stated that he also examined co-accused Dharam Pal and found following injuries. (1) Multiple small abrasion on the right side of neck with crushed formation was seen. (2) A small abrasion on the upper lip right side no swelling was seen. (3) Blunt trauma to the left eyebrow area. No swelling was seen. (4) Patient was complaining of pain on whole of scalp. No loose hairs were present. (5) Blunt trauma to the right thigh. (6) Blunt trauma to the right elbow and right hand. He has stated that all injuries were simple in nature with duration of 2 to 3 days caused with blunt weapon. He has stated that he

issued MLC Ext PW16/K which bears his signature. He has stated that on the same day he also examined co-accused Ajit Kumar and found no injury on his person. He has stated that he issued MLC Ext PW16/L which bears his signature. He has stated that injuries could be caused if person fell on hard surface while running. He has stated that injuries No.3,4,5 and 6 are not visible injuries. He has stated that injury No.1 could be caused if person is caught from neck. He has stated that emergency service is provided round the clock at CHC Amb and CH Chintpurni.

9.17. PW17 Dr.M.K.Pathak SMO has stated that he was posted at regional hospital Una since 2004. He has stated that on dated 16.7.2007 the then SMO Una directed him to collect DNA sample of Prithvi Raj and his wife Kashmiro Devi. He has stated that above named persons were identified by police officials and thereafter he got sample collected through laboratory technician under his supervision and got them properly sealed and thereafter handed over the same to police officials. He has stated that while collecting sample he had properly followed the procedure.

9.18. PW18 Kusha Dutt has stated that he remained posted as MHC Police Station Amb since February 2007. He has stated that on dated 22.6.2007 Inspector Mehar Chand SHO police station Amb deposited with him one sealed parcel containing match box, one bottle containing blood sealed with seal impression 'M', one sealed parcel containing clothes of deceased Sunil Kumar and one sealed parcel containing viscera of deceased Sunil Kumar. He has stated that on dated 23.6.2007 one sealed parcel containing clothes of co-accused Ajit Kumar sealed with seal impression 'T' and one sealed parcel of blood stained clothes of co-accused Dharam Pal were deposited with him. He has stated that on dated 26.6.2007 one sealed parcel containing knife weapon of offence sealed with seal impression 'J' were deposited with him. He has stated that on dated 16.7.2007 blood sample of Prithvi Raj and Kashmiro Devi sealed with seal of mortuary Una were also deposited with him. He has stated that blood sample of parents of deceased Sunil Kumar and sealed parcel of blood stained clothes of co-accused Dharam Pal were sent for DNA test through MHC Ashwani Kumar vide RC No. 132 of 2007 on dated 17.7.2007 to CFSL Chandigarh. He has stated that HHC Ashwani Kumar on dated 17.7.2007 after depositing the same at CSFL Chandigarh handed over RC to him. He has stated that sealed parcels containing match box and bottle having blood, blood stained clothes of co-accused Ajit Kumar, one parcel containing knife, one sealed parcel containing blood stained clothes of deceased Sunil Kumar and one sealed parcel containing viscera of deceased Sunil Kumar were sent to FSL Junga vide RC No. 134 of 2007 through constable Ram Kishore. He has stated that case property remained intact in his custody. He has denied suggestion that he deposed falsely in Court. He has stated that his statement was not recorded by Investigating Officer on the day when case property was deposited with him.

9.19. PW19 Ashwani Kumar has stated that he remained posted in police station Amb for the last two years. He has stated that on dated 17.7.2007 MHC Kusha Dutt police station Amb handed over one sealed parcel containing blood sample of parents of deceased Sunil Kumar, one blotting paper sealed with seal of mortuary Una containing an ice box and one sealed parcel containing blood stained clothes of co-accused Dharam Pal sealed with seal 'MC' along with papers for depositing the same at CFSL Chandigarh. He has stated that he deposited the same at CFSL Chandigarh and returned RC to MHC Amb. He has stated that sealed parcels remained intact in his custody.

9.20. PW20 Sarup Lal has stated that he was posted as Motor Mechanic at police line Una since 1980. He has stated that on dated 3.7.2007 he mechanically examined maruti car No. HP-19A-4696 which was parked in the premises of police station Amb. He has stated that after checking vehicle he issued his report Ext PW20/A which bears his

signature. He has stated that there was no mechanical defect in the vehicle. He has stated that front mirror of car was broken.

9.21. PW21 Mehar Chand has stated that he remained posted as Inspector police station Amb since January 2007. He has stated that on dated 22.6.2007 he received telephonic message from medical officer CHC Amb that one Sunil Kumar was brought dead in hospital. He has stated that on the basis of statement of medical officer CHC Amb report No.25 dated 22.6.2007 Ext PW21/A was recorded. He has stated that thereafter he along with police officials proceeded to CHC Amb and reached there at about 12.50 AM. He has stated that he took photographs of dead body of deceased Sunil Kumar Ext PW21/1 to Ext PW21/8 and negatives of photographs are Ext PW21/9 to Ext PW21/16 and filled inquest report Ext PW21/B. He has stated that he also forwarded application Ext PW12/C for conducting post mortem of deceased Sunil Kumar. He has stated that he recorded the statement of PW1 Mukal Sood Ext PW1/A as per his version and forwarded the same to police station along with his endorsement Ext PW21/C for registration of FIR. He has stated that thereafter FIR Ext PW21/D was recorded by SI Om Parkash who was working under him at that time. He has stated that he identified his signatures. He has stated that Om Parkash made endorsement Ext PW21/E on rukka which bears his signatures. He has stated that on dated 22.6.2007 he proceeded to the spot and reached there at about 12 noon. He has stated that he inspected the spot and took photographs of the spot which are Ext PW21/17 to Ext PW21/25. He has stated that thereafter he took into possession blood from the pillar and chair after scratching the same and put the same into bottle and sealed with seal impression 'M' and memo Ext PW21/A was prepared. He has stated that he also prepared site plan Ext PW21/F and took into possession maruti car No. HP-19A-4696 along with documents and key vide seizure memo Ext PW1/B. He has stated that he took into possession stones, pieces of glass and one shoe which are Ext P3 to Ext P5. He has stated that bottle Ext P1 and match box Ext P2 are same. He has stated that he sent dead body of deceased Sunil Kumar for post mortem examination to District Hospita l Una and received post mortem report Ext PW12/B. He has stated that he deposited aforesaid case property with MHC police station Amb. He has stated that on dated 23.6.2007 he arrested co-accused Dharam Pal and co-accused Ajit Kumar from Partap Nagar Amb. He has stated that co-accused Ajit Kumar produced his clothes i.e. pant Ext P6 and shirt Ext P7 and same were took into possession vide seizure memo Ext PW9/A. He has stated that on the same day co-accused Dharam Pal deposited his clothes i.e. shirt Ext P8, pant Ext P9 and undergarments Ext P10 which were took into possession vide memo Ext PW10/A. He has stated that on dated 26.6.2007 co-accused Ajit Kumar made his disclosure statement under Section 27 of Evidence Act and thereafter he recovered weapon of offence and disclosure statement Ext PW10/B was recorded. He has stated that thereafter co-accused Ajit Kumar took police officials to the disclosed place and got recovered knife Ext P11 regarding which memo Ext PW11/A was prepared. He has stated that he also prepared rough sketch of weapon Ext PW13/A. He has stated that all articles were sealed separately and memos were signed by witnesses. He has stated that he prepared site plan of the place of recovery of knife Ext PW21/G. He has stated that on dated 26.6.2007 co-accused Kewal Krishan was arrested by him. He has stated that after arrest of accused persons they were also medically examined on dated 23.6.2007. He has stated that information regarding arrest of co-accused Dharam Pal Ext PW21/H and co-accused Ajit Kumar Ext PW21/J given to concerned JMIC. He has stated that car in question was mechanically examined from Sarup Chand mechanic and obtained his report Ext PW20/A. He has stated that on dated 16.7.2007 he called the parents of deceased Sunil Kumar and their blood sample for DNA test was obtained at District Hospital Una. He has stated that he moved application Ext PW21/K to SHO Una who marked the same to Dr. M.K.Pathak. He has stated that he recorded the statement of witnesses under Section 161 Cr.PC. He has stated that statement of Mukal Sood Ext PW1/A

under Section 154 Cr.PC, supplementary statement Ext PW21/L under Section 161 Cr PC, statement of Ratinder Singh Ext PW21/M including portion A to A, statement of Satinder Singh Ext PW21/N including portion A to A, statement of Atul Kumar Ext PW21/O including marked portion, statement of Gurpiara Ext PW21/P including marked portion, statement of Jagdish Ext PW21/Q including marked portion and statement of Dhani Ram Ext PW21/R including marked portion were recorded by him as per their versions. He has stated that during the course of investigation one Sanjiv @ Happy could not be arrested and proceedings under Sections 82 and 83 Cr.PC were initiated against him. He has stated that report of FSL Ext PW21/S and Ext PW21/T were received by him. He has stated that thereafter on completion of investigation he prepared charge sheet and submitted the same in Court. He has stated that on dated 10.7.2007 he handed over the investigation of present case to K.C.Bhatia District Inspector who arrested co-accused Rukam Deen and co-accused Gurbax Singh and also recorded statement of witnesses. He has stated that site plan Ext PW21/V was prepared from JE Bharwain and he also obtained sample of seal on the piece of cloth Ext PW21/W to Ext PW21/Z. He has denied suggestion that accused persons did not give any disclosure statement. He has denied suggestion that he planted the recovery of knife against accused persons. He has admitted that as per investigation as well as per statements of injured witnesses namely Mukal Sood and Satinder it has not come on record that deceased Sunil Kumar told anybody that injury was caused by co-accused Dharam Pal or co-accused Ajit Kumar. He has denied suggestion that he conducted investigation in partial manner. He has denied suggestion that accused persons have been falsely implicated in the present case.

10. Statements of accused persons recorded under Section 313 Cr.PC. Accused persons have stated that they are innocent and have been falsely implicated in the present case. Accused persons did not lead any defence evidence.

11. Submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No.13 of 2008 that there is no iota of evidence to connect appellants Dharam Pal and Ajit Kumar with the commission of offence punishable under Section 427 IPC and on this ground criminal appeal No. 13 of 2008 filed by appellants Dharam Pal and Ajit Kumar be accepted is rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that facts can be proved by way of oral evidence or by way of documentary evidence. It is well settled law that all facts except the contents of documents or electronic records can be proved by way of oral evidence as per Section 59 of the Indian Evidence Act 1872. We have carefully perused testimony of PW1 Mukal Sood eye witness of the incident. PW1 has specifically stated when he appeared in witness box that when they placed injured in car and started leaving from the place of incident then co-accused Dharam Pal and co-accused Kewal Krishan and younger brother of co-accused Dharam Pal did not allow to take deceased Sunil Kumar to hospital and they broken window panes of the vehicle with the help of stones. PW1 Mukal Sood has stated in positive manner that thereafter one of the co-accused tried to drag deceased Sunil Kumar from outside the car and thereafter they again placed deceased Sunil Kumar in car and brought deceased Sunil Kumar to civil hospital Chintpurni. PW1 Mukal Sood has specifically stated that civil hospital at Chintpurni was closed and thereafter deceased was brought to civil hospital Amb and the doctor at Amb declared Sunil Kumar dead. Testimony of PW1 Mukal Sood to this effect is trustworthy, reliable and inspires confidence of Court. There is no positive evidence on record in order to prove that PW1 has hostile animus against appellants at any point of time. Similarly PW2 Satinder Kumar has specifically stated in positive manner when he appeared in witness box that when deceased Sunil Kumar was brought to car to take him to hospital then co-accused Dharam Pal, brother of Dharam Pal and co-accused Kewal Krishan started pelting stones on the car and obstructed them. PW2 Satinder Kumar has specifically

stated in positive manner that co-accused Dharam Pal, his brother and co-accused Kewal Krishan also broken window panes of car. PW2 Satinder Kumar has specifically stated in positive manner that thereafter they took deceased Sunil Kumar to hospital at Chintpurni but the hospital was closed and thereafter they took deceased Sunil Kumar to hospital at Amb where Sunil Kumar was declared dead by medical officer. Testimony of PW2 Satinder Kumar is also trustworthy, reliable and inspires confidence of Court to this effect. There is no positive, reliable and cogent reason to disbelieve the testimony of PW2 Satinder Kumar to this effect. There is no positive evidence on record in order to prove that PW2 has hostile animus against appellants at any point of time. Similarly PW3 Atul has specifically stated when he appeared in witness box that as soon as they put deceased Sunil Kumar in car then co-accused Dharam Pal and other persons did not allow them to go ahead. PW3 Atul has stated in positive manner that co-accused Dharam Pal, co-accused Ajit Kumar and some other persons pelted stones on the car but ultimately they took deceased Sunil Kumar to hospital at Chintpurni. PW3 has stated in positive manner that hospital at Chintpurni was closed and thereafter they brought deceased to hospital at Amb for medical treatment. Testimony of PW3 Atul to this effect is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW3 Atul to this effect. There is no positive evidence on record that PW3 has hostile animus against appellants at any point of time. PW6 Ratinder Singh another eye witness of the incident has stated in positive manner that he brought car and thereafter PW1 Mukal Sood and PW2 Satinder Kumar brought deceased Sunil Kumar to car. PW6 Ratinder Singh has stated in positive manner that thereafter co-accused Dharam Pal, co-accused Kewal Krishan and co-accused Ajit Kumar started pelting stones on car. PW6 Ratinder Singh has specifically stated in positive manner that they put deceased Sunil Kumar in car with great struggle and thereafter they took deceased Sunil Kumar to hospital at Chintpurni but the hospital was closed and thereafter they brought deceased Sunil Kumar to hospital at Amb where he was declared dead by medical officer. Testimony of PW6 Ratinder Singh eye witness is also trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW6 Ratinder Singh to this effect. There is no positive evidence on record in order to prove that PW6 has any hostile animus against appellants at any point of time. It is held that it is proved beyond reasonable doubt as per oral testimony of PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh that both appellants namely Dharam pal and Ajit Kumar in furtherance of common intention intentionally committed mischief by causing loss and damage to maruti car bearing registration No.HP-19A-4696 belonging to Jeewan Singh.

12. Another submission of learned Advocate appearing on behalf of appellants in criminal Appeal No. 13 of 2008 that learned trial Court had acquitted accused persons qua criminal offence punishable under Sections 302, 323 and 324 IPC and on this ground appellants Dharam Pal and Ajit Kumar be also acquitted qua criminal offence under Section 427 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that criminal offence punishable under Section 427 IPC and criminal offence punishable under Sections 302, 323 and 324 IPC are independent criminal offence. It is well settled law that Court can convict accused person strictly as per proved facts relating to particular criminal offence. It is well settled law that concept falsus in uno falsus in omnibus is not applicable in criminal trials. See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs. State of Haryana. Even as per section 222(2) of code of criminal procedure 1973 if a person is charged of major offence then he could be convicted for minor criminal offence if minor criminal offence is proved. See AIR 2000 SC 297 titled State of HP Vs. Tara Dutt. See 1997 (4) Supreme 214 titled Sangharabonia Sreenu Vs. State of A.P.

13. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No. 13 of 2008 that PW1 Mukal Sood, PW2 Satinder Kumar and PW3 Atul have been declared as hostile witness by prosecution and on this ground appeal filed by appellants Dharam Pal and Ajit Kumar be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. It was held in case reported in 2011 (6) SCC 312 titled Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat that evidence of hostile witness may contain elements of truth and should not be entirely discarded. Also see AIR 1991 SC 1853 titled Khujji @ Surendra Tiwari Vs. State of Madhya Pradesh, See 2012 (4) SCC 327 titled Bhajju @ Karan Singh Vs. State of Madhya Pradesh, Also see 2012 (5) SCC 777 titled Ramesh Harijan Vs. State of Uttar Pradesh, See AIR 1976 SC 202 titled Bhagwan Singh Vs. State of Haryana and Also See AIR 1977 SC 170 titled Ravindra Kumar Vs. State of Orissa. Also see AIR 1979 SC 1848 titled Syad Akbar Vs. State of Karnataka**.** Also see AIR 1971 SC 1853 titled Surendra Tiwari Vs. State of MP.

14. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No. 13 of 2008 that material question was not put to appellants Dharam Pal and Ajit Kumar under Section 313 Cr.PC relating to criminal offence under Section 427 IPC and on this ground appeal filed by appellants be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the statement of accused persons recorded under Section 313 Cr PC. It is held that learned trial Court had put material questions to co-accused Dharam Pal and co-accused Ajit Kumar relating to criminal offence under Section 427 IPC when statements of co-accused Dharam Pal and co-accused Ajit Kumar were recorded under Section 313 Cr.PC. It is held that no miscarriage of justice has been caused to co-accused Dharam Pal and co-accused Ajit Kumar by way of not putting material questions to appellants under Section 313 Cr PC. It is held that all incriminating questions were put to accused persons under Section 313 Cr.PC relating to criminal offence under Section 427 IPC.

15. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No.13 of 2008 that all prosecution witnesses are interested witnesses and on this ground conviction of co-appellant Dharam Pal and co-appellant Ajit Kumar under Section 427 IPC be set aside is also rejected being devoid of any force for the reason hereinafter mentioned. There is no evidence on record that prosecution witnesses have hostile animus against accused persons at any point of time. It was held in case reported in AIR 1981 SC 1390 titled State of Rajasthan Vs. Kalki and another that relative witness is not equivalent to interested witness. It was held that conviction in criminal case can be given on the testimony of relative witness if testimony of relative witness is trustworthy. It was held that there is difference between relative witness and interested witness.

16. Another submission of learned Advocate appearing on behalf of appellants in Criminal Appeal No 13 of 2008 that there is improvement in the testimony of PW1 Mukal Sood and PW7 Dhani Ram and on this ground appeal filed by appellants be accepted is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused testimonies of PW1 Mukal Sood and PW7 Dhani Ram. There is no material improvement in the testimonies of PW1 and PW7 which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when testimony of prosecution witnesses is recorded after a gap of sufficient time. In the present case incident took place on dated 21.6.2007 at about 11.30 pm at village Badhmana Tehsil Amb District Una HP and statements of prosecution witnesses were recorded on dated 11.12.2007, 12.12.2007, 13.12.2007 and 14.12.2007. Hence it is held that material improvements in the testimony of prosecution witnesses are not proved on record in the present case. It was held

in case reported in 2015 (3) SC 1 titled Pawan Kumar Vs. State of UP that minor discrepancies in criminal case should be ignored.

17. Submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that learned trial Court had wrongly acquitted accused persons under Sections 302, 323 and 324 IPC is rejected being devoid of any force for the reason hereinafter mentioned. PW1 Mukal Sood eye witness of the incident has specifically stated when he appeared in witness box that he did not see anybody causing injury to deceased Sunil Kumar. Similarly PW2 Satinder Kumar has stated in positive manner when he appeared in witness box that he does not know who caused injury to deceased Sunil Kumar. PW3 Atul another eye witness of the incident has specifically stated in positive manner that he does not know who had caused injury to deceased Sunil Kumar. Similarly PW6 Ratinder Kumar eye witness has also stated in positive manner that he did not see anybody inflicting injury upon deceased Sunil Kumar. None of the witness has stated in positive manner that which of the accused had caused injury upon deceased Sunil Kumar with knife. It was held in case reported in 2005 (9) SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in 2010 (11) SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It was held in case reported in AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. Also See: AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra, See AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. State of Gujarat, See AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others.

18. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that presence of co-accused Dharam Pal at the place of incident is proved on record and on this ground co-accused Dharam Pal be convicted under Section 302, 323 and 324 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that simply presence of co-accused Dharam Pal at the place of incident is not sufficient to hold that co-accused Dharam Pal had inflicted injury upon deceased Sunil Kumar with sharp edged weapon. There is no positive, cogent and reliable evidence on record in order to prove that co-accused Dharam Pal had inflicted injury upon deceased Sunil Kumar with sharp edged weapon.

19. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that as per testimony of prosecution witnesses connectivity of accused persons with the commission of offence punishable under Sections 302, 323 and 324 IPC is proved beyond reasonable doubt is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution witnesses. It is held that fact of connectivity of accused persons is not proved on record qua commission of offence punishable under Sections 302, 323 and 324 IPC. There is no positive, cogent and reliable evidence on record in order to prove that accused persons have intentionally and voluntarily caused murder of deceased Sunil Kumar. There is no positive, cogent and reliable eye witness on record in order to prove that accused persons have voluntarily caused hurt to deceased Sunil Kumar with dangerous weapon. PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh eye witness of the incident did not support prosecution case relating to criminal offence punishable under Sections 302, 323 and 324 IPC. PW1, PW2, PW3 and PW6 have not stated in positive manner that accused persons in their presence have caused murder of deceased Sunil Kumar and they have also not stated that accused persons have voluntarily

caused hurt with sharp edged weapon to deceased Sunil Kumar in their presence. On the contrary PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh have stated in positive manner that accused persons did not inflict injury upon the body of deceased Sunil Kumar in their presence. Even as per testimony of PW12 Dr.S.K.Bansal who conducted post mortem of deceased injuries on the person of deceased are not possible with knife Ext P11. Even prosecution did not prove the fact that knife Ext P11 was used in the commission of murder of deceased as per testimony of PW12.

20. Another submission of learned Additional Advocate General appearing on behalf of State in Criminal Appeal No. 272 of 2008 that as per disclosure statement given by co-accused Ajit Kumar accused persons be convicted under Sections 302, 323 and 324 IPC is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that disclosure statement is not a substantive evidence to convict accused persons but it is only corroborative evidence. It was held in case reported in AIR 1979 SC 1042 titled Babbo and others Vs. State of Madhya Pradesh that in the absence of substantive evidence recovery has no probative value.

21. Submission of learned Advocate appearing on behalf of revisionist Prithvi Raj in Criminal Revision No. 57 of 2008 that it is proved on record that accused persons have given blows on the chest of deceased Sunil Kumar as a result of which blood started oozing out and blood fell on the ground as well as on the pillar of the house where incident took place and blood of deceased Sunil Kumar was also found in the car when deceased was taken for medical treatment and on this ground revision petition be accepted is rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution witnesses. PW1 Mukal Sood, PW2 Satinder Kumar, PW3 Atul and PW6 Ratinder Singh who are alleged eye witnesses of the incident have specifically stated in positive manner that they did not see the fact that accused persons have inflicted injuries upon the chest of deceased Sunil Kumar with sharp edged weapon. None of the prosecution witnesses have stated that accused persons have inflicted injuries upon deceased Sunil Kumar with sharp edged weapon in their presence. It is well settled law that criminal offence should be proved beyond reasonable doubt. Eye witnesses of the incident did not support the prosecution case qua inflicting injury upon the body of deceased Sunil Kumar with sharp edged weapon.

22. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that blood was found on the pillar of house, on the legs of chairs and on the car and on this ground accused persons be convicted is also rejected being devoid of any force for the reason hereinafter mentioned. There is no positive evidence on record in order to prove that which of the accused had inflicted injuries upon the body of deceased Sunil Kumar. As per chemical analyst report Ext PW21/T placed on record although human blood was found on dry blood scrapped from chair but same was found inconclusive for grouping. Similarly human blood was found on pant of Ajit Kumar but blood was insufficient for blood grouping. We are of the opinion that in the absence of proof of blood grouping it is not expedient in the ends of justice to convict accused persons under Sections 302, 323, 324 and 201 IPC.

23. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that deceased Sunil Kumar had sustained injury at the bride house and thereafter deceased Sunil Kumar died due to impact of injuries and on this ground accused persons be convicted is also rejected being devoid of any force for the reason hereinafter mentioned. We are of the opinion that there is no evidence on record in order to prove that which of the accused had inflicted injury upon deceased Sunil Kumar. All prosecution eye witnesses have stated in positive manner that injuries were not inflicted

upon deceased Sunil Kumar in their presence by accused persons. In the absence of proof of role of each accused persons relating to inflicting of injuries upon person of deceased it is not expedient in the ends of justice to connect accused persons under Sections 302, 323, 324 and 201 IPC. It is well settled law that prosecution is under legal obligation to prove its case against accused persons beyond reasonable doubt. It is well settled law that accused is presumed to be innocent till proven guilty in accordance with law.

24. Another submission of learned Advocate appearing on behalf of revisionist in Criminal Revision No. 57 of 2008 that learned trial Court had failed to appreciate the fact that young life of deceased Sunil Kumar was taken away by criminals and accused persons should not be allowed to go scot free on minor variations in the statements of prosecution witnesses is also rejected being devoid of any force for the reason hereinafter mentioned. We have carefully perused the testimony of entire prosecution oral as well as documentary evidence. There is no positive, reliable and cogent evidence on record to prove that which of accused had inflicted injury upon deceased Sunil Kumar with sharp edged weapon. Although it is proved on record that deceased Sunil Kumar had sustained injuries and it is also proved on record that thereafter deceased Sunil Kumar died but it is not proved on record that which of the accused had inflicted injuries upon deceased Sunil Kumar with sharp edged weapon.

25. In view of above stated facts Criminal Appeal No. 13 of 2008 titled Dharam Pal and another Vs. State of HP, Criminal Appeal No. 272 of 2008 titled State of HP Vs. Dharam Pal and Criminal Revision No. 57 of 2008 titled Prithvi Raj Vs. Dharam Pal and others are dismissed. Judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court had properly appreciated oral as well as documentary evidence placed on record in the present case. Criminal Appeal No. 13 of 2008, Criminal Appeal No. 272 of 2008 and Criminal Revision No. 57 of 2008 are disposed of. Certified copy of judgment be placed in each consolidated appeal file. Pending application if any also disposed of. Records of learned trial Court along with certified copy of judgment be sent back forthwith.

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

Bahadur. ...Appellant.

Versus

Bratiya and others. ...Respondents.

RSA No. 8 of 2003
Reserved on: 7.4.2015
Decided on: 23.6.2015

Hindu Succession Act, 1956- Sections 2(2) and 4- Plaintiff filed a Civil Suit pleading that his father was Gaddi and was governed by custom according to which daughters do not inherit the property of their father and the attestation of mutation in favour of the plaintiff and defendants was wrong- held, that any text, rule or interpretation of Hindu Law or any custom or usage immediately before the commencement of the Act shall cease to have effect with respect to which provision is made in the Act- custom providing that the daughters will not inherit the property will be in derogation of the provision of Hindu Succession Act and cannot be recognized- further, such custom will be in violation of Article 15 of the Constitution of India. (Para-21 to 63)

Cases referred:
Mahomed Ibrahim Rowther vs. Shaik Ibrahim Rowther and others, AIR 1922 Privy Council 59
Ram Narain and another vs. Mst. Har Narinjan Kaur and another, 1924 Lahore 116
Sundrabai Hanmantrao Kulkarni and others vs. Hanmant Gurunath Kulkarni and others, AIR 1932 Bombay 398
Effuah Amissah vs. Effauh Krabah and others, AIR 1936 Privy Council 147
Gokal Chand vs. Parvin Kumari, AIR 1952 SC 231
T. Saraswathi Ammal v. Jagadambal and another, AIR 1953 SC 201
Ujagar Singh vs. Mst. Jeo, AIR 1959 SC 1041
Indramani Devi and others vs. Raghunath Bhanja Birbar Jagadeb and another, AIR 1961 Orissa 9
Labishwar Manjhi vs. Pran Manjhi and others, (2000) 8 SCC 587
Manshan and others vs. Tej Ram and others, AIR 1980 SC 558
Velamuri Venkata Sivaprasad (dead) by LRs vs. Kothuri Venkateswarlu (Dead) by LRs and others, (2000) 2 SCC 139
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Manshan and others vs. Tej Ram and others, AIR 1980 SC 558
Bala Shankar Maha Shankar Bhattjee and others vs. Charity Commissioner, Gujarat State, AIR 1995 SC 167
Mahant Shri Srinivas Ramanuj Das vs. Surjanarayan Das and another, AIR 1967 SC 256
Dhabai Marandi vs. Bibhuti Marandi Lodo Marandi and others, 2009 Law Suit (Jhar) 1485
Kartik Oraon vs. David Munzni and another, AIR 1964 Patna 201
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Lingappa Pochanna Appelwar vs. State of Maharashtra and another, (1985) 1 SCC 479
C. Masilamani Mudaliar and others vs. Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others, (1996) 8 SCC 525
Papaiah vs. State of Karnataka and others, (1996) 10 SCC 533
Ahmedabad Municipal Corporation vs.Nawab Khan Gulab Khan and ors, (1997) 11 SCC 121
Charan Singh etc. vs. State of Punjab and others etc., AIR 1997 SC 1052
Velamuri Venkata Sivaprasad (Dead) by Lrs. Vs. Kothuri Venkateswarlu (Dead) by Lrs. and others, (2000) 2 SCC 139
State of Kerala and another vs. Cahndramohanan, (2004) 3 SCC 429
Dayaram vs. Sudhir Batham and others, (2012) 1 SCC 333

For the Appellant : Mr. Anand Sharma, Advocate.
For the Respondents : Mr. C.P. Sood, 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 5.10.2002 rendered by the District Judge, Chamba Division, Chamba in Civil Appeal No. 29 of 2002.

2. "Key facts" necessary for the adjudication of this appeal are that the appellant-plaintiff (herein after referred to as 'plaintiff' for convenience sake) instituted a suit for declaration against the respondents-defendants (hereinafter referred to as the "defendants" for convenience sake) to the effect that father of plaintiff Rasalu was Gaddi, therefore, belonged to Scheduled Tribe community. The parties were governed by custom, according to which, the daughters do not inherit the property of their father and the attestation of mutation No.288 dated 19.2.1987 by the Assistant Collector 2nd Grade, Chamba in favour of the plaintiff and defendants in respect of the land comprising Kitas 16, Khata Khatauni No. 96/124 measuring 39 bighas and 17 biswas to the extent of 1/6th share and the land comprising Khasra Kitas 3, Khata Khatauni No. 97/125 measuring 10 bighas 18 biswas to the extent of 7/98th share and the land comprising Khasra Kitas-10 Khata Khatauni No. 98/126 measuring 12 bighas and 19 biswas to the extent of 14/378th share situated in Mohal Aghar, Pargana Panjla, Tehsil and District Chamba is illegal, null and void and subsequent attestation of mutation No. 371 dated 23.8.1994 in favour of defendant No.1 by defendants No.2 to 5 in the suit land is also illegal, null and void. The suit land was previously owned and possessed by Rasalu, who was Gaddi and father of the plaintiff and defendant No.1. Rasalu being Gaddi belonged to Scheduled Tribe category and after his death, his estate including the suit land was to be inherited by the plaintiff and defendant No.1 being sons of Rasalu. There was a custom amongst the Gaddies that the daughters do not inherit the property of their father after his death.

3. The suit was contested by the defendants. Defendants have admitted that Rasalu was previously owner in possession of the suit land, but it is specifically denied that Rasalu was Gaddi by caste. It is denied that Rasalu was Scheduled Tribe. It is further averred that estate of Rasalu was rightly inherited by the plaintiff and defendants. The mutation has also rightly been attested.

4. Replication was filed by the plaintiffs. Issues were framed by the Senior Sub Judge Chamba on 31.7.1996. He decreed the suit on 20.2.2002 to the extent that defendants No.1 to 5 and their deceased father Rasalu were declared to be belonging to Gaddi community, which was a scheduled Tribe, to which provisions of Hindu Succession Act, in the matter of succession were not applicable and mutation No. 288 dated 19.2.1987 qua the share of deceased Rasalu in the suit land, attested in favour of defendants No. 2 to 5 and mutation No. 371 dated 27.8.1994 attested in favour of defendant No. 1 qua the relinquishment of their shares in the suit land by defendants No.2 to 5, was declared to be illegal, null and void. Defendants preferred an appeal before the District Judge. He allowed the same on 5.10.2002. Hence, the present appeal. It was admitted on 1.6.2004 on the following substantial questions of law:

> **"1. Whether the Learned lower Appellate Court had jurisdiction to hold the custom to be illegal being opposed to public policy, when the same had not been challenged as such by the respondents?**
>
> **2. Whether the learned Lower Appellate court has erred in placing reliance on Section 3 of the Limitation Act to come to the conclusion that the suit was barred by time?**
>
> **3. Whether the learned Lower Appellate Court has erred in invoking the provisions of Section 114 (g) of the Indian Evidence Act when the said provision was not at all attracted to the facts of the present case?"**

5. Mr. Anand Sharma, learned counsel for the appellants, has supported the judgment dated 20.2.2002 rendered by learned Senior Sub Judge Chamba.

6. Mr. C.P. Sood, learned counsel for defendant No.1 has supported the judgment and decree dated 5.10.2002 rendered by the learned District Judge, Chamba.

7. I have heard the learned counsel for the parties and have gone through the records carefully.

8. Since all the substantial questions of law are interlinked, they are being discussed together to avoid repetition of discussion of evidence.

9. PW-1 Bhadur has testified that Rasalu was owner of the suit land. Rasalu had two sons and four daughters. Rasalu was Gaddi by caste. Gaddies are governed by customary law and as per customary law, property devolves upon sons and daughters are not legally entitled to inherit the property as per custom. Plaintiff and defendant No.1 were in possession of the suit land and daughters of Rasalu were residing in village Bharmour. They were married and they did not remain in possession of the suit land. He did not know whose names the mutation was sanctioned after the death of Rasalu. He has testified that plaintiff and defendant No.1 were the legal heirs of deceased Rasalu. He has come to know about the mutation one year ago.

10. PW-2 Karmo has testified that the parties were known to him. Plaintiff and defendants are Gaddi by caste. According to him, the daughters were not entitled for the property of their father.

11. DW-1 Bratia has testified that name of his father was Rasalu and father of Rasalu was Bhangasi. Bhangasi had three sons namely Rasalu, Hushnak and Chand. Defendants were Rajputs by caste. They used to reside in Tehsil Chamba. Rajput daughters legally inherit the property alongwith brothers. The property of Chand devolved upon his daughters and sons, who was his uncle. He has proved copies of Jamabandis Ext. D1, Ex.D-2, copy of Pariwar Register Ext. D-3, Ext. D-4, copy of Jamabandi Ext. D5, copy of pedigree table Ext. D-6, Ext. D-7, copy of Jamabandi Ext. D8 and copies of mutations Ext. D-9, D-10, D-11, D-12, D-13, D-14, D-15 and Ext. D-16, and the copies of decisions Ext. D-17 and D-18.

12. DW-2 Hoshiara Ram has testified that the parties were known to him. He was related to them. The parties are Rajputs. According to custom, the daughters are legally entitled to inherit the property amongst Gaddi Rajputs.

13. DW-3 Machlu has deposed that parties are known to him. He is a Gaddi Rajput. According to customs amongst Gaddi Rajputs, daughters are legally entitled to inherit the property of their father. Name of his father was Jawahar and after his death, the property devolved upon sons and daughters equally. Their custom is old and continuous. He used to reside in Tehsil Chamba.

14. Sub-section (2) of section 2 of the Hindu Succession Act reads is as under:-

> **" (2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (255) of Article 366 of the Constitution unless the Central government, by notification in the official Gazette, otherwise directs."**

15. Clause (1) of Article 342 of the Constitution of India provides that the President may with respect to any State or Union Territory and where it is a State, after consultation with the Governor, by public notification, specify the Tribes or Tribal communities or parts of or groups within tribes or tribal communities which shall for the

purposes of the Constitution deemed to be Scheduled Tribes in relation to that State or Union Territory as the case may be. According to clause (2), Parliament may, by law, include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or any tribal community or part of or a group, within any tribe or tribal community but save as a notification issued under the said clause shall not be valid by issuing subsequent notifications.

16. Clause (25) of Article 366 of the Constitution of India reads as under:

> **"Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Article 342 to be Scheduled Tribes for the purposes of this Constitution."**

17. Ext. P-8 is the certificate of scheduled tribes issued in favour of the plaintiff. Learned Sub-Judge 1st Class, Chamba vide Ext. PC had framed, *inter alia*, the following issue:

> **"Whether the parties to the suit are Gaddies (Scheduled Tribes) and governed by custom in the matter of succession as alleged? OPP"**

18. It was held by the trial Court that the parties were Gaddies and they were governed by custom in the matter of inheritance and in the absence of "will" Smt. Rukko was not entitled to the property of her father. Defendant Rukko filed an appeal against the judgment and decree dated 25.6.1994 before the District Judge bearing Civil Appeal No. 34 of 1994. The appeal was dismissed by the District Judge on 28.7.1997. The District Judge also held that a married daughter does not inherit the property of her father and in the absence of sons; the property goes to the reversioners. Ex.PD is the copy of judgment dated 28.6.1982 rendered by the Senior Sub Judge, Chamba where issue No.1 was framed to the following effect:

> **"Whether the parties are Gaddies and there is a custom in them under which widow and daughter do not inherit the property of the deceased husband as also of father? OPP**

19. According to the findings of the learned Senior Sub Judge, Chamba, the parties were not governed under Succession Act, but under custom in which daughters do not inherit and widow has only life interest. Similarly, the Senior Sub Judge in Civil Civil No.72/87 decided on 28.4.1989 had framed the following issue:

> **"Whether Sh. Thelu was Gaddi and governed by custom in the matter of succession as alleged?" OPD**

20. Learned Senior Sub Judge gave the findings that in accordance with custom governing the Gaddies, married daughter in the presence of male co-lateral had no right in the estate of her deceased father. According to pedigree table Ex.PF, the parties have been shown as Gaddi Rajput. In Ex.P-2, i.e. copy of Pariwar register, Gaddi Rajput is mentioned. In Ex.P-4 also expression, "***Gaddi"*** has been mentioned. Ex. P-6 is the statement of one of the defendant whereby he has admitted that he was Gaddi Rajput. In Ex.PG, a note has been appended qua mutation No. 365 [(Drusati Jati) correction of caste]. There is a reference to order dated 18.3.1993 on the basis of which correction of caste has been carried out. Order dated 18.3.1993 is not on record. Similarly, the caste has been changed on the basis of order dated 18.3.1993 in Ex.PK and Ex.PM as well. It is, thus, evident that before 1993, the parties were Rajput and not Gaddi as per Ex.PG, PK and PM. According to Jamabandi for the year 1990-91 Ex.D-1, defendants No.2 to 5 have relinquished their share in favour of defendant No.1. In Pariwar Register Ex.D-3, the caste Rajput has only been

mentioned. There is no reference of parties being Gaddi. In pedigree table Ex.D-6 and D-7, expression "***Rajput***" has been mentioned. Learned Sub Judge 1st Class in Civil Suit No.40 of 1981, i.e. Ex.D-17, has held that parties were governed by custom in matters of succession and according to their custom prevalent in the area; daughters also succeed to the property of their father. Learned District Judge in Civil Appeal No.10 of 1987/1983 dated 11.11.1987 Ex.D-18 has returned the findings that there was no custom amongst the Gaddies which prevented the widow and daughters to succeed to the property of their husband or father as the case may be and even if there was any custom, it has not been uniformly followed and there had been serious departure from it.

21. It is not in dispute that the parties are Hindus and they follow Hindu customs and practices.

22. In ***Mahomed Ibrahim Rowther*** vs. ***Shaik Ibrahim Rowther and others***, AIR 1922 Privy Council 59, their Lordships have held that customs should be ancient, invariable and established by clear evidence. The Privy Council has held as under:

> **"In their essential characteristics custom and an election to abide by the law of the old status differ fundamentally as sources of law, still there is no mode of proving this alleged election except by way of inference from actings and conduct that would establish a custom so that, along whatever line this case may be approached, the custom must be established and the burden of proof of this is on the defendants. In India, however, custom plays a large part in modifying the ordinary law and it is now established that there may be a custom at variance even with the rules of Mahomedan Law governing the succession in a particular community of Mahomedans. But the custom must be proved. The essentials of a custom or usage have been repeatedly defined. (45 Cal. 45: 45 I.A.10(P.C.).) followed. It is of special usages modifying the ordinary law of succession that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."**

23. The Division Bench of Lahore High Court in ***Ram Narain and another*** vs. ***Mst. Har Narinjan Kaur and another***, 1924 Lahore 116 has held that where the custom set up by the plaintiffs is most unusual as being opposed both to the Hindu Law and general agricultural custom the burden of proving the alleged special family custom, lies very heavily upon the plaintiffs. The Division Bench has further held that it is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable, it is further essential that they should be established so by clear and unambiguous evidence.

24. The Division Bench of Bombay High Court in ***Sundrabai Hanmantrao Kulkarni and others*** vs. ***Hanmant Gurunath Kulkarni and others***, AIR 1932 Bombay 398 has held that when a party relies on a custom as establishing an exception to the general law, the burden is upon him to establish the custom.

25. In ***Effuah Amissah*** vs. ***Effauh Krabah and others***, AIR 1936 Privy Council 147, their Lordships have held that material customs must be proved in the first instance by calling witnesses acquainted with them until the particular customs have, by frequent proof in the courts, become so notorious that the courts take judicial notice of them.

26. In the present case, material placed on record does not prove the custom in the Gaddies where the daughters can be deprived of their right in the property.

27. Their Lordships of the Hon'ble Supreme Court in ***Gokal Chand*** vs. ***Parvin Kumari***, AIR 1952 SC 231 have laid down the following principles to be kept in view in dealing with questions of customary law:

> **"1. It should be recognized that many of the agricultural tribes in the Punjab are governed by a variety of customs, which depart from the ordinary rules of Hindu and Muhammadan law, in regard to inheritance and other matters mentioned in S. 5 of the Punjab Laws Act, 1872.**
>
> **2. In spite of the above, fact, there is no presumption that a particular person or class of persons is governed by custom, and a party who is alleged to be governed by customary law must prove that he is so governed and must also prove the existence of the custom set up by him, See 'DAYA RAM v. SOHEL SINGH', 110 P. R. 1906 P. 390 at 410: 'ABDUL HUSSEIN KHAN v. BIBI SONA DERO', 45 Ind App 10 (PC).**
>
> **3. A custom, in order to be binding, must derive its force from the fact that by long usage it has obtained the force of law, but the English rule that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" should not be strictly applied to Indian conditions. All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invaribaility as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. See MT. SUBHANI v. NAWAB', AIR 1941 PC 21 at 32.**
>
> **4. A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence and its exercise without controversy, and such evidence may be safely acted on when it is supported by a public record of custom such as the Biwaj-i-am or Manual of Customary Law. See 'AHMED KHAN v. MT. CHANNI BIBI', AIR 1925 PC 267 at 271.**
>
> **5. No statutory presumption attaches to the contents of a Riwaj-i-am or similar compilation, but being a public record prepared by a public officer in the discharge of his duties under Government rules, the statements to be found therein in support of custom are admissible to prove facts recited therein and will generally be regarded as a strong piece of evidence of the custom. The entries in the Riwaj-i-am may, however, be proved to be incorrect, and the quantum of evidence required for the purpose of rebutting them will vary with the circumstances of each case. The presumption of correctness attaching to a Riwaj-i-am may be rebutted, if it is shown that if affects adversely the rights of females or any other class of persons who had no opportunity of appearing before the revenue authorities. See 'BEG v. ALLAH DITTA', AIR 1916 PC 129 AT 131, 'SALEH MOHAMMAD v. ZAWAR HUSSAIN', AIR 1944 PC 18; 'MT. SUBHANI v. NAWAB', AIR 1941 P C 21 at 25.**
>
> **6. When the question of custom applicable to an agriculturist is raised, it is open to a party who denies the application of custom the show that the person who claims to be governed by it has completely**

and permanently drifted away from agriculture and agricultural associations and settled for good in urban life and adopted trade, service etc., as his principal occupation and means and source of livelihood, and does not follow other customs applicable to agriculturists. See' MUHAMMAD HAYAT KHAN v. SANDHE KHAN', 55 P R. 1908 P.270 at 274: 'MUZAFFAR' MUHAMMAD v. IMAM DIN', 9 Lah 120 at p. 125.

7. The opinions expressed by the Compiler of a Riwaj-i-am or Settlement Officer as a result of his intimate knowledge and investigation of the subject, are entitled to weight which will vary with the circumstances of each case. The only safe rule to be laid down with regard to the weight to be attached to the Complier's remarks is that if they represent his personal opinion or bias and detract from the record of long standing custom, they will not be sufficient to displace the custom, but if they are the result of his inquiry and investigation as to the scope of the applicability of the custom and any special sense in which the exponents of the custom expressed themselves in regard to it, such remarks should be given due weight. See 'NARAIN SINGH v. MT. BASANT KAUR', AIR 1935 Lah 419 at 421, 422; 'MT. CHINTO v. THEBU', AIR 1935 Lah 985 : 'KHEDAM HUSSAIN v. MOHAMMED HUSSAIN', AIR 1941 Lah 73 at 79."

28. Their Lordships of the Hon'ble Supreme Court in ***T. Saraswathi Ammal*** v. ***Jagadambal and another***, AIR 1953 SC 201 have held that oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom. Their Lordships have held as under:

".....5. Oral evidence as to instances which can be proved by documentary evidence cannot safely be relied upon to establish custom, when no satisfactory explanation for withholding the best kind of evidence is given....."

29. Their Lordships of the Hon'ble Supreme Court ***in Ujagar Singh*** vs. ***Mst. Jeo***, AIR 1959 SC 1041 have held that many customs have been passed into law of land and proof of it becomes unnecessary under section 57 (1) of the Evidence Act.

30. However, in the present case, custom, as noticed hereinabove, has not been recognized consistently by the courts and thus has not passed into law of land. The plaintiff in this case has failed to prove that the custom prevailing in the area where the parties resided was ancient, invariable and unbroken custom and the same has not been judicially noticed by the court consistently.

31. Learned Single Judge in ***Indramani Devi and others*** vs. ***Raghunath Bhanja Birbar Jagadeb and another***, AIR 1961 Orissa 9 has held that burden of proving alleged custom by clear and unambiguous evidence lies on the plaintiff. Learned Single Judge has held as under:

"[5] There is no documentary evidence to prove the terms of the grant made by the plaintiff's father Pitabash, in favour of his younger brother Ramchan-dra. The contesting defendants are admittedly the heirs of Ramchandra and they would, under the ordinary rule of Hindu Law, be entitled to the property unless the special custom (Kulachara) of excluding female heirs in respect of maintenance grants, as alleged by the plaintiff, be held to have been clearly established. Though custom may supersede a rule of Hindu Law, as pointed out by the Privy Council

in Ramalakshmi Ammal v. Sivananatha Perumal, 14 Moo Ind. App 570 (586) (PC) :

"It is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends.

"This principle was reiterated by the Privy Council in Abdul Hussain v. Mst. Bibi Sona Dero, AIR 1917 PC 181 and was again cited with approval in Saraswathi Ammal v. Jagadamba, AIR 1953 SC 201 at p. 205. Thus, the burden had become doubly heavy on the respondent to prove the alleged custom by clear and unambiguous evidence because not only is he the plaintiff in the suit but he also claimed title to the property on the basis of a special custom (Kulachar) against the ordinary rule of Hindu Law."

32. Their Lordships of the Hon'ble Supreme Court in ***Labishwar Manjhi*** vs. ***Pran Manjhi and others***, (2000) 8 SCC 587 have held that though the parties belonged to Santhal scheduled tribes but they were Hinduised and they were following the Hindu traditions. Thus, sub-section (2) would not apply to exclude the parties from application of the Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. Their Lordships have held as under:

"[5] The respondent filed second appeal before the High Court challenging the said finding contending that courts below had committed error in recording the finding that Hindu Succession Act will apply. However, the High Court allowed the appeal of the respondent by holding that Hindu Law as it stood prior to enactment of Hindu Succession Act, 1956 would apply, hence the appellant no. 1 inherited the property during her lifetime and on her death it would devolve to the agnates of her husband viz. contesting respondent no1. Challenging the said finding, the submission on behalf of the appellant is that the High Court committed error in concluding that the parties would be governed by the law as prevailed prior to coming into force of Hindu Succession Act, 1956. The submission is, once finding is recorded by the first Appellant Court and confirmed by the High Court that the parties are Hinduised then they would be governed by the law as is applicable on any Hindu and if that be so the Hindu Succession Act, 1956 would be applicable to the parties. Challenging this submission, learned Counsel for the respondent submits that the parties being tribals by virtue of Sub-section 2 of Section 2, the Hindu Succession Act, 1956 would not be applicable. It excludes the members of any Scheduled Tribes from their application to the said Act. Based on this submission is, even if the parties have Hinduised, the parties being of Santhal tribe, they are following their customary law of Santhal, hence Hindu Succession Act would not be applied. Reliance being placed to the decision of Patna High Court, reported in 1967 (15) Bihar Law Journal 323 (Satish Chandra Brahama v. Bagram Brahma and Anr.) This decision deals with the case of Scheduled Tribes, namely, Uraon. The court held that Uraon Tribe is a member of Scheduled Tribe within the

meaning of Clause 25 of Article 366 of the Constitution of India and by virtue of Sub-section 2 of Section 2 of the Hindu Succession Act, the provision of that Act will not apply to this tribe, consequently Section 14 would also not apply. The said decision further records, the Uraon can change their religion but by changing of the religion alone they do not cease to be Uraon for other purposes. The Court's findings based on various other factors, such as religious functions, marriages, disposal of the dead bodies by cremation or by burying the dead body etc. , has to be tested before such changes.

[6] The question which arises in the present case is, whether the parties who admittedly belong to Santhal tribe are still continuing with their customary tradition or have they after being Hinduised changed their customs to that what is followed by the Hindus. It is in this context when the matter came first before the High Court, the High Court remanded the case for decision in this regard. After remand, the first appellate court recorded the findings, that most of the names of their families of the parties are Hindu names. Even Public Witness-1 admits in the cross examination that they perform the pindas at the time of death of anybody. Females do not use vermillion on the forehead after the death of their husbands, widows do not wear ornaments. Even Public Witness-2 admits that they perform Shradh ceremonies for 10 days after the death and after marriage, females use vermilion on their foreheads. The finding is that they are following the customs of the Hindus and not of the Santhal's. In view of such a clear finding, it is not possible to hold that Sub-section 2 of Section 2 of Hindu Succession Act excludes the present parties from the application of the said Act. Sub-section 2 only excludes members of any Scheduled Tribe admittedly as per finding recorded in the present case though the parties originally belong to the Santhal Scheduled Tribe they are Hinduised and they are following the Hindu traditions. Hence, we have no hesitation to hold that Sub-section 2 will not apply to exclude the parties from application of Hindu Succession Act. The High Court fell into error in recording a finding to the contrary. In view of this, the widow of Lakhiram would become the absolute owner by virtue of Section 14 of the said Act, consequently the gift given by her to appellant nos. 2 and 3 were valid gift, hence the suit of respondent no. 1 for setting aside the gift deed and inheritance stand dismissed."

33. Their Lordships of the Hon'ble Supreme Court in ***Smt. Manshan and others*** vs. ***Tej Ram and others***, AIR 1980 SC 558 while consideration section 8 read with section 4 of the Hindu Succession Act, 1956 have held that the custom which prevented the daughters from inheriting the property got superseded by the provisions of the Act and hence the heirs of the collateral were no longer entitled to succeed to his property. Their Lordships have held as under:

"[3] The argument put forward on behalf of the respondents in the High Court with reference to Section 14 of the Hindu Succession Act was wholly misplaced. There was no question of applying either sub-section (1) or sub-sec. (2) of Section 14 of the said Act. Here the simple question which had to be answered was as to who was the heir of Chaudhary under the Hindu Succession Act on the date of his death. The property will revert to him or her. Reading Sections 4 and 8 of the Act together

it is clear to us that on the date of death of Chaudhary, in supersession of the prevalent custom, his daughters became the preferential heirs and were entitled to inherit his property. Chaudhary might have remained a life owner according to the custom. But the portion of the custom which prevented the daughters from inheriting got superseded by the provisions of the Act and hence Bhagat Ram's heirs were no longer entitled to succeed to the property of Chaudhary in the year 1957. The effect of the declaratory decree passed in the year 1950, it is plain, was merely to declare that whosoever would be the next reversioner to the estate of Chaudhary at the time of his death would get the property in respect of which the declaratory decree was made and not necessarily the person in whose favour the declaratory decree was passed.

[4] The High Court also seems to have been influenced by the expression 'dying intestate' occurring in Section 8 of the Act, and appears to have taken the view that since Chaudhary had no power to bequeath his ancestral property by a will, Section 8 would not apply and the daughters would not be entitled to claim the property as his reversioners under Section 8. In our opinion this is an entirely erroneous view of the law. Section 8 would apply where a male Hindu dies intestate either not having made any will or having made any invalid will. It squarely covered the case of the respondents."

34. Their Lordships of the Hon'ble Supreme Court in ***Velamuri Venkata Sivaprasad (dead) by LRs*** vs. ***Kothuri Venkateswarlu (Dead) by LRs and others***, (2000) 2 SCC 139 have held that in the matter of interpretation of statutes specially relating to womenfolk, due weightage should be given to the constitutional requirement of equality of status, therefore, Hindu Succession Act, 1956 should be interpreted accordingly. Their Lordships have held as under:

"[12] Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution permeates quality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure

therefrom. Tulasamma's case, obviously having this in mind decided the issue and attributed the widest possible connotation to the words used in Section 14(1) of the Act of 1956. The decision in Tulasamma's case (AIR 1977 SC 1944) from time to time came up for consideration before this Court and the same stands accepted without any variation as noted herein before. One of the latest decisions where Tulasamma's case has been considered, is the decision of this Court in the case of Raghubir Singh v. Gulab Singh (1998) 6 SCC 314 (324) : (1998 AIR SCW 2393 : AIR 1998 SC 2401) wherein the Dr. Justice A. S. Anand, Chief Justice speaking for the Bench in paragraphs 24 and 26 of the Report observed :-

"24. Accordingly, we hold that the right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and the wife and that right in the case of a widow is "a pre-existing right", which existed under the Shastric Hindu Law long before the passing of the 1937 or the 1946 Acts. Those Acts merely recognised the position as was existing under the Shastric Hindu Law and gave it a "statutory" backing. Where a Hindu widow is in possession of the property of her husband, she has a right to be maintained out of it and she is entitled to retain the possession of that property in lieu of her right to maintenance.

26. It is by force of Section 14(1) of the Act, that the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument. So far as sub-section (2) of Section 14 is concerned, it applies to instruments, decrees, awards, gifts etc., which create an independent or a new title in favour of the female for the first time. It has no application to cases where the instrument/document either declares or recognises or confirms her share in the property or her "pre-existing right to maintenance" out of that property. As held in Tulasamma case sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own, without interfering with the operation of Section 14(1) of the Act."

35. Learned Single Judge of Madhya Pradesh High Court in ***Lalsai*** vs. ***Bodhan Ram and others***, AIR 2001 Madhya Pradesh 159 has held that the Hindu law as amended from time to time is applicable to member of scheduled tribe of Madhya Pradesh, therefore, even though no notification has been issued by Central Government, yet Hindu Succession Act is applicable to members of uraon community. Learned Single Judge has held as under:

"[4] Having heard the learned counsel for both the sides and having scrutinised the entire records of the Courts below, it is apparent that the said findings of the Courts below are not based on the correct proposition of law. Admittedly, the parties are 'uraon'. The learned counsel for the respondents has drawn my attention on the provisions of S. 2 (2) of the Act, 1956 wherein it has been mentioned that the provisions of the said Act of 1956 shall not apply to the members of any scheduled tribe unless the Central Government by notification in the official gazette, otherwise directs. The contention of the learned counsel for the respondents is that since no notification has yet been issued by the Central Government, the provisions of the Act of 1956

shall not be applicable to the members of the 'Uraon' community. It has been held by this Court in Lachan Kunwar v. Budhwar in second Appeal No. 40 of 1982 (date of judgment 27-8-1987) that the Hindu Law as amended from time to time is applicable on the members of scheduled tribes of M.P. As such the provisions of the Act of 1956 are applicable to the members of scheduled tribe of Madhya Pradesh, though no notification as envisaged in S. 2 (2) of the said Act of 1956 has been issued by the Central Government. Therefore, in my view, the provisions of the Act, 1956 shall be applicable to 'Uraon' community even though no notification as above has so far been issued by the Central Government."

36. Learned Single Judge of Punjab and Haryana High Court in ***Smt. Bhago*** vs. ***Satbir***, AIR 2007 Punjab and Haryana 161 has held that when custom is not proved by leading cogent and convincing evidence, opinion expressed by complier of *Riwaj-i-am* or Settlement Officer in his book on customary law would carry no value. Learned Single Judge has held as under:

"[23] As far as Riwaj-i-am is concerned, no precedent has been cited by the plaintiff. No instance of unchaste Brahman widow having forfeited her rights in the property of her late husband has been brought on the record by way of evidence. Therefore, Riwaj-i-am described by E. Joseph ICS, Settlement Officer pertaining to question No. 55 stand exactly on the same footing as in hardayal v. Mst. Dakhan, AIR 1953 Punjab 209 and Arma Ram v. Mst. Chameli, AIR 1953 Punjab 211. Riwaj-i-am cannot be said to carry any evidentiary value all by itself, unless it is proved by leading cogent and convincing evidence that the said custom is being followed uninterruptedly by the Brahmans of District Rohtak. The existence of such custom if not sought to be established from any other evidence must be negatived. The report submitted by the Additional Civil judge, Sr. Division, Bahadurgarh carries nowhere as the same is not based on documentary proof so as to establish that a Brahman widow in Rohtak District leading an unchaste life loses her right of inheritance in the estate of her deceased husband. Therefore, no value can be attached to the report as well as to the question and answer No. 5 of the book written by E. Joseph, settlement Officer.

[25] In the absence of any evidence brought on the file it cannot be said that the opinion expressed by the Compiler of riwaj-i-am or Settlement Officer is of any help to the present appellant. Therefore, the substantial question of law raised in this appeal remains unproved by the plaintiff/appellant.

[32] I do not find any force in the contention of the learned counsel for the appellant for the reasons that the plaintiff/appellant has failed to prove with any instance or precedent on the record the custom that a Brahman widow leading an unchaste life cannot inherit the estate of her deceased husband. Ram Dai had become the full owner of the property after coming into force of the Hindu succession Act, 1956 thus she had a right to will away her property in favour of the defendants."

37. According to PW-1 Bhadur, property devolves upon sons and not on daughters. To the similar effect is the statement of PW-2 Karmo. However, DW-1 Bratia has

categorically stated that in Chamba district, the property devolves upon the boys and girls equally. His statement is corroborated by DW-2 Hoshiara Ram and DW-3 Machlu. The Court has gone through the judgments exhibited by the plaintiff and defendants. In few of the judgments of the Senior Sub Judge and District Judge, it is held that in the community of Gaddi, property devolves only upon the sons and it does not devolve upon the daughters, but in few of the judgments, it is held that property amongst Gaddi community would devolve upon sons and daughters equally. There is no consistency in the judgments cited hereinabove to prove the customs amongst the Gaddies that sons alone would inherit the property. The plaintiff has not even placed on record copy of ***Riwaj-i-aam*** to prove that there is custom prevalent in the Gaddi community that after the death of male collateral, the property devolves upon sons only and not upon daughters. In the copy of Pariwar register produced by the plaintiff, expression "***Rajput Gaddi***" has been mentioned. The cast "***Rajput Gaddi***" has only been changed on the basis of order dated 18.3.1993, as discussed hereinabove. The copy of order dated 18.3.1993 has not been placed on record. It further strengthens the case of the defendants that parties were Rajput and not Gaddi. Thus, there is no illegality in the mutation whereby the property was mutated in favour of daughters of Rasalu vide mutation No. 288 dated 19.2.1987 and thereafter the relinquishment of the proprietary rights in favour of defendant No.1 Bratia by the daughters of Rasalu vide mutation No. 371 dated 23.8.1994. Even if it is hypothetically held that the parties were Gaddi still the plaintiff has failed to prove that there was any custom whereby the girls were excluded from succeeding to the property of their father. Moreover, the mutations were attested on 19.2.1987 and 23.8.1994, but the suit has been filed beyond the period of limitation.

38. Section 4 of the Hindu Succession Act, 1956 reads as under:

> **"4. Overriding effect of Act :- (1) Save as otherwise expressly provided in this Act,-(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;**
>
> **(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act."**

39. According to the plain language of section 4 of the Hindu Succession Act, 1956, any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of the Act shall cease to have effect with respect to any matter for which provision is made in the Act. In view of this though there is no conclusive evidence that the custom is prevailing in the Gaddi community that the daughters would have no rights in the property but even if it is hypothetically assumed that this custom does exist, the same would be in derogation of section 4 of the Hindu Succession Act, 1956.

40. Learned Single Judge of Punjab High Court in ***Mast. Taro*** vs. ***Darshan Singh and others***, AIR 1960 Punjab 145 has held that by virtue of sections 2 and 4 of the Hindu Succession Act, Punjab Agricultural custom, so far as it was applicable to Hindus, is no longer in force so far as the matters of succession etc. are concerned, which are now governed by the provisions of the Hindu Succession Act. Learned Single Judge has held as under:

> **"[2] In view of the provisions of the Hindu Succession Act and the further fact that both Mst. Achhari and Mst. Taro are alive, the reversioners have no locus standi to bring the present suit because,**

whether there be a will or not Mst. Taro is the next heir after the demise of Mst. Achhari and the reversioners do not come in till the entire line of Mst. Taro become extinct. On behalf of the plaintiffs-respondents it was urged in the first instance that the Hindu Succession Act (hereinafter referred to as the Act) does not apply to the Jats who are primarily governed by the Punjab Agricultural custom in mattes of succession.

Section 2 of the Act makes the Act applicable to all persons who are not Muslims, Christians, Parsis or Jews by religion, and, in particular, sub-clause (b) of sub-s. (1) of S. 2 specifically provides that the Act is applicable to Sikhs and it was not denied that the parties either belong to this religion or are otherwise Hindus and "are not Muslims, Christians, Parsis or Jews." Section 4 of the Act makes the provisions of this Act applicable to all persons governed by the Act to the exclusion of "any other law in force immediately before the commencement of this Act." According to sub-clause (a) of sub-s (1) of S. 4, inter alia, "any custom or usage as part of Hindu law in force immediately before the commencement of this Act" ceases to have effect with respect to any matter for which provision is made in this Act.

Prior to the coming into force of the Act, every person was governed by his personal law, which, in the case of Hindus and Sikhs, was the Hindu law as modified by custom. Thus, custom including agricultural custom modified the Hindu law so far as the Hindu Jats were concerned to the extent to which it went counter to the provisions of strict Hindu law. Thus, Punjab agricultural custom must be treated to be part of Hindu law as it was in force in this State. From the date of the enforcement of the Hindu Succession Act, Hindu law, as modified by custom, is no longer applicable, qua matters relating to succession. Sub-clause (b) of sub-s. (1) of S. 4 further makes it clear by providing that "any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act."

Agricultural custom is certainly "a law" governing succession amongst Jats. Thus, we have no doubt that by virtue of Ss. 2 and 4 of the Hindu Succession Act, Punjab Agricultural custom, so far as it was applicable to Hindus, is no longer in force so far as the matters of succession etc. are concerned which are now governed by the provisions of the Hindu Succession Act."

41. Their Lordships of the Hon'ble Supreme Court in ***Punithawalli Ammal*** vs. ***Minor Ramalingam and another***, AIR 1970 SC 1730 have held that rights conferred on a Hindu female under section 14 (1) of the Act are not restricted or limited by any rule of Hindu Law and the provision makes a clear departure from the Hindu law texts or rules. Their Lordships while interpreting section 14 (1) of the Hindu Marriage Act have held that the full ownership conferred on Hindu female by section 14 (1) is not defeated by subsequent adoption by her. Their Lordships have held as under:

"[6] The explanation to the section is not necessary for our present purpose. It was conceded at the Bar that Sellathachi was in possession of the property in dispute on the date the Act came into force. By virtue of the aforesaid provision, she became the full owner of the

property on that date. From a plain reading of section 14 (1), it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu law. The presumption of continuity of law is only a rule of interpretation. That presumption is inoperative if the language of the concerned statutory provision is plain and unambiguous. The fiction mentioned earlier is abrogated to the extent is conflicts with the rights conferred on a Hindu female under section 14 (1) of the Act. In Sukhram v. Gauri Shankar, (1968) 1 SCR 476 = (AIR 1968 SC 365) this Court held that though a male member of a Hindu family governed by the Benaras School of Hindu law is subject to restrictions qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restrictions. This Court held in Munna Lal v. Rajkumar, 1962 Supp (3) SCR 418 = (AIR 1962 SC 1493) that by virtue of section 4 of the Act the legislature abrogated the rules of Hindu law on all matters in respect of which there is an express provision in the Act. In our opinion the rights conferred on a Hindu female under section 14 (1) of the Act are not restricted or limited by any rule of Hindu law. The section plainly says that the property possessed by a Hindu female on the date the Act came into force whether acquired before or after the commencement of the Act shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provision.

[7] In our judgment the learned judges of the Madas High Court were not right in limiting the scope of section 14 (1) by taking the aid of the fiction mentioned earlier. That in our opinion is wholly impermissible. On the point under consideration the decision of the Bombay High Court in Yamunabai v. Ram Maharaj Shreedhar Maharaj (AIR 1960 Bom 463), lays down the law correctly."

42. Their Lordships of the Hon'ble Supreme Court in ***Smt. Manshan and others*** vs. ***Tej Ram and others***, AIR 1980 SC 558 have held that the custom which prevented the daughters from inheriting the property got superseded by the provisions of the Act and hence the heirs of the collateral were no longer entitled to succeed to his property. Their Lordships have held as under:

"[3] The argument put forward on behalf of the respondents in the High Court with reference to Section 14 of the Hindu Succession Act was wholly misplaced. There was no question of applying either sub-section (1) or sub-sec. (2) of Section 14 of the said Act. Here the simple question which had to be answered was as to who was the heir of Chaudhary under the Hindu Succession Act on the date of his death. The property will revert to him or her. Reading Sections 4 and 8 of the Act together it is clear to us that on the date of death of Chaudhary, in supersession of the prevalent custom, his daughters became the preferential heirs and were entitled to inherit his property. Chaudhary might have remained a life owner according to the custom. But the portion of the custom which prevented the daughters from inheriting got superseded by the provisions of the Act and hence Bhagat Ram's heirs were no longer entitled to succeed to the property of Chaudhary

> in the year 1957. The effect of the declaratory decree passed in the year 1950, it is plain, was merely to declare that whosoever would be the next reversioner to the estate of Chaudhary at the time of his death would get the property in respect of which the declaratory decree was made and not necessarily the person in whose favour the declaratory decree was passed.
>
> [4] The High Court also seems to have been influenced by the expression 'dying intestate' occurring in Section 8 of the Act, and appears to have taken the view that since Chaudhary had no power to bequeath his ancestral property by a will, Section 8 would not apply and the daughters would not be entitled to claim the property as his reversioners under Section 8. In our opinion this is an entirely erroneous view of the law. Section 8 would apply where a male Hindu dies intestate either not having made any will or having made any invalid will. It squarely covered the case of the respondents."

43. The Hindu law generally recognizes three types of customs local custom, class custom and family custom. In the present case, plaintiff has failed to prove the usages of any type of custom out of three customs conclusively either on the basis of oral or documentary evidence.

44. Article 15 of the Constitution of India prohibit discrimination on the ground of sex. Articles 38, 39 and 46 envisage socio-economic justice to the women and also Preamble to the Constitution. Rule of law should establish uniform pattern in the society. The women have to be advanced socially and economically to bestow upon them dignity. The daughters in a society, who are Hindu, cannot be left and segregated from main stream. They are entitled to equal share in the property. Needless to add that gender discrimination violates fundamental rights.

45. According to the Gazetteer of India Himachal Pradesh Chamba published on 19.3.1963, the Gaddies are divided into four classes, i.e. (i) Brahmans, (ii) Khatris and Rajputs, who regularly wear the sacred thread, (iii) Thakurs and Rathis who, as a rule, do not wear it and (iv) the last class, comprising Kolis, Riharas, Lohars, Badhies, Sipis and Halis, to which last class the title of Gaddi is disputedly applied as inhabitants of the Gaderan. Each class is divided into numerous gotras or exogamous sections. Thus, the jhunun gotra of the Khatris gives daughters to the Brahmans and the Brahmans of Kukti regularly inter-marry with the other groups. Hindu constitutes about 91% of the population. They follow the Hinduism. According to Himachal Pradesh District Gazetters Kinnaur published on 11.8.1971, out of total population of 40,980, 91% were Hindus, 9% Buddhists and only 27 sikhs. According to Gazetteer of India, Himachal Pradesh Lahul and Spiti published in the year 1975, in Lahul Sub Division, Hinduism is the leading religion and in Spiti it is Buddhism. According to District Gazetteer Kangra District published in the month of March, 1925, 95% of the population is Hindu.

46. Their Lordships of the Hon'ble Supreme Court in ***Bala Shankar Maha Shankar Bhattjee and others*** vs. ***Charity Commissioner, Gujarat Stat***e, AIR 1995 SC 167 have held that the historical material contained therein relating to dispute whether temple in question is public or private is evidence under section 45 though not conclusive, but court may consider such evidence in conjunction with other evidence. Their Lordships have held as under:

> **"[22] The contention of Sri Yogeshwar Prasad that the Asstt. Charity Commissioner has failed to prove that Kalika Mataji temple is a public trust; contrarily the evidence on records, namely the 'Will' of Bai Diwali,**

widow of N. Girjashankar, establishes that the temple and its properties were always treated as private properties. It would get fortified and gets corroborated by decrees in Civil Suit No. 439 of 1985, one of the legatees sought to annul the Will in Exhibits 10, 59 and the decree in that behalf. The Civil Suit Nos. 353 of 1993, Ex. 24 and the Civil Suit No. 439 of 1885, Ex. 26 and the Civil Suit Nos. 904 of 1903 and 910 of 1903, Ex. 52 and Ex. 54, Civil Suit No. 912 of 1903, Ex. 55 would establish that the appellant's family had always treated the temple and the lands attached to temple as private properties. It has also been further contended that the entry into the temple was subject to permission and the devotees were not allowed to have Pooja, but have Darshan only. These circumstances have duly been taken into consideration by the District Judge while the High Court had not considered them in proper perspective. We find no force in the contention. It is seen that the Gazette of the Bombay Presidency, Vol. III published in 1879 is admissible under Sec. 35 read with Sec. 81 of the Evidence Act, 1872. The Gazette is admissible being official record evidencing public affairs and the Court may presume their contents as genuine. The statement contained therein can be taken into account to discover the historical material contained therein and the facts stated therein is evidence under Sec. 45 and the Court may in conjunction with other evidence and circumstances take into consideration in adjudging the dispute in question, though may not be treated as conclusive evidence. The recitals in the Gazette do establish that Kalika Mataji is on the top of the hill. Mahakali temple and Bachra Mataji on the right and left to the Kalika Mataji. During Moughal rule another Syed Sadar Peer was also installed there, but Kalika Mataji was the chief temple. Hollies and Bills are the main worshippers. On full Moon of Chaitra (April) and Dussehra (in the month of October), large number of Hindus of all classes gather there and worship Kalika Mataji, Mahakali, etc. After the downfall of Moughal empire, Marathas took over and His Highness Scindia attached great importance to the temple. One of the devotees in 1700 offered silver doors. The British annexed the territory pursuant to the treaty between Her Majesty's Government of India and His Highness Scindia on the 12th December, 1860. A condition was imposed in the treaty for continued payment of fixed cash grants to all the temples from the Treasury and that British emperors accepted the condition. Regular cash grants of fixed sums were given to all the temples by Scindias and British rulers, as evidenced by Exhibits 27, 28, 29 and 30. The historical statement of noted historian, stated by the High Court, by name M. S. Commissionaria in his Vol. 1 of 1938 Edition corroborates the Gazette on the material particulars, which would establish that the temple was constructed on the top of the hill around 14th century and the people congregate in thousands and worship, as of right, to Kalika Mataji and other deities. R. N. Joglekar's Alienation manual brought up in 1921 in the Chapter 5 Devasthana also corroborates the historical evidence. It is true that Bai Diwali in her Will, Ex. 22 treated the temple and the properties to be private property and bequeathed to her brother and the litigation ensued in that behalf. At that time, as rightly pointed out by the High Court, the concept of public trust and public temple was not very much in vogue. Therefore,

the treatment meted out to these properties at that time is not conclusive. On the other hand, the fixed cash grants given by the Rulers Scindias and the successor British emperors, the large endowment of lands given to Kalika Mataji temple by the devotees do indicate that the temple was treated as public temple. The appropriation of the income and the inter se disputes in that behalf are self-serving evidence without any probative value. Admittedly, at no point of time, the character of the temple was an issue in any civil proceedings. All the lands gifted to the deity stand in the name of the deities, in particular large extent of agricultural lands belong to Kalika Mataji. The entries in Revenue records corroborated it. The Gazette and the historical evidence of the temple would show that the village is the pilgrimage centre. Situation of the temples on the top of the hill away from the village and worshipped by the people of Hindus at large congregated in thousands without any let or hindrance and as of right, devotees are giving their offerings in large sums in discharge of their vows, do establish that it is a public temple. It is true that there is no proof of dedication to the public. It is seen that it was lost in antiquity and no documentary evidence in that behalf is available. Therefore, from the treatment meted out to the temple and aforesaid evidence in our considered view an irresistible inference would be drawn that the temple was dedicated to the Hindu public or section thereof and the public treat the temple as public temple and worship thereat as of right. It is true that there is evidence on record to show that there was board with inscription thereon that "No entry without permission" and that only Darshan was being had and inside pooja was not permitted. But that is only internal regulation arranged for the orderly Darshan and that is not a circumstance to go against the conclusion that it is a public temple. Enjoyment of the properties and non-interference by the public in the management are not sufficient to conclude that the temple is a private temple. It is found by the District Court and the High Court that the appellants are heredity priests and when the public found that they are in the management of the properties, they obviously felt it not expedient to interfere with the management of the temples. It is seen that the High Court considered the evidence placed on record and has drawn the necessary conclusions and inferences from the proved facts that Kalika Mataji temple is a public temple. It is a finding of fact. As regard the oral evidence the High Court rightly appreciated the evidence and it being a question of fact, we find no error in the assessment of the evidence by the High Court."

47. Their Lordships of the Hon'ble Supreme Court in ***Mahant Shri Srinivas Ramanuj Das*** vs. ***Surjanarayan Das and another***, AIR 1967 SC 256 have held that Gazetteer can be consulted on matter of public history and the statements in such Gazetteer can be relied on as providing historical material. Their Lordships have held as under:

"[26] It is urged for the appellant that what is stated in the Gazetteer cannot be treated as evidence. These statements in the Gazetteer are not relied on as evidence of title but as providing historical material and the practice followed by the Math and its head. The Gazetteer can be consulted on matters of public history."

48. Learned Single Judge of Jharkhand High Court in ***Dhabai Marandi*** vs. ***Bibhuti Marandi Lodo Marandi and others***, 2009 Law Suit (Jhar) 1485 has held as under:

> **"13. Section 2 of the Act defines Hindu which is as follows:**
>
> **2(1)(a) to any person who is a Hindu by religion in any of its forms or developments, including a Virashaiva, a Lingayat or a follower of the Brahmo, Prarthana or Arya Samaj.**
>
> **(b) to any person who is a Buddhist, Jaina or Sikh by religion, and**
>
> **(c) to any other person, who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by this Hindu Law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed.**
>
> **Clause (c) finds a negative definition of Hindu by excluding Muslims, Christian, Parsi or Jews, meaning thereby that if they are not Christian, Muslim, Jews they are Hindu provided they could not have been governed by Hindu Law or its custom. Section 2(1) of the aforesaid clause do not exclude the scheduled tribes from the definition of Hindu. Section 2(2) only postpones the application of Hindu Succession Act till the notification as required under this provision is issued. This by implication means that S.T. are also Hindues only, the application of Hindu Succession Act is simply contingent to certain notification. A scheduled tribe, pure and simple who is adhering to his custom is to be distinguished from that who has been Hinduised prior to commencement of the Hindu Succession Act and in my view such Hinduised tribal do fall within Section 2(1)(c) of the Act and may be treated as Hindu because there is no proving on the record that such tribals could not have been governed by the Hindu Law. Nothing has been shown that the custom bars the Munda from adopting any form of Hindu Religion."**

49. In view of the definite law laid down by their Lordships of the Hon'ble Supreme Court and the judgments of various other courts, provisions of sub-section (2) of section 2 of Hindu Succession Act, 1956 will not come in the way of inheritance of the property by the daughters belonging to tribal area where Hinduism and Buddhism is followed.

50. The Division Bench of Patna High Court in ***Kartik Oraon*** vs. ***David Munzni and another***, AIR 1964 Patna 201 has explained the term "tribe" as under:

> **".....14 "Tribe" has been defined in Encyclopaedia Britannica, Volume 22, 1961 edition, at page 465, by W. H. R. Rivers as "a social group of a simple kind, the members of which speak a common dialect, have a single government, and act together for such common purposes as "warfare". Other typical characteristics include a common name, a contiguous territory, a relatively uniform culture or way of life and a tradition of common descent. Tribes are usually composed of a number of local communities, e.g., bands, villages or neighbourhoods, and are often aggregated in clusters of a higher order called nations. The term is seldom applied to societies that have achieved a strictly territorial organization in large states but is usually confined to groups whose**

unity is based primarily upon a sense of extended kinship ties. It is no longer used for kin groups in the strict sense, such as clans....."

51. Dr. Gupta, Jai Prakash in "The customary laws of the Munda and the Oraon" has defined the tribe as under:

"**Tribe in the Dictionary of Anthropology is defined as 'a social group, usually with a definite area, dialect, cultural homogeneity, and unifying social organization. It may include several sub-groups, such as sibs or villages. A tribe ordinarily has a leader and may have a common ancestor, as well as patron deity. The families or small communities making up the tribe are linked through economic, social, religious, family, or blood ties'.**"

52. Their Lordships of the Hon'ble Supreme Court in ***Sri Manchegowda etc.*** vs**.** ***State of Karnataka and others***, AIR 1984 SC 1151 have held that the State consistently with the directive principles of the Constitution has made it a policy and very rightly to preserve, protect and promote the interests of the Scheduled Castes and Scheduled Tribes which by and large form the weaker and poorer sections of the people in our country. Their Lordships have held as under:

"[11] It is no doubt true that before the passing of the present Act any transfer of granted land in breach of the condition relating to prohibition on such transfer would not have the effect of rendering the transfer void and would make any such transfer only voidable. The present Act seeks to introduce a change in the legal position. The prohibition on transfer of granted land had been imposed by law, rules or regulations governing such grant or by the terms of the grant. The relevant provisions imposing such prohibition by rules, regulations and laws have been referred to in the judgment of the High Court. It is quite clear that the condition regarding prohibition of transfer of granted land had been introduced in the interest of the grantees for the purposes of up keep of the grants and for preventing the economically dominant sections of the community from depriving the grantees who belong to the weaker sections of the people of their enjoyment and possession of these lands and for safeguarding their interests against any exploitation by the richer sections in regard to the enjoyment and possession of these lands granted essentially for their benefit. As the Statement of Objects and Reasons indicates, this prohibition on transfer of granted land has not proved to be a sufficiently strong safeguard in the matter of preserving grants in the hands of the grantees belonging to the Scheduled Castes and Scheduled Tribes; and, in violation of the prohibition on transfer of the granted land, transfers of such lands on a large scale to the serious detriment of the interests of these poorer sections of the people belonging to the Scheduled Castes and Scheduled Tribes had taken place. In view of this unfortunate experience the Legislature in its wisdom and in pursuance of its declared policy of safeguarding, protecting and improving the conditions of these weaker sections of the community. thought it fit to bring about this change in the legal position by providing that any such transfer except in terms of the provisions of the Act will be null and void and not merely voidable. The Legislature no doubt is perfectly competent in pursuance of the aforesaid policy to provide that such

transactions will be null and void and not merely voidable. Even under the Contract Act any contract which is opposed to public policy is rendered void. The State, consistently with the directive principles of the Constitution, has made it a policy and very rightly, to preserve, protect and promote the interests of the Scheduled Castes and Scheduled Tribes which by and large form the weaker and poorer sections of the people in our country. This may be said to be the declared policy of the State and the provisions seeking to nullify such transfers is quite in keeping with the policy of the State which may properly be regarded as public policy for rendering social and economic justice to these weaker sections of the society.

[12] In pursuance of this policy, the Legislature is undoubtedly competent to pass all enactment providing that transfers of such granted lands will be void and not merely voidable for properly safeguarding and protecting the interests of the Scheduled Castes and Scheduled Tribes for whose benefit only these lands had been granted. Even in the absence of any such statutory provisions, the transfer of granted lands in contravention of the terms of the grant or in breach of any law, rule or regulation covering such grant will clearly be voidable and the resumption of such granted lands after avoiding the voidable transfers in accordance with law will be permitted. Avoidance of such voidable transfers and resumption of' the granted lands through process of law is bound to take time. Any negligence and delay on the part of the authorities entitled to take action to avoid such transfers through appropriate legal process for resumption of such grant may be further impediments in the matter of avoiding such transfers and resumption of possession of the granted lands. Prolonged legal proceedings will undoubtedly be prejudicial to the interests of the members of the Scheduled Castes anti Scheduled Tribes for whose benefit the granted lands are intended to be resumed. As transfers of granted lands in contravention of the terms of the grant or any law, regulation or rule governing such grants can be legally avoided and possession of such lands can be recovered through process of law, it must be held that the Legislature for the purpose of avoiding delay and harassthent of protracted litigation and in its object of speedy restoration granted lands to the members of the weaker communities is perfectly competent to make suitable provision for resumption of such granted lands by stipulating in the enactment that transfers of such lands in contravention of the terms of the grant or any regulation, rule or law regulating such grant will be void and providing a suitable procedure consistent with the principles of natural justice for achieving this purpose without recourse to prolonged litigation in Court in the larger interests of benefiting the members of the Scheduled, Castes and Scheduled Tribes."

53. Their Lordships of the Hon'ble Supreme Court in ***Lingappa Pochanna Appelwar*** vs. ***State of Maharashtra and another***, (1985) 1 SCC 479 while considering Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974 have explained the concept of distributive justice. Their Lordships have held as under:

"[14] Under the scheme of the Constitution, the Scheduled Tribes as a class require special protection against exploitation. The very existence

of Scheduled Tribes as a distinctive class and the preservation of their culture and way of life based as it is upon agriculture which is inextricably linked with ownership of land, requires preventing an invasion upon their lands. The impugned Act and similar measures undertaken by different States placing restrictions on transfer of lands by members of the Scheduled Castes and Tribes are aimed at the State Policy enshrined in Art. 46 of the Constitution which enjoins that "The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular of the Scheduled Castes and Tribes and shall protect them from social injustice and all forms of exploitation." One has only to look at the artlessness, the total lack of guile, the ignorance and the innocence, the helplessness, the economic and the educational backwardness of the tribals pitted against the artful, usurious, greedy land grabber and exploiter invading the tribal area from outside to realize the urgency of the need for special protection for the tribals if they are to survive and to enjoy the benefits of belonging to the 'Sovereign, Socialist, Secular, Democratic Republic' which has vowed to secure to its citizens 'justice, social, economic and political' 'assuring the dignity of the individual'. The great importance which the Founding Fathers of the Constitution attached to the protection, advancement and prevention of exploitation of tribal people may be gathered from the several provisions of the Constitution. Apart from Art. 14 which, interpreted positively, must promote legislation to protect and further the aspirations of the weak and the oppressed, including the tribals, there are Arts. 15(4) and 16(4) which make special provision for reservation in Government posts and admissions to educational institutions. Even the Fundamental Rights guaranteed by Art. 19(1)(d) and (e), that is, the right to move freely throughout the territory of India and the right to reside and settle in any part of the territory of India are made expressly subject to reasonable restrictions for the protection of the interests of any Scheduled Tribe. The proviso to Art. 275 specially provides for the payment out of the Consolidated Fund of India as grants in aid of the revenues of a State such capital and recurring sums as may be necessary to meet the cost of developmental schemes for the promotion of the welfare of the Scheduled Tribes in the State. Art. 330 provides for reservation in the House of the People for the Scheduled Tribes. Art. 332 provides for the reservation of seats for the Scheduled Tribes in the Legislative Assemblies of the States. Art. 335 specially directs that the claims of the members of the Scheduled Castes and the Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of the State. Art. 343(2) empowers the President to specify the tribes or tribal communities or parts of them which shall be deemed to be Scheduled Tribes for the purposes of the Constitution. Arts. 244 and 244A of the Constitution make special provision for the administration and control of the scheduled areas and the scheduled tribes in any State by the application of the Fifth and the Sixth Schedules. Paragraph 3 of the Fifth Schedule particularly enjoins the Governor of each State having scheduled areas to report to the President annually or whenever

so required, regarding the administration of the scheduled area in that State, and the executive power of the Union is extended by that paragraph to giving directions to the State as to the administration of the said area. Paragraph 5(2) empowers the Governor to make regulations for the peace and good Government of any area in any State which is for the time being a scheduled area and, in particular, and without prejudice to the generality of the foregoing power, such regulations may (a) prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area; (b) regulate the allotment of land to members of Scheduled Tribes in such areas; and (c) regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area. Mention has already been made of Art 46 of the Directive Principle which specially enjoins the State to protect the Scheduled Castes and Tribes from all social injustice and from all forms of exploitation. All these provisions emphasize the particular care and duty required of all the organs of the State to take positive and stern measures for the survival, the protection and the preservation of the integrity and the dignity of the tribals.

[15] The problem of how far and to what extent the law of contract should be used as an instrument of distributive justice has been engaging the attention not only of the Legislatures and the Courts but also of scholars. Kronman in his recent article 'Contract Law and Distributive Justice' observes:

"If one believes it is morally acceptable for the State to forcibly redistribute wealth from one group to another, the only question that remains is how far the redistribution should be accomplished."

According to learned author, this could be achieved not only by taxation but also by regulatory control of private transactions. He accepts that distributive fairness can only be achieved by taxation or contractual regulation, at some sacrifice in individual liberty.

[20] The legislation is based on the principle of distributive justice. The impugned Act is intended and meant as an instrument for alleviating oppression, redressing bargaining imbalance, cancelling unfair advantages, and generally overseeing and ensuring probity and fair dealing. It seeks to reopen transactions between parties having unequal bargaining power resulting in transfer of title from one to another due to force of circumstances and also seeks to restitute the parties to their original position. Quite recently, this Court in Manchegowda v. State of Karnataka. (1984) 3 SCC 301 : (AIR 1984 SC 1151) upheld the constitutional validity of the Karnataka Scheduled Castes and Scheduled Tribes (Prohibition of Transfer of Certain Lands) Act, 1978. It provided for restoration of lands transferred by members of Scheduled Castes and Tribes where the grant of land was attached with a condition regarding prohibition of transfer of the granted lands. It repelled the contention that Ss. 4 and 5 of the Act which provided for avoidance of transfers were violative of Art. 14, Art. 19(1)(f) and Aft. 31 of the Constitution and observed that any transfer of such lands in violation of the prohibition conferred on the transferee only a defeasible

title and therefore the provisions could not be held to be arbitrary, illegal and void."

54. Their Lordships of the Hon'ble Supreme Court in ***C. Masilamani Mudaliar and others*** vs. ***Idol of Sri Swaminathaswami Swaminathaswami Thirukoil and others***, (1996) 8 SCC 525 have held that section 14 of the Hindu Succession Act should be constructed Harmoniously consistent with the constitutional goal of removing gender-based discrimination and effectuating economic empowerment of Hindu females. Their Lordships have further held that women have right to elimination of gender based discrimination particularly in respect of property so as to attain economic empowerment. This forms part of universal human rights and they have right to equality of status and opportunity which also forms part of the basic structure of the Constitution. The Supreme Court is obliged to effectuate these rights of women. The personal laws inconsistent with the constitutional mandates are void under Article 13 of the Constitution of India. Their Lordships have held as under:

"[15] It is seen that if after the Constitution came into force, the right to equality and dignity of person enshrined in the Preamble of the Constitution, Fundamental Rights and Directive Principles which are a trinity intended to remove discrimination or disability on grounds only of social status or gender, removed the pre-existing impediments that stood in the way of female or weaker segments of the society. In S. R. Bommai v. Union of India, [(1995) 1 SCC (sic)] this Court held that the Preamble is part of the basic structure of the Constitution. Handicaps should be removed only under rule of law to enliven the trinity of justice, equality and liberty with dignity of person. The basic structure permeates equality of status and opportunity. The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they became void under Article 13 if they violated fundamental rights. Right to equality is a fundamental right. Parliament, therefore, has enacted Section 14 to remove pre-existing disabilities fastened on the Hindu female limiting her right to property without full ownership thereof. The discrimination is sought to be remedied by Section 14 (1) enlarging the scope of acquisition of the property by a Hindu female appending an explanation with it.

[18] Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedom are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

[20] The Parliament made the Protection of Human Rights act, 1993. Section 2(b) defines human rights means "the rights relating to

life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international conventions and enforceable by Courts in India." Thereby the principle embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

[19] Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2 (f) denudes its effect and enjoin to implement Article 2(f) read with its obligation undertaken under Articles 3, a 14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Convention of Right to Development. The directive principles and fundamental rights, though provided the matrix for development of human personality and elimination of discrimination, these conventions add urgently and teeth for immediate implementation. It is, therefore, imperative of the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

[23] Bharat Ratna Dr. B. R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitutes conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constellate economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins that this Court to breath life into the dry bones of the Constitution, international convictions and the Protection of Human Rights Act and the Act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women."

55. Their Lordships of the Hon'ble Supreme Court in ***Papaiah*** vs. ***State of Karnataka and others***, (1996) 10 SCC 533 have explained the right to economic justice to members of SCs/Sts/OBCs under Articles 14, 15, 21, 46, 39 (b) and Preamble as under:

"[8] It is seen that Art. 46 of the Constitution, in terms of its Preamble, enjoins upon the State to provide economic justice to the Scheduled Castes, Scheduled Tribes and other weaker Sections of the society and to prevent their exploitation. Under Art. 39(b) of the Constitution, the State is enjoined to distribute its largess, land, to subserve the public good. The right to economic justice to the Scheduled Castes, Scheduled

Tribes and other weaker sections is a fundamental right to secure equality of status, opportunity and liberty. Economic justice is a facet of liberty without which equality of status and dignity of person are teasing illusions. In rural India, land provides economic status to the owner. The State, therefore, is under constitutional obligation to ensure to them opportunity giving its largess to the poor to augment their economic position. Assignment of land having been made in furtherance, thereof, any alienation, in its contravention, would be not only in violation of the constitutional policy but also opposed to public policy under S. 23 of the Contract Act. Thereby, any alienation made in violation thereof is void and the purchaser does not get any valid right, title or interest thereunder. It is seen that rule 43 (a) specifically prohibits alienation of assigned land. It does not prescribe any limitation of time as such. However, it is contended that the appellant has obtained land by way of sale in 1958 long before the Act came into force and thereby he perfected his title by adverse possession. We find no force in contention. This Court had considered this question in similar circumstances R. Chandevarappa's case (1995 (5) SCALE 620) and had held thus :

"The question then is whether the appellant has perfected his title by adverse possession. It is seen that a contention was raised before the Assistant Commissioner that the appellant having remained in possession from 1968, he perfected his title by adverse possession. But the crucial facts to constitute adverse possession have not been pleaded. Admittedly the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant."

56. Their Lordships of the Hon'ble Supreme Court in ***Ahmedabad Municipal Corporation*** vs. ***Nawab Khan Gulab Khan and others***, (1997) 11 SCC 121 have held that Articles 38, 39 and 46 mandate the State as its economic policy to provide socio-economic justice to minimize inequalities in income and in opportunities and status and it positively charges the State to distribute its largess to the weaker sections of the society envisaged in Article 46 to make socio-economic justice a reality, meaningful and fruitful. Their Lordships have held as under:

"13. Socio-economic justice, equality of status and of opportunity and dignity of person to foster the fraternity among all the sections of the society in an integrated Bharat is the arch of the Constitution set down in its Preamble. Arts. 39 and 38 enjoin the State to provide facilities and opportunities. Arts. 38 and 46 of the Constitution enjoin the State to promote welfare of the people by securing social and economie justice to the weaker sections of the society to minimise inequalities in income and endeavour to eliminate inequalities in status. In that case,

it was held that to bring the Dalits and the Tribes into the mainstream of national life, the State was to provide facilities and opportunities as it is duty of the State to fulfil the basic human and Constitutional rights to residents so as to make the right to life meaningful. In Shantistar Builders v. Narayan Khimalal Totame, 1990(1) SCC 520 : AIR 1990 SC 630, another Bench of three Judges had held that basic needs of man have traditionally been accepted to be three - food, clothing and shelter. The right to life is guaranteed in any civilised society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in. The difference between the need of an animal and a human being for shelter has to be kept in view. For an animal, it is the bare protection of the body, for a human being, it has to be a suitable accommodation which would allow him to grow in every aspect - physical, mental and intellectual. The surplus urban-vacant land was directed to be used to provide shelter to the poor. In Olga Tellis case, (supra), the Constitution Bench had considered the right to dweil on pavements or in slums by the indigent and the same was accepted as a part of right to life enshrined under Art. 21; their ejection from the place nearer to their work would be deprivation of their right to livelihood. They will be deprived of their livelihood if they are evicted from their slum and pavement dwellings. Their eviction tantamounts to deprivation of their life. The right to livelihood is a traditional right to life, the easiest way of depriving a person of his right to life would be to deprive him of means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. The deprivation of right to life, therefore, must be consistent with the procedure established by law. In P. G. Gupta v. State of Gujarat, 1995 Supp (2) SCC 182, another Bench of three Judges had considered the mandate of human right to shelter and read it into Art. 19(l)(e) and Art. 21 of the Constitution and the Universal Declaration of Human Rights and the Convention of Civic, Economie and Cultural Rights and had held that it is the duty of the State to construct houses at reasonable cost and make them easily accessible to the poor. The aforesaid principles have been expressly embodied and in-built in our Constitution to secure economie democracy so that everyone has a right to life, liberty and security of the person. Art. 22 of the Declaration of Human Rights envisages that everyone has a right to social security and is entitled to its realisation as the economie, social and cultural rights are indispensable for his dignity and free development of his personality. It would, therefore, be clear that though no person nas a right to encroach and erect structures or otherwise on footpath, pavement or public streets or any other place reserved or earmarked for a public purpose, the State has the Constitutional duty to provide adequate facilities and opportunities by distributing its wealth and resources for settlement of life and erection of shelter over their heads to make the right to life meaningful, effective and fruitful. Right to livelihood is meaningful because no one can live without means of his living, that is the means of livelihood. The deprivation of the right to life in that context would not only denude right of the effective content and meaningfulness but

it would make life miserable and impossible to live. It would, therefore, be the duty of the State to provide right to shelter to the poor and indigent weaker sections of the society in fulfilment of the Constitutional objective."

57. Their Lordships of the Hon'ble Supreme Court in ***Charan Singh etc.*** vs. ***State of Punjab and others etc***., AIR 1997 SC 1052 have held that socio-economic justice is required to be done to the weaker sections under Articles 38, 39 (b) and 46 of the Constitution of India and particularly to scheduled castes and scheduled tribes and to prevent them from social injustice and prevention of all forms of exploitation. Their Lordships have held as under:

"[10] It is now settled policy of the Government as enjoined under Art. 46 of the Constitution and the Directive Principles, particularly Arts. 38 and 39(b) and the Preamble of the Consitution that economic and social justice requires to be done to the weaker sections of the society, in particular to the Scheduled Castes and Scheduled Tribes and to prevent them from social injustice and prevention of all forms of exploitation. In the light of that constitutional objective of economic empowerment, the Government have rightly taken the policy to assign the lease to the either to a Co-operative Society composed of the Scheduled Castes or individual members of the Scheduled Tribes members, as the case may be, in accordance with their policy then in vogue at the rate of Rs. 20/- per acre or 90 times the land revenue, whichever is less. Under these circumstances, the appellants having been inducted into posession reclaimed the land and remained in possession after the expiry of the lease, the Government is required to regularise their possession and assign the lands in their possession in accordance with its policy. The appellants, therefore, are directed to make necessary application within four weeks from today to the competent authority and the authorities are directed to regularise their possession imposing necessary conditions for their continuance in possession and enjoyment of the same in the light of the constitutional objective of rendering them socio-economic justice, putting restrictions on sub-letting or selling; all the relevant conditions in that behalf may be imposed so that they remain in possession and enjoy the same to improve their social and economic status as enjoined under the Constitution. The authorities also are directed to dispose of the applications, within a period of two months from the date of the receipt of the same. The appellants shall remain in possession until the regularisation is done and shall enjoy the lands without any sub-letting or alienation thereof."

58. Their Lordships of the Hon'ble Supreme Court in ***Velamuri Venkata Sivaprasad (Dead) by Lrs***. Vs. ***Kothuri Venkateswarlu (Dead) by Lrs. and others***, (2000) 2 SCC 139 have held that socio economic legislation should be interpreted with the widest possible connotation and in the matter of interpretation of statutes specially relating to womenfolk, due weightage should be given to the constitutional requirement of equality of status. Thus, the Hindu Succession Act, 1956 should be interpreted accordingly. Their Lordships have further held that equality of status permeates the basic structure of the Constitution and negates gender bias. Their Lordships have held as under:

"[12] Undisputably, the Hindu Succession Act, 1956 in particular Section 14 has introduced far reaching changes having due regard to

the role and place of womanhood in the country on the basis of the prevailing socio-economic perspective. It is now a well-settled principle of law that legislations having socio-economic perspective ought to be interpreted with widest possible connotation as otherwise, the intent of the legislature would stand frustrated. Recognition of Rights and protection thereof thus ought to be given its full play for which the particular legislation has been introduced in the Statute Book. Gender bias is being debated throughout the globe and the basic structure of the Constitution permeates quality of status and thus negates gender bias. Gender equality is one of the basic principles of our Constitution. The endeavour of the law court should thus be to give due weightage to the requirement of the Constitution in the matter of interpretation of statutes wherein specially the women folk would otherwise be involved. The legislation of 1956 therefore, ought to receive an interpretation which would be in consonance with the wishes and desires of framers of our Constitution. We ourselves have given this Constitution to us and as such it is a bounden duty and an obligation to honour the mandate of the Constitution in every sphere and interpretation which would go in consonance therewith ought to be had without any departure therefrom. Tulasamma's case, obviously having this in mind decided the issue and attributed the widest possible connotation to the words used in Section 14(1) of the Act of 1956. The decision in Tulasamma's case (AIR 1977 SC 1944) from time to time came up for consideration before this Court and the same stands accepted without any variation as noted herein before. One of the latest decisions where Tulasamma's case has been considered, is the decision of this Court in the case of Raghubir Singh v. Gulab Singh (1998) 6 SCC 314 (324) : (1998 AIR SCW 2393 : AIR 1998 SC 2401) wherein the Dr. Justice A. S. Anand, Chief Justice speaking for the Bench in paragraphs 24 and 26 of the Report observed:-

"24. Accordingly, we hold that the right to maintenance of a Hindu female flows from the social and temporal relationship between the husband and the wife and that right in the case of a widow is "a pre-existing right", which existed under the Shastric Hindu Law long before the passing of the 1937 or the 1946 Acts. Those Acts merely recognised the position as was existing under the Shastric Hindu Law and gave it a "statutory" backing. Where a Hindu widow is in possession of the property of her husband, she has a right to be maintained out of it and she is entitled to retain the possession of that property in lieu of her right to maintenance.

26. It is by force of Section 14(1) of the Act, that the widow's limited interest gets automatically enlarged into an absolute right notwithstanding any restriction placed under the document or the instrument. So far as sub-section (2) of Section 14 is concerned, it applies to instruments, decrees, awards, gifts etc., which create an independent or a new title in favour of the female for the first time. It has no application to cases where the instrument/document either declares or recognises or confirms her share in the property or her "pre-existing right to maintenance" out of that property. As held in Tulasamma case sub-section (2) of Section 14 is in the nature of a

proviso and has a field of its own, without interfering with the operation of Section 14(1) of the Act."

[34] It is pertinent to note here that the courts ought always to adopt a construction of the statute which will ensure to the benefit of the society and eschew such a construction which may adversely affect the society. Morality and law cannot but be equated with each other; what is legal is moral and as such morality cannot be differentiated from the law. One School of thought recorded that while it is true that what is legal is moral but the converse is not true. We however, do not dilate on this issue excepting reiterating what is stated herein before in this judgment.

59. Article 51-A (e) of the Constitution of India also commands to protect the women in order to renounce practices derogatory to the dignity of women.

60. Their Lordships of the Hon'ble Supreme Court in ***State of Kerala and another*** vs. ***Cahndramohanan***, (2004) 3 SCC 429 have held as under:

"[3] The question which has been raised at the Bar is not free from doubt. The Constitution provides for declarations of certain castes and tribes as Scheduled Castes and Scheduled Tribes in terms of Articles 341 and 342 of the Constitution of India. Article 342 reads as under:

"342. Scheduled Tribes:- (1) The President may with respect to any State or Union Territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the tribes or tribal communities or parts or of groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union Territory, as the case may be.

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under Clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

[4] The object of the said provision is to provide right for the purpose of grant of protection to the Scheduled Tribes having regard to the economic and educationally backwardness wherefrom they suffer. For the aforementioned purpose only the President of India has been authorised to issue the notification to parts or groups within the Tribes. It is not in dispute that the Constitution (Scheduled Tribes) Order, 1950 made in terms of the aforementioned provisions is exhaustive. The question which is required to be posed at the outset is what is the Tribes....."

61. The tribal belts have modernized with the passage of time. They profess Hindu rites and customs. They do not follow different Gods. Their culture may be different but customs must conform to the constitutional philosophy.

62. Their Lordships of the Hon'ble Supreme Court in ***Dayaram*** vs. ***Sudhir Batham and others***, (2012) 1 SCC 333 have held that to declare the law carries with it the power and within limits, the duty to make law when none exists. Directions issued in the exercise of judicial power can fashion modalities out of the existing executive apparatus, to

ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The judicial power was exercised to interpret the Constitution as a "living document" and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves. Their Lordships have held as under:

> **"17. The directions issued in Madhuri Patil were towards furtherance of the constitutional rights of scheduled castes/scheduled tribes. As the rights in favour of the scheduled castes and scheduled tribes are a part of legitimate and constitutionally accepted affirmative action, the directions given by this Court to ensure that only genuine members of the scheduled castes or scheduled tribes were afforded or extended the benefits, are necessarily inherent to the enforcement of fundamental rights. In giving such directions, this court neither re-wrote the Constitution nor resorted to `judicial legislation'. The Judicial Power was exercised to interpret the Constitution as a `living document' and enforce fundamental rights in an area where the will of the elected legislatures have not expressed themselves.**
>
> **18. Benjamin Cardozo in his inimitable style said that the power, to declare the law carries with it the power and within limits the duty, to make law when none exists. (Nature of the Judicial Process, page 124). Directions issued in the exercise of Judicial Power can fashion modalities out of existing executive apparatus, to ensure that eligible citizens entitled to affirmative action alone derive benefits of such affirmative action. The directions issued in Madhuri Patil are intrinsic to the fulfillment of fundamental rights of backward classes of citizens and are also intended to preclude denial of fundamental rights to such persons who are truly entitled to affirmative action benefits."**

63. The upshot of the appreciation of the evidence and the law discussed hereinabove is that daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the Hindu Succession Act, 1956 and not as per customs and usages in order to prevent the women from social injustice and prevention of all forms of exploitation. The laws must evolve with the times if societies are to progress. It is made clear by way of abundant precaution that the observations made hereinabove only pertain to right to inherit the property by the daughters under the Hindu Succession Act, 1956 and not any other privileges enjoined by the tribal in the tribal areas.

64. All the substantial questions of law are answered accordingly.

65. Learned First Appellate Court has correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgment and decree passed by the first appellate court.

66. In view of the analysis and discussion made hereinabove there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

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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 Ref:- Ghazala Abdullah ...Petitioner.
Versus
State of H.P. & others ...Respondents.

CWPIL No. 8 of 2015
Date of Order: 23.06.2015

Constitution of India, 1950- Article 226- Complaints were received in the Court that authorities are not taking action against the person who are violating the directions issued by the Court- trees are being cut on the pretext that permission had been obtained from the authorities to cut the trees- respondent directed to appear before the Court to explain the situation and the respondent commanded to take action strictly as per law.

Present: Mr. Aman Sood, Advocate, as Amicus Curiae.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for the respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Mr. Anup Rattan, learned Additional Advocate General, stated at the Bar that the name of respondent No. 8 has wrongly been reflected in the array of respondents as it should be 'Municipal Council, Dharamshala through its Executive Officer, Dharamshala, District Kangra'. His statement is taken on record. Accordingly, name of respondent No. 8 be read as 'Municipal Council, Dharamshala through its Executive Officer, Dharamshala, District Kangra' instead of 'Chairman, Municipal Council, Kangra at Dharamshala'. Registry is directed to carry out necessary correction in the cause title.

2. Respondents No. 1 to 4 and 6 have filed the fresh compliance/status reports. We have gone through the same and are of the view that the same are not in tune with the directions made by this Court. Thus, we record our dissatisfaction.

3. The Registry has also received complaints alongwith CD, perusal of which do disclose that the authorities are not taking actions against the persons who are violating the directions issued by this Court, as warranted under law and who are also involved in the commission of offences punishable under penal laws and other laws applicable. It is also mentioned in one of the complaints that granting of permission to the land owners to cut the trees from the land owned by them has been stayed by this Court vide order, dated 05.06.2015, but the trees are being cut under the pretext that they have already obtained the permission from the authorities to cut the trees, and when the matter was reported to the authorities, they did not bother to take any action by saying that these persons were within their rights to cut the trees.

4. It is astonishing how the authorities can make such a statement. Respondents No. 4 to 6, 8 and the SHO concerned are directed to appear before this Court on the next date and to explain the position. In the meantime, all the sanctions granted earlier, i.e. prior to 05.06.2015, which are yet to be executed, are stayed.

5. We wonder why the authorities have not drawn any action under the penal laws against the person(s) who have violated the directions issued by this Court read with other provisions of law applicable. All the respondents are commanded to draw action(s) strictly as per the mandate of law.

6. Registry is directed to furnish copy of all the communications alongwith CD to the learned Amicus Curiae and learned Advocate General during the course of the day enabling them to file response/status report.

7. Respondents No. 1 and 2 are also directed to file latest status report relating to Jakhoo forest before the next date.

8. List on **6th July, 2015.** Copy **dasti.**

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

Cr.MMO No. 117 of 2014
Order Reserved on 20th May 2015
Date of Order 23rd June, 2015

1. Sanjeev Kumar son of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una H.P.
2. Shri Jagdish Singh son of Shri Sohan Singh resident of village Fatehpur (Mehral) P.O. Nangran, Tehsil and District Una HP
3. Smt. Darshna Devi wife of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una HP
4. Shri Sandeep alias Vicky son of Shri Jagdish Chand resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una HP ....Petitioners

Versus

1. State of H.P. through Principal Secretary (Home) to the Government of Himachal Pradesh Shimla-171002
2. Smt. Nirmala Devi wife of Shri Sanjeev Kumar son of Shri Jagdish Singh resident of village Fatehpur (Mehral) P.O. Nangran Tehsil and District Una H.P. now residing with her uncle Sh. Kamal Singh son of Shri Dalel Singh resident of village Agampur Tehsil Anandpur Sahib District Ropar Punjab ....Non-petitioners

Code of Criminal Procedure, 1973- Section 482- petitioners sought quashing of FIR on the ground that private complaint was filed before Sub Divisional Judicial Magistrate Aanadpur Sahib in which all the accused were acquitted- wife had left matrimonial home in the month of May, 2003 and FIR was lodged after more than 10 years- no specific date and time regarding the demand of dowry were given- record showed that ACJM had given liberty to the complainant to file fresh complaint under provision of law before competent Court having jurisdiction and this judgment has attained finality- hence, fresh complaint filed by the complainant pursuant to the direction of the Court cannot be said to be barred by law.

(Para-6 and 8)

Cases referred:

Monica Kumar (Dr.) and another vs. State of U.P. and others, (2008)8 SCC 781

Basudev Bhoi vs. Bipadabhanjan Puhan and another, 1997(2) Crimes 331 (Orissa High Court)

Union of India vs. Major General Shri Kant Sharma and another, JT 2015 (4) SC 576

Commissioner of Income Tax and others vs.Chhabil Dass Agarwal, JT 2013 (11) SC 387

L. Chander Kumar vs. Union of India (Constitutional Bench of India), (1997)3 SCC 261

For the Petitioners:	Mr. Onkar Jairath, Advocate.
For Non-petitioner No.1:	Mr. J.S. Rena, Assistant Advocate General.
For Non-petitioner No.2:	Ms. Anjali Soni Verma, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. read with Article 227 of the Constitution of India for quashing FIR No. 85 of 2013 dated 7.8.2013 registered against the petitioners under Sections 406, 498-A and 120-B IPC at P.S. Kot-Kehlur Tehsil Shri Naina Devi Ji District Bilaspur (H.P.). It is pleaded that private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar was filed before Sub Divisional Judicial Magistrate Anandpur Sahib under Sections 406, 498-A read with Section 120-B IPC which was decided on dated 22.12.2012 and learned Sub Divisional Judicial Magistrate Anandpur Sahib acquitted all accused persons qua offence punishable under Sections 406, 498-A read with Section 120-B IPC by way of giving them benefit of doubt. It is pleaded that as per Constitution of India accused persons cannot be tried twice for the same offence. It is further pleaded that Smt. Nirmala Devi left her matrimonial house in the month of May 2003 and application under Section 156(3) Cr.P.C. for registration of FIR was filed on dated 3.8.2013 after more than ten years and on this ground FIR is liable to be quashed. It is also pleaded that there is no specific date and time mentioned as to when Rs.1 lac (Rupees one lac only) was demanded by petitioners from Smt. Nirmala Devi as dowry and further pleaded that list of dowry articles filed is also false. It is pleaded that no article of dowry was entrusted to petitioners. It is pleaded that as of today articles of dowry took away by Smt. Nirmala Devi in presence of Pardhan Gram Panchayat and other members. It is pleaded that divorce petition already stood filed by petitioner No.1. Prayer for acceptance of petition filed under Section 482 Cr.P.C. sought with further prayer to quash FIR No. 85 of 2013 dated 7.8.2013 registered in Police Station Kot-Kehloor District Bilaspur (H.P.).

2. Per contra reply filed on behalf of the State of H.P. pleaded therein that Sanjeev is husband of Nirmala Devi and Jagdish Singh is father-in-law of Nirmala Devi and Smt. Darshna Devi is mother-in-law of Nirmala Devi and Sandeep @ Vickey is brother-in-law of Nirmala Devi. It is pleaded that Nirmala Devi was married with Sanjeev Kumar in the year 2002 and one male child was born. It is pleaded that prior to the birth of male child Smt. Nirmala Devi was residing at her parental house. It is pleaded that Smt. Nirmala Devi filed private complaint under Sections 406, 498-A and 120-B IPC before Sub Divisional Judicial Magistrate Anandpur Sahib. It is pleaded that Sub Divisional Judicial Magistrate Aanadpur Sahib decided the case on dated 22.12.2012 with a direction that Nirmala Devi would be at liberty to file fresh complaint under the provisions of law before the competent Court having jurisdiction. It is pleaded that in compliance of direction of learned Sub Divisional Judicial Magistrate Aanadpur Sahib announced in IPC complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar fresh complaint before learned Judicial Magistrate 1st Class Bilaspur under Sections 406, 498-A and 120-B IPC filed and thereafter learned Judicial Magistrate 1st Class Bilaspur sent the complaint under Section 156(3) Cr.P.C. for investigation. It is pleaded that during investigation it was established that after sometime of marriage all petitioners started maltreating and harassing and misbehaving Smt. Nirmala Devi physically as well as mentally and also demanded Rs.1 lac (Rupees one lac only). It is further pleaded that petitioner No.1 and petitioner No. 3 also beaten Smt.Nirmala Devi and Nirmala Devi

was forced to leave her matrimonial house. It is pleaded that cruelty is continuing offence against the married women and there is no question of limitation. It is pleaded that learned Sub Divisional Judicial Magistrate Aanadpur Sahib while announcing the judgment in IPC complaint No. 119 of 2007 has given the liberty to complainant to file fresh complaint under the provisions of law before competent Court of law having jurisdiction. It is pleaded that during investigation criminal offences under Sections 406, 498-A and 120-B IPC are established and challan was prepared by SHO of P.S. Kot Kehlur. It is pleaded that FIR was registered in P.S. Kot Kehlur as per directions of learned Judicial Magistrate 1st Class Bilaspur issued under Section 156(3) of Code of Criminal Procedure. Prayer for dismissal of petition filed under Section 482 IPC read with Article 227 of Constitution of India sought.

3. Per contra separate reply filed on behalf of Smt. Nirmala Devi wife of co-petitioner No.1 Sanjeev Kumar pleaded therein that petitioners have not approached the Court with clean hands and suppressed the material facts. It is pleaded that learned Sub Divisional Judicial Magistrate Aanadpur Sahib had given the liberty to Nirmala Devi to file fresh complaint under provisions of law before competent Court having jurisdiction. It is pleaded that Smt. Nirmala Devi had also filed proceedings under Section 125 Cr.P.C. regarding maintenance allowance but co-petitioner No.1 Sanjeev Kumar did not pay any maintenance allowance to Smt. Nirmala Devi. It is pleaded that Smt. Nirmala Devi has filed fresh complaint strictly as per compliance of directions issued by Sub Divisional Judicial Magistrate Aanadpur Sahib in case No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar decided on dated 22.12.2012. It is pleaded that Smt. Nirmala Devi has filed an application under Section 156(3) of Code of Criminal Procedure before learned Judicial Magistrate 1st Class Bilaspur seeking direction to SHO P.S. Kot Kehlur to register criminal case under Sections 406, 498-A and 120-B IPC. It is pleaded that learned Judicial Magistrate 1st Class Bilaspur had perused the facts mentioned in the complaint and thereafter after perusal of entire complaint had directed the SHO P.S. Kot Kehlur to register the FIR and investigate the matter. It is pleaded that in compliance to the directions of learned Judicial Magistrate 1st Class Bilaspur SHO P.S. Kot Kehlur had registered the case under Sections 406, 498-A and 120-B IPC vide FIR No. 85 of 2013 dated 7.8.2013. It is pleaded that offence under Sections 406, 498-A is continuous criminal case against married women. Prayer for dismissal of petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India sought.

4. Court heard learned counsel appearing for the petitioners and learned Assistant Advocate General appearing on behalf of non-petitioner No.1 and learned counsel appearing on behalf of non-petitioner No.2 at length and also perused the entire record carefully.

5. Following points arise for determination in present case:-

1. Whether petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India is liable to be accepted in view of availability of alternative efficacious statutory remedy?

2. Final Order.

Reasons for findings on Point No.1.

6. Submission of learned Advocate appearing on behalf of petitioners that earlier also private criminal complaint was filed under Sections 406, 498-A read with Section 120-B IPC before Sub Divisional Judicial Magistrate Aanadpur Sahib and accused persons were acquitted by Sub Divisional Judicial Magistrate Aanadpur Sahib and again fresh FIR could not be registered is rejected being devoid of any force for the reasons hereinafter

mentioned. Court has perused the judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib in private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev kumar and learned Sub Divisional Judicial Magistrate Aanadpur Sahib has given the liberty to complainant Nirmala Devi to file fresh complaint under the provisions of law before competent Court having jurisdiction. There is no evidence on record in order to prove that judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib in private complaint No. 119 of 2007 was set aside by competent authority of law. Judgment passed by learned Sub Divisional Judicial Magistrate Aanadpur Sahib dated 22.12.2012 has attained the stage of finality. In judgment Sub Divisional Judicial Magistrate Aanadpur Sahib has given the liberty to complainant Nirmala Devi to file fresh complaint under the provisions of law before competent Court. It is well settled law that judgment should not be read in isolation but should be read as a whole. The liberty granted to Smt. Nirmala Devi to file fresh complaint under the provisions of law before competent Court of law is not challenged by petitioners before higher authorities. Hence it is held that fresh complaint was filed by Smt. Nirmala Devi in compliance to the directions of Sub Divisional Judicial Magistrate Aanadpur Sahib given in judgment passed in private complaint No. 119 of 2007 titled Nirmala Devi vs. Sanjeev Kumar decided on 22.12.2012.

7. Another submission of learned Advocate appearing on behalf of the petitioners that FIR No. 85 of 2013 dated 7.8.2013 registered in P.S. Kot Kehlur is contrary to law is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that FIR No. 85 of 2013 dated 7.8.2013 was registered against the petitioners under Sections 406, 498-A and 120-B IPC in compliance to the directions issued by learned Judicial Magistrate 1st Class Bilaspur under Section 156(3) of Code of Criminal Procedure. It is held that investigation was started in present case as per directions of learned Judicial Magistrate 1st Class Bilaspur issued under Section 156(3) Cr.P.C. It is well settled law that where investigation is started at the instance and as per reference sent by Magistrate under Section 156(3) Cr.P.C. then police officials to whom the reference is sent has no discretion but to register the FIR and initiate investigation in accordance with law and thereafter to submit the report to the Judicial Magistrate under Section 173 Cr.P.C.

8. Another submission of learned Advocate appearing on behalf of the petitioners that criminal Court cannot take cognizance under Section 468 of Code of Criminal Procedure 1973 is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that on dated 22.12.2012 Sub Divisional Judicial Magistrate Aanadpur Sahib had granted liberty to Nirmala Devi to file fresh complaint under the provisions of law before competent Court of law. It is held that limitation would start w.e.f. 22.12.2012 granted by Sub Divisional Judicial Magistrate Aanadpur Sahib to file fresh complaint. It is held that offences under Sections 498-A IPC and 406 IPC are criminal warrant cases. It is held that alternative remedy to the petitioners to plead their case for discharge under Section 239 of Code of Criminal Procedure 1973 before learned trial Court is available in present case and learned trial Court after hearing the petitioners and State would pass the order under Section 239 of Cr.P.C. strictly in accordance with law in present case. It is further held that another alternative remedy to file revision under Section 397 of Code of Criminal Procedure is also available to the petitioners against the order passed by learned trial Court under Section 239 Cr.P.C. It was held in case reported in ***(2008)8 SCC 781 titled Monica Kumar (Dr.) and another vs. State of U.P. and others*** that inherent jurisdiction under Section 482 Cr.P.C. has to be exercised carefully and with caution. It was held in case reported in ***1997(2) Crimes 331 (Orissa High Court) titled Basudev Bhoi vs. Bipadabhanjan Puhan and another*** that inherent power under Section 482 Cr.P.C. should be exercised when no other alternative remedy is available to the litigant. It was held that power under Section 482 Cr.P.C. should be exercised sparingly. It was held in case

reported in ***JT 2015 (4) SC 576 titled Union of India vs. Major General Shri Kant Sharma and another*** that if alternative statutory remedy is available then power under Articles 226 and 227 of Constitution of India should not be invoked. ***(See: JT 2013 (11) SC 387 titled Commissioner of Income Tax and others vs.Chhabil Dass Agarwal. See: (1997)3 SCC 261 titled L. Chander Kumar vs. Union of India (Constitutional Bench of India)*** Point No. 1 is decided against the petitioners.

Point No. 2 (Final Order)

9. In view of above stated facts petition filed under Section 482 Cr.P.C. read with Article 227 of Constitution of India is dismissed. However petitioners shall be at liberty to raise the plea before learned trial Court under Section 239 of Code of Criminal Procedure 1973 that petitioners could not be prosecuted for the same criminal offence more than once as mentioned under Article 20(2) of Constitution of India and thereafter learned trial Court after hearing prosecution and accused persons will decide the plea in accordance with law. Observations made in this order will not effect the merits of case in any manner and will be strictly confine for the disposal of petition filed under Section 482 of Code of Criminal Procedure 1973 read with Article 227 of Constitution of India. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

1. Cr. Appeal No. 113 of 2013.
2. Cr. Appeal No. 177 of 2013
Judgment reserved on: 25.5.2015
Date of Judgment: June 23 , 2015.

1**. Cr.Appeal No.113 of 2013**

Vijay Kumar @ Tantu son of Sh.Nater Singh. ..Appellant.

Vs.

State of H.P. ..Respondent.

For the appellant: Mr.Anoop Chitkara, Advocate.

For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals with Mr. Vikram Thakur, Dy. Advocate General.

2. Cr. Appeal No.177 of 2013

Naresh Thakur ..Appellant.

Vs.

State of H.P. ..Respondent.

For the appellant: Mr. N.S.Chandel, Advocate.

For the respondent: Mr.Ashok Chaudhary, Mr.V.S.Chauhan, Addl. Advocate Generals and Mr.Vikram Thakur, Dy. Advocate General.

Indian Penal Code, 1860- Section 376(2)(g)- Prosecutrix had stayed with her boyfriend in a hotel- accused 'N' who was manager in the hotel entered into the room where prosecutrix was staying and gagged her mouth- he called co-accused 'V' who took the prosecutrix to adjoining room No. 27 where she was raped – prosecutrix had immediately given an affidavit before the Executive Magistrate stating that she was pressurized by the police officials to file complaint- she was examined forcibly and no rape was committed upon her- her boyfriend had specifically stated that no rape was committed by accused person- he had also filed an

affidavit to this effect- no injuries were detected on her person- case was filed earlier against the prosecutrix under Section 41(2) and 109 Cr.PC- all these circumstances create doubt regarding the prosecution version- held, that in these circumstances, accused were wrongly convicted by the Court. (Para-10 to 17)

Cases referred:
Anjlus Dungdung Vs. State of Jharkhand, 2005 (9) SCC 765
Nanhar Vs. State of Haryana 2010 (11) SCC 423
State (Delhi Administration) Vs. Gulzarilal Tandon, AIR 1979 SC 1382
Sharad Birdhichand Sarda Vs. State of Maharashtra, AIR 1984 SC 1622
Bhugdomal Gangaram and others Vs. State of Gujarat, AIR 1983 SC 906
State of UP Vs. Sukhbasi and others, AIR 1985 SC 1224
State of Punjab Vs. Gurmit Singh and others, AIR 1996 (2) titled SCC 384
State of Rajasthan Vs. N.K, 2000 (5) SCC 30
State of HP Vs. Lekh Raj and another, 2000 (1) SCC 247
Madan Gopal Kakkad Vs. Naval Dubey and another, 1992 (3) SCC 204

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Both appeals filed against same judgment and sentence passed by learned Additional Sessions Judge, Fast Track Court Solan in Session trial No. 18-FTC/7 of 2009 decided on dated 12.3.2013 titled State of HP Vs. Vijay Kumar and another. Hence both appeals are consolidated and disposed of vide same judgment in order to avoid conflict judgment.

BRIEF FACTS OF THE PROSECUTION CASE:

2. Brief facts of the case as alleged by prosecution are that on intervening night dated 30.11.2008 and 1.12.2008 at about 1.30 mid night accused persons have committed gang rape upon prosecutrix in Krishna hotel in room No.27. It is further alleged by prosecution that on intervening night of 30.11.2008 to 1.12.2008 dated 30.11.2008 prosecutrix had stayed in room No.28 with her boy friend PW12 Rajesh in Krishna hotel. It is further alleged by prosecution that co-accused Naresh Kumar who was manager of Krishna hotel entered into room where prosecutrix was staying during the night and thereafter gagged mouth of prosecutrix. It is further alleged by prosecution that thereafter co-accused Naresh Kumar called co-accused Vijay Kumar @ Tantu on mobile phone and thereafter co-accused Vijay Kumar @ Tantu came in the room of Krishna hotel where prosecutrix was staying and lifted prosecutrix forcibly from room No.28 and took prosecutrix to adjoining room No. 27.It is further alleged by prosecution that thereafter both accused persons un-dressed prosecutrix and thereafter co-accused Vijay Kumar @ Tantu committed sexual intercourse with prosecutrix without her consent. It is further alleged by prosecution that co-accused Naresh Kumar manager of Krishna hotel kept watching so that no one could enter inside room No.27.It is further alleged by prosecution that cell phone of prosecutrix was broken by co-accused Naresh Kumar who was manger of hotel. It is further alleged by prosecution that after committing sexual intercourse upon prosecutrix by co-accused Vijay Kumar @ Tantu both accused persons left the room of Krishna hotel. It is further alleged by prosecution that thereafter prosecutrix came back from room No.27 to room No.28 where her boy friend Rajesh was sleeping unconsciously due to effect of intoxication. It is further alleged by prosecution that thereafter prosecutrix threw water upon PW12 Rajesh with

bucket and thereafter PW12 Rajesh regained senses and thereafter prosecutrix narrated entire incident to her boy friend PW12 Rajesh. It is further alleged by prosecution that thereafter prosecutrix along with PW12 Rajesh came at reception room where co-accused Naresh Kumar was sitting as manager. It is further alleged by prosecution that thereafter application Ext PW10/A was filed in police station Sadar Solan and FIR Ext PW10/B was registered. It is further alleged by prosecution that thereafter prosecutrix was medically examined and medical examination of prosecutrix was conducted by medical board comprising PW18 Dr. Anju Madan and PW20 Dr. Amrish Kapoor. It is further alleged by prosecution that thereafter MLC of prosecutrix Ext PW18/B was obtained. It is further alleged by prosecution that underwear Ext P8, bra Ext P9, top Ext P10 and Jeans Ext P11 and sanitary pad Ext P12 of prosecutrix took into possession and same were sent for chemical examination to FSL Junga. It is further alleged by prosecution that prosecutrix located room No.27 and 28 of Krishna hotel and site plan was prepared. It is further alleged by prosecution that bed sheets of room No.27 and 28 also took into possession by investigating agency. It is further alleged by prosecution that MLC of co-accused Naresh Kumar also obtained. It is further alleged by prosecution that co-accused Naresh Kumar had entered into room No.28 through window of bath room. It is further alleged by prosecution that parcel containing bed sheets, pieces of broken glass, clothes of prosecutrix, blood sample of prosecutrix, vaginal swab and pubic hairs of prosecutrix were deposited in malkhana. It is further alleged by prosecution that thereafter report of Scientific officer FSL Junga Ext PW7/A was obtained. It is further alleged by prosecution that underwear of accused persons also took into possession and blood sample and semen were sent for chemical examination to FSL Junga. It is further alleged by prosecution that photographs of rooms were also obtained. Charge was framed against accused persons on dated 15th July 2010 under Section 376 (2)(G) IPC by learned Presiding Officer Fast Track Court Solan. Accused persons did not plead guilty and claimed trial.

3. Prosecution examined following oral witness and accused adduced following defence witness in support of defence.

Sr.No.	Name of Witness
PW1	Rakesh Kohli
PW2	Sushil Bansal
PW3	Pawan Kumar
PW4	Gulab Singh
PW5	Ram Lal
PW6	Muna
PW7	Ajay Sehgal
PW8	Dr.Subhash Thakur
PW9	Hardev
PW10	Govind Ram
PW11	Jagdish Chand
PW12	Rajesh Thakur
PW13	Chander Mohan
PW14	Sita Ram
PW15	Upasana
PW16	Dinesh Kumar
PW17	Prosecutrix
PW18	Dr.Anju Madan

PW19	Santosh Kumar
PW20	Dr.Amrish Kapoor
DW-1	Narain Singh
DW-2	Manoj Verma
DW-3	Raman Kumar
DW-4	Jai Gopal

4. Prosecution also produced following documentary evidence in support of its case:-

Sr.No.	Description:
Ex.PW1/A	Recovery memo
Ex.PW1/D	Recovery memo
Ex.P-1	Register
Ex.PW1/C	Certificate
Ex.PW2/A	Seizure Memo
Ex.P-6	Parcel
Ex.P-7	Glass (broken)
Ex.PW2/B	Seizure memo
Ex.PW3/A	Seizure memo
Ex.D-1	Affidavit of Rajesh Kumar
Ex.PW3/B	Seizure memo
Ex.D-2	Affidavit of Anu Rana
Ex.PW7/A	Report of FSL
Ex.PW8/A	Application for medical examination of co-accused Vijay Kumar.
Ex.PW8/B	MLC of Vijay
Ex.PW8/C	MLC of Naresh
Ex.PW8/D	Report of FSL, Junga
Ex.PW9/A	Certificate regarding functioning of Computer.
Ex.PW10/A	Application of prosecutrix
Ex.PW10/C	Endorsement of application
Ex.PW10/B	Copy of FIR No. 255/2008
Ex.PW 8D	Daily station diary
Ex.PW13/A	Copy of malkhana register
Ex.PW13/B	Copy of road certificate
Ex.PW18/B	MLC of prosecutrix
Ex.PW17/A	Signature of prosecutrix on MLC
Ex.P-8	Underwear
Ex.P-9	Bra
Ex.P-10	Top
Ex.PW-12	Sanitary pad
Ex.P-11	Jean
Ex.PW20/A	Opinion
Ex.PW20/B	Opinion

Ex.PW18/A	Application for medical examination of prosecutrix
Ex.PW19/A	Spot map
Ex.PW19/C	Seal impression
Ex.PW19/D	Statement of Rajesh Thakur
Ex.PW19/B1to B5	Photographs
Ex.PW19/B 6 to B 10	Negatives
Ex. D-3	Copy of case U/S 41-(2)-109Cr.P.C

5. Statements of accused persons were also recorded under Section 313 Cr PC. Accused persons have stated that they are innocent and they have been falsely implicated in the present case. Learned trial Court convicted both appellants under Section 376(2)(g) IPC and sentenced both accused persons to rigorous imprisonment for a period of ten years and to pay fine to the tune of Rs.10,000/- (Ten thousand) each. Learned trial Court further directed that in default of payment of fine appellants shall further undergo rigorous imprisonment for one year. Learned trial Court further directed that if fine amount realized same would be paid to prosecutrix as compensation.

6. Feeling aggrieved against the judgment and sentence passed by learned Additional Sessions Judge Fast Track Court Solan appellants filed present both appeals.

7. We have heard learned Advocate appearing on behalf of the appellants and learned Additional Advocate General appearing on behalf of respondent and also gone through the entire record carefully.

8. Point for determination before us is whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court had committed miscarriage of justice to appellants.

9.ORAL EVIDENCE ADDUCED BY PROSECUTION:

9.1 PW1 Rakesh Kohli has stated that he is owner of Krishna guest house situated near vegetable market Solan. He has stated that he remained associated in the investigation of case. He has stated that on dated 1.12.2008 he handed over one register of his guest house to Investigating Officer in the presence of witness Anu and Rajesh. He has stated that Ext PW1/A was prepared by police officials. He has stated that register is Ext P1. He has stated that entry regarding stay of Rajesh and prosecutrix in Krishna hotel on dated 30.11.2008 is Ext PW1/B which was filled by Rajesh. He has stated that on dated 30.11.2008 no other persons stayed in his hotel except Rajesh and prosecutrix. He has stated that co-accused Naresh Kumar was care taker of the hotel and at the time of incident co-accused Naresh Kumar was working in hotel. He has stated that thereafter co-accused Naresh Kumar left the job from hotel. He has stated that he issued certificate Ext PW1/C which bears his signature in red circle at point 'A'. He has stated that police officials also took into possession bed sheets from room Nos.27 and 28 and sealed the same in two different parcels. He has denied suggestion that memo Ext.PW1/B was not prepared at the spot. He has stated that total rooms in the guest house are 15. He has stated that he was not present in the night in hotel and he had no personal knowledge about case.

9.2 PW2 Sushil Bansal has stated that he was posted as HHG in police station Sadar Solan since 2008. He has stated that he remained associated in the investigation of

present case. He has stated that on dated 1.12.2008 he along with police officials was present at Krishna hotel bypass Solan. He has stated that police officials took one bed sheet from room No.28 and pieces of broken glass in his presence and in the presence of witness. He has stated that bed sheet and pieces of glass were put in separate cloth parcel and sealed with seal impression 'B' having seven seal impressions on each parcel. He has stated that memo Ext PW2/A was prepared. He has stated that owner of guest house was also present. He has stated that police officials also took into possession one bed sheet Ext.P3 from room No.27 of the guest house. He has stated that bed sheet was wrapped in white clothes and sealed with seal impression 'B'. He has stated that entry register of the guest house was also took into possession by police officials. He has stated that register is Ext P1. He has denied suggestion that no pieces of glass were present in the room of hotel. He has denied suggestion that no pieces of glass were took into possession by police officials. He has stated that he does not know that prosecutrix had informed police officials that nothing was happened with her.

9.3. PW3 Pawan Kumar has stated that he is owner of hotel situated at Sadhupul. He has stated that Rajesh is his younger brother. He has stated that on dated 3.12.2008 he was called at police station Sadar Solan. He has stated that his brother Rajesh was under the influence of liquor. He has stated that prosecutrix was also present there. He has stated that Rajesh and prosecutrix went to the office of Tehsildar Solan and their statements were recorded by Tehsildar at Solan. He has stated that nothing was took into possession by police officials in his presence. Witness was declared hostile. He has admitted that on dated 31.12.2010 Rajesh stayed with prosecutrix in Krishna hotel near bypass road Solan. He has stated that he had not filed any complaint to SP Solan. He has stated that no force was used by police officials to obtain signature of prosecutrix and Rajesh. He has denied suggestion that affidavits of Rajesh and prosecutrix were obtained by force and by way of exercising the influence by accused persons. He has denied suggestion that family of accused persons are influential persons and they have pressurized the prosecutrix and Rajesh to give affidavit to hush up the matter. He has stated that he did not enter in the office of Tehsildar Solan. He has stated that no FIR was registered against police officials. He has denied suggestion that he is deposing falsely at the instance of accused persons.

9.4 PW4 Gulab Singh has stated that he remained posted as Constable at police station Sadar Solan from 2007 to 2010. He has stated that on dated 23.3.2009 he remained associated in the investigation of present case. He has stated that he went through bypass road Solan to Krishna guest house situated near vegetable market Solan. He has stated that PW1 Rakesh Kohli had produced one certificate Ext PW1/C which was took into possession by Investigating Officer vide memo Ext PW1/D.

9.5 PW5 Ram Lal has stated that in the year 2008 he was posted as HHC at police station Sadar Solan. He has stated that on dated 30.11.2008 he was working in police station as MHC and also used to attend telephone calls. He has stated that on dated 1.12.2008 at about 4 AM one Alto car bearing registration No. HP 64-1311 came at police station and one boy and one girl alighted from the car and came to information room police station Sadar Solan. He has stated that he inquired from them about the reason for coming to police station and they disclosed that last night they stayed in Krishna hotel near bypass road Solan and during night time manager of Krishna hotel and another person had given beatings and misbehaved with them. He has stated that he provided pen and white paper to them. He has stated that girl filed written complaint on paper and produced before him. He has stated that prosecutrix had written in her complaint that she was raped in Krishna hotel. He has stated that he immediately informed Station House Officer and thereafter lady constable was called to police station Sadar Solan. He has denied suggestion that

prosecutrix was forced by police officials to file complaint against her wishes. He has denied suggestion that prosecutrix did not intent to file any complaint against accused persons.

9.6 PW6 Muna has stated that he is driver by profession. He has stated that he was driver of truck having registration No.HP-13B-0424. He has stated that Pawan was owner of the truck. He has stated that he along with Raju @ Rajesh were sitting in Tipper and were going to collect bricks to Surajpur. He has stated that Rajesh deboarded truck near Koti and went in Alto car and came towards Solan side. He has stated that he went to Krishna hotel and saw that Rajesh and prosecutrix was sitting in the room. He has stated that he inquired from Rajesh and prosecutrix whether they want to go to home but they refused. He has stated that thereafter he went towards Sadhupul and reached at Solan at 10.30 PM. He has stated that Alto car was parked near Krishna hotel.

9.7. PW7 Ajay Sehgal has stated that he was posted as Scientific Officer Biology and Serology Division State FSL Junga HP Shimla since 12.6.2008. He has stated that he is M.Sc in Botany. He has stated that 15 sealed parcels were received through Constable Dinesh Kumar. He has stated that seals on the parcel were intact and tallied with specimen seals. He has stated that he examined exhibits found in the parcels. He has stated that as per biological and serological examination in the laboratory the result of examination was as under. (1) Blood and semen was not detected on exhibit-1 (Pubic hair Anu Kumari), exhibit 5e (Brassiere Anu Kumari), Exhibit-7(Pubic hair Vijay Kumar), exhibit-11a (Vest Naresh Kumar) exhibit-12 (Pubic hair Naresh Kumar), exhibit-15 (Slides Naresh Kumar) and exhibit-16 (Slides, Vijay Kumar.) (2) Human blood was found in exhibit-2 (Blood sample Anu Kumari) exibit-3 (Blood sample Anu Kumari), exibit-10 (Blood sample Vijay Kumar) and exhibit-14 (Blood sample Naresh Kumar). (3) Blood was detected in traces on exhibit-4 (Vaginal smear slides Anu Kumari) but it was insufficient for further examination human semen was found on the exhibit. (4) Blood was not detected on exhibit-5a (Pants Anu kumari), exhibit-8a (Underwear of Vijay kumar), exhibit 8b (T-shirt Vijay Kumar), exhibit 11-b (Underwear Naresh Kumar) and exhibit-19 (Bed Sheet) but human semen was not found on the exhibits. (5) Human blood was found on exhibit-5b (Upper/hood Anu Kumari) and exhibit-5c (Underwear Anu Kumari) but semen was not detected on the exhibits. (6) Blood was detected in traces on exhibit-5d (Pad Anu Kumari and exhibit-20 (Bed sheet) but it was insufficient for further examination. Semen was not detected on the exhibits. The report Ex.PW7/A (Two leaves) bear his signature in red circle A with stamp of scientific officer. He has stated that blood was detected in traces upon pad and vaginal smear slide which was not sufficient for further examination. He has stated that he could not state definitely whether human blood which was detected was blood of menstruation period or not.

9.8. PW8 Dr. Subhash Thakur has stated that he was posted as Medical Officer Regional Hospital Solan in the year 2008. He has stated that on the request of police officials he examined co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar. He has stated that co-accused Vijay Kumar @ Tantu was normal built male. He has stated that on examination of external genitalia pubic hairs were present and scortum and penis were well developed. He has stated that he handed over MLC, two sealed sample of pubic hair and samples obtained upon slides to police officials. He has stated that co-accused Vijay Kumar @ Tantu was normal built male and he was capable of performing sexual intercourse. He has stated that MLC Ext PW8/B was issued by him. He has stated that he also examined co-accused Naresh Kumar and he was capable of performing sexual intercourse. He has stated that MLC Ext.PW8/B bears his signature. He has admitted that no human blood or semen was detected on pubic hair examined by them. He has admitted that in young age generally boys have night falls and semen comes out.

9.9. PW9 HC Hardev has stated that in the year 2008 he remained posted as MHC Police Station Solan. He has stated that on the direction of Station House Officer he recorded FIR in the computer and also issued CIPA certificate regarding functioning of computer. He has stated that certificate Ext PW9/A bears his signature in red circle 'A'. He has stated that application was not given in writing to SHO in his presence. He has stated that SHO had given him one application to fill it in the computer.

9.10 PW10 Inspector Govind Ram has stated that he remained posted as SHO police station Sadar Solan. He has stated that HHC Ram Lal informed him telephonically to come to police station and thereafter he came to police station Solan. He has stated that one girl and one boy were present at police station. He has stated that prosecutrix handed over complaint Ext PW10/A and on the basis of complaint FIR Ext.PW10/B was recorded in the computer at police station Solan by MHC Hardev Singh. He has stated that after registration of FIR investigation was handed over to ASI Santosh Kumar. He has denied suggestion that prosecutrix requested him not to lodge complaint against accused persons. He has denied suggestion that prosecutrix was forced to sign complaint without her consent.

9.11. PW11 Jagdish Chand has stated that he remained posted as SHO police station Sadar Solan. He has stated that after completion of investigation he prepared challan.

9.12. PW12 Rajesh Thakur has stated that he is owner of guest house at Sadhupul and he was also owner and driver of truck bearing registration No.HP-13-0403. He has stated that prosecutrix is known to him because prosecutrix used to visit to his guest house along with her family members. He has stated that he also used to visit at the house of prosecutrix at Kandaghat. He has stated that prosecutrix was working at Chandigarh and he also used to visit at the house of prosecutrix at Chandigarh. He has stated that he wanted to marry with prosecutrix. He has stated that he along with prosecutrix proceeded to Solan from Parwanoo. He has stated that prosecutrix met him in the evening at Parwanoo. He has stated that number of car of the prosecutrix was HP-64-1311. He has stated that he and prosecutrix consumed meal and wine at Dharampur. He has stated that in the way his driver Manish @ Munna met him. He has stated that prosecutrix was not feeling well and she was vomiting and thereafter he took a room in Krishna hotel. He has stated that thereafter they slept in the night in the room of Krishna hotel. He has stated that police officials came in the night at about 2.30 and inquired about him and thereafter police officials started beatings him. He has stated that he was kept in separate room by police officials. He has stated that he tried to talk with prosecutrix but police officials did not allow him to talk with prosecutrix. He has stated that co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar have not committed anything with prosecutrix and accused persons have been falsely implicated in the present case. Witness was declared hostile. He has admitted that he waited prosecutrix at Parwanoo. He has stated that prosecutrix came to Parwanoo in the evening in Alto car and thereafter he and prosecutrix proceeded to Solan in a car having registration No. HP-64-1311. He has stated that he had not married with prosecutrix till date. He has stated that prosecutrix is not his girl friend as of today. He has admitted that he and prosecutrix asked manager of Krishna hotel at Solan about dinner and manager of Krishna hotel told him that dinner would not be prepared in hotel. He has denied suggestion that co-accused Vijay Kumar @ Tantu came to Krishna hotel in his room with dinner and one bottle of liquor. He has denied suggestion that he consumed dinner in hotel. He has denied suggestion that he had taken many pegs of liquor. He has admitted that he along with prosecutrix slept in the room of Krishna hotel. He has denied suggestion that at about 2 PM prosecutrix had thrown water upon him to wake him. He has denied suggestion that co-accused Naresh Kumar had tried to rape prosecutrix. He has denied suggestion that co-accused Vijay Kumar @ Tantu took prosecutrix in the adjoining room of

hotel and committed rape with prosecutrix without her consent. He has denied suggestion that prosecutrix had filed written complaint to police. He has stated that he did not file any complaint regarding beatings to him against police officials. He has stated that he did not receive any injury. He has stated that he does not know whether medical examination of prosecutrix was conducted or not. He has denied suggestion that prosecutrix was working as receptionist in Indian Palace Hotel Mani Mazra since 2/3 years. He has denied suggestion that at about 11 PM after consuming dinner he went to sleep in the room of Krishna hotel. He has denied suggestion that at about 1.30 AM co-accused Naresh Kumar manager of Krishna hotel entered into the room through window of bathroom. He has denied suggestion that co-accused Naresh Kumar gagged mouth of prosecutrix. He has denied suggestion that prosecutrix also told him that she took glass of water from the table and tried to save her but co-accused Naresh Kumar had snatched the glass and thrown on the floor of hotel. He has denied suggestion that he was under the influence of liquor and he did not wake up. He has denied suggestion that co-accused Naresh Kumar contacted another co-accused Vijay Kumar @ Tantu on mobile phone. He has denied suggestion that thereafter after 4/5 minutes co-accused Vijay Kumar @ Tantu came in the room of hotel. He has denied suggestion that prosecutrix told him that co-accused Vijay Kumar @ Tantu immediately lifted the prosecutrix and took her to adjoining room. He has denied suggestion that prosecutrix told him that thereafter co-accused Vijay Kumar @ Tantu removed Jeen of prosecutrix immediately after putting her on bed. He has denied suggestion that prosecutrix told him that accused persons gagged her mouth when prosecutrix tried to raise hue and cry and when accused persons raped her. He has denied suggestion that co-accused Vijay Kumar @ Tantu committed rape with prosecutrix and after committing rape co-accused Vijay Kumar fled from the spot. He has denied suggestion that he resiled from his earlier statement in order to save accused persons.

9.13 PW13 Chander Mohan has stated that he remained posted as MHC Malkhana Incharge. He has stated that on dated 1.12.2008 ASI Santosh Kumar deposited three cloth parcels sealed with seal impression 'B'. He has stated that he recorded entry in malkhana register and was kept in safe custody. He has stated that malkhana register is Ext.PW13/A. He has stated that sealing and recovery of articles were not effected in his presence.

9.14. PW14 Constable Sita Ram has stated that in the year 2008 he was posted as Constable at police station Sadar Solan. He has stated that on dated 1.12.2008 Medical officer Civil Hospital Solan handed over him 12 parcels along with sample of seal. He has stated that on the same day he handed over case property to MHC malkhana Incharge. He has stated that case property remained intact in his possession. He has denied suggestion that no parcel was handed over to him. He has stated that in his presence no sealing was done and no recovery was effected.

9.15. PW15 LC Upasana has stated that in the year 2008 he remained posted as LC at police post City Solan. He has stated that on dated 1.12.2008 he was deputed to collect the samples. He has stated that medical examination of prosecutrix was conducted at Civil Hospital Solan. He has stated that he deposited case property with MHC police station Sadar Solan. He has stated that case property remained intact in his custody. He has denied suggestion that no sealing was done in his presence. He has stated that parcels were not prepared and recovered in his presence. He has denied suggestion that no parcels were handed over to him.

9.16. PW16 HC Dinesh Kumar has stated that in the year 2008 he was posted as Constable at police station Sadar Solan. He has stated that on dated 3.12.2008 MHC handed over him case property 20 parcels in a sealed condition along with sample of seal 'B'.

He has stated that he deposited case property in the office FSL Junga. He has stated that case property remained intact in his custody.

9.17. PW17 prosecutrix has stated that she was working as receptionist in Indian Palace Hotel at Panchkula. She has stated that on dated 1.12.2008 she had travelled by car having registration No. HP-64-1311 which belongs to her mother and proceeded towards Kandaghat where her mother was residing. She has stated that car was driven by Rajesh who was her friend at the relevant time. She has stated that she reached at Krishna resort at about 9.30 PM. She has stated that Rajesh her boy friend had booked room in the resort and entry to this effect was recorded in resort register. She has stated that she had stayed with her boy friend Rajesh in night in the room of resort. She has stated that driver of Rajesh namely Munna who was truck driver came to her room and he stayed in the room for about 10 minutes. She has stated that thereafter she consumed dinner which was procured from outside as dinner was not available in the resort. She has stated that after consuming dinner Munna left the room. She has stated that she slept in the room of resort. She has stated that room was bolted from inside and window of bath room was kept open. She has stated that co-accused Naresh Kumar entered inside the room of resort from window of bath room. She has stated that after entering into room co-accused Naresh Kumar gagged her mouth and asked her to move to next room. She has stated that she refused to do so. She has stated that thereafter co-accused Naresh Kumar called another co-accused Vijay Kumar @ Tantu. She has stated that co-accused Vijay Kumar came in the room after 20/25 minutes and thereafter co-accused Vijay Kumar lifted her in his lap and took her into next adjoining room. She has stated that she was wearing Jeans and Top at the relevant time. She has stated that despite of her protest both accused un-dressed her clothes. She has stated that thereafter rape was committed by co-accused Vijay Kumar @ Tantu and another co-accused Naresh Kumar had gone outside the room. She has stated that co-accused Vijay Kumar @ Tantu told to co-accused Naresh Kumar that no one should come inside room. She has stated that her cell phone was broken by co-accused Naresh Kumar. She has stated that incident took place at about 2 PM and thereafter both accused persons left and thereafter she came back in previous room where her boy friend Rajesh was sleeping in unconscious condition. She has stated that she threw water upon her boy friend Rajesh and he came to senses and thereafter she narrated entire incident to him. She has stated that thereafter she along with her boy friend Rajesh went to reception room where co-accused Naresh Kumar manager of the hotel was sitting. She has stated that thereafter she along with her boy friend Rajesh went to police station Sadar Solan and FIR Ext PW10/B was registered. She has stated that thereafter police officials took her to RH Solan where she was medically examined by Medical Officer. She has stated that she handed over her Jeans, Top, underwear and Bra to Medical officer which were sealed. She has stated that thereafter she was took to resort by police officials and thereafter bed sheet and broken pieces of glass were took into possession by police officials vide seizure memo Ext PW2/A. She has admitted that Rajesh was her boy friend. She has admitted that her boy friend Rajesh had physical relations with her. She has stated that she had performed sexual intercourse with her boy friend Rajesh for 2/3 times. She has admitted that her boy friend Rajesh also visited at her residential house at Chandigarh. She has admitted that she was arrested along with other girls namely Pooja Baghele, Harwinder Gill, Sapna, Lucky Thakur, Priyanka, Mamta and Rajeev in a case under Section 41(2) and 109 Cr.PC. She has admitted that above named girls were dancing in the hotel out of which one was her sister. She has stated that the name of her sister is Priya @ Anju. She has stated that she was arrested by police officials and thereafter she was released on bail. She has admitted that she was undergoing menstruation period when alleged incident took place. She has stated that she does not know whether she was wearing sanitary napkin pad at the time of menstruation period or not. She has denied suggestion that she had sexual intercourse with her boy friend Rajesh

on the alleged date of incident. She has denied suggestion that her boy friend Rajesh had consumed only two pegs and he was in senses. She has denied suggestion that on the alleged date of incident police officials took her and her boy friend Rajesh to police Station. She has denied suggestion that she has falsely implicated accused persons in present case. She has stated that she was not married. She has stated that co-accused Naresh Kumar did not commit rape with her. She has stated that she was asked to enter into compromise with accused persons subject to payment of Rs.1,00,000/- (One lac). She has stated that money was not paid to her. She has denied suggestion that just to grab money from accused persons false case was instituted by her.

9.18. PW18 Dr.Anju Madan has stated that PW18 was posted as Medical Officer in Regional Hospital Solan in the year 2008. Medical officer has stated that police filed application Ext PW18/A for conducting medical examination of prosecutrix who was brought by police of alleged history of sexual assault in Krishna hotel by a manager of Krishna hotel where she was staying with her boy friend Rajesh who was unconscious at that time. Medical officer has stated that board of two members of doctors was formed. Medical officer has stated that patient was found normal. Medical officer has stated that the height of patient was 5 feet. Medical officer has stated that pulse rate of the prosecutrix was 80 minutes and BP 100/80 mm. Medical officer has stated that breast of the prosecutrix was well developed. Medical officer has stated that pubic hairs were present. Medical officer has stated that there was no mark of injury in the form of abrasion or contusion on the part of body including external genitalia. Medical officer has stated that there was no bleeding from the valva. Medical officer has stated that there was smelling of discharge with white colour. Medical officer has stated that there was no injury or bleeding in the vagina of prosecutrix. Medical Officer has stated that hymen was torn at 3 0'clock position. Medical officer has stated that there was no stains of semen or blood on the Jeans. Medical officer has stated that prosecutrix has menstruation four days ago. Medical officer has stated that there was no semen stains on the external genitalia. Medical officer has stated that MLC Ext PW18/B was issued. Medical officer has stated that after receiving FSL report blood was detected in traces and human semen was also detected upon vaginal slides of prosecutrix. Medical officer has stated that underwear Ext P8, bra Ext P9, top Ext P10, Jeans Ext P11 and Sanitary Pad Ext P12 are the same which were took into possession at the time of examination of prosecutrix. Medical officer has stated that victim was habitual of sexual intercourse. Medical officer has stated that no semen stain was found on the external genital part of the victim. Medical Officer has stated that there was no mark of violence on victim body and there was no injury on the person of victim. He has stated that only by DNA test it could be found that semen were of any particular person.

9.19 PW19 ASI Santosh Kumar has stated that he remained posted as Investigating Officer in police station Solan w.e.f. 2007 to 2009. He has stated that on dated 1.12.2008 after registration of FIR investigation of present case was handed over to him by SHO Police Station Solan and he along with police officials went to Krishna hotel. He has stated that manager of the hotel took him to the room in which prosecutrix had stayed. He has stated that manager of the hotel also took him to the room where rape was committed by co-accused Vijay Kumar @ Tantu upon the prosecutrix. He has stated that both rooms were checked and locked and key was took into possession. He has stated that manager of Krishna hotel had joined investigation and search of co-accused Vijay Kumar @ Tantu was carried out and he was spotted at village Kuthar. He has stated that he could identify manager of the hotel and co-accused Vijay Kumar @ Tantu. He has stated that both accused persons were brought to police station and application was filed for medical examination of prosecutrix and accused persons and thereafter MLC was obtained. He has stated that thereafter prosecutrix was brought to the spot and spot was inspected in the presence of

prosecutrix and spot map Ext PW19/A was prepared at the instance of prosecutrix. He has stated that photographs Ext PW19/B1 to Ext PW19/B5 were snapped by him. He has stated that negatives are Ext PW19/B6 to Ext PW19/B10. He has stated that thereafter bed sheet of room No.28 and broken pieces of glass were took into possession and the same were sealed in parcel. He has stated that bed sheet of room No.27 also obtained and sealed in a parcel. He has stated that underwear Ext P8, bra Ext P9, Top Ext P10 and sanitary pad Ext P12 are the same which were took into possession by medical officer at the time of medical examination of prosecutrix. He has stated that bed sheet Ext P5 is the same which was took into possession by him from room No.28. He has denied suggestion that he visited Krishna hotel in connection with raid after receiving information that immoral trafficking was going in Krishna hotel. He has denied suggestion that prosecutrix and her boy friend Rajesh were apprehended and they were brought to police station. He has denied suggestion that under the direction of politician accused persons were falsely implicated in the present case. He has denied suggestion that despite affidavit given by prosecutrix and her boy friend Rajesh accused persons were falsely implicated in the present case. He has stated that broken glasses were not sent to FSL Junga for obtaining finger print. He has admitted that prosecutrix was staying in the room of Krishna hotel with her boy friend Rajesh. He has stated that no semen of accused persons were took into possession by Medical officer for comparison with recovered semen. He has stated that co-accused Naresh Kumar was care taker of hotel. He has stated that there was no evidence that co-accused Naresh Kumar had given beatings to prosecutrix and there was no evidence of pulling hairs of prosecutrix. He has stated that allegation of rape was not levelled by the prosecutrix against co-accused Naresh Kumar. He has stated that affidavits were produced before him by prosecutrix and Rajesh. He has stated that it did not come in his investigation that prosecutrix was offered Rs.1,00,000/- (One lac). He has stated that prosecutrix and her boy friend were not available after handing over of affidavits and both had gone missing thereafter. He has denied suggestion that false case was filed against accused persons.

9.20. PW20 Dr.Amrish Kapoor has stated that in the year 2009 he was posted as Gynecologist in Zonal Hospital Solan. He has stated that he found blood traces and also found human semen in the vaginal slide of prosecutrix. He has stated that definite opinion was not given because DNA test of semen and DNA test of blood of accused persons was not supplied for comparison. He has stated that intercourse was committed upon prosecutrix on the basis of traces of human semen in the vaginal slide of prosecutrix. He has stated that there was no mark of injury on the body of prosecutrix. He has stated that there was no injury upon genital area of prosecutrix or upon other parts of prosecutrix body. He has stated that there was no resistance on the part of prosecutrix while performing sexual intercourse.

9.21. DW1 Narain Singh has stated that he was posted as Naib Tehsildar-cum-Executive Magistrate Solan w.e.f. June 2008 to April 2011. He has stated that prosecutrix came to him for attestation of affidavit executed by prosecutrix in connection with false implication of co-accused Vijay Kumar @ Tantu and co-accused Naresh Kumar. He has stated that he asked prosecutrix specifically before attestation of affidavit Ext D2 whether she had executed and signed the affidavit without any threat, coercion or pressure. He has stated that prosecutrix was identified by local Advocate Sh. Manoj Verma. He has stated that after fully satisfying himself he attested affidavit Ext D2 as Executive Magistrate. He has stated that similarly Rajesh also appeared before him and he verified the contents mentioned in the affidavit by explaining the statement made in affidavit Ext D1. He has stated that Rajesh appeared before him and he was identified by local Advocate Sh. Manoj Verma. He has stated that after fully satisfying himself he attested affidavit which bears his

signature. He has stated that prosecutrix and Rajesh have orally stated that wrong FIR under Section 376 IPC was registered.

9.22. DW2 Manoj Verma has stated that he is practicing as Advocate at District Court Solan since September 2002. He has stated that prosecutrix met him on 1.12.2008 in the premises of Tehsildar at Solan. He has stated that mother of prosecutrix was his client and he was familiar with the prosecutrix. He has stated that prosecutrix had executed affidavit Ext D2 and signed the same at point A to D in his presence. He has stated that prosecutrix also signed in the register. He has stated that he also signed as identifier. He has stated that he inquired from prosecutrix whether she had executed the affidavit without any coercion, pressure or threat from any person. He has stated that thereafter prosecutrix told him that she had executed affidavit without any threat, coercion or pressure. He has stated that similarly Rajesh had also executed affidavit Ext D1. He has stated that thereafter prosecutrix and Rajesh appeared before Executive Magistrate for attestation of affidavit. He has stated that thereafter Executive Magistrate before attesting the affidavit asked the prosecutrix and Rajesh whether they have executed the affidavit without any coercion, force, threat or pressure. He has stated that after questioning deponent and satisfying himself Executive Magistrate attested the affidavit.

9.23. DW3 Raman Kumar MHC police station Dharampur District Solan HP has stated that he has brought document Ext D3 comprising three pages and the same is true as per original record.

9.24. DW4 Jai Gopal Sub Inspector CID Unit Solan HP has stated that he remained posted as Investigating Officer at Dharampur w.e.f. 2008 to May 2010. He has stated that he had visited Pine View Hotel Dharampur from where accused No. 1 to 7 mentioned in Ext D3 were recovered and they were booked under Section 41(2) and 109 Cr.PC. He has stated that he had investigated the case. He has stated that girls were in semi nude condition at the time of recovery from hotel. He has stated that girls were six in number. He has stated that one Rajiv Kumar was also found in the hotel where 30/35 persons were sitting in hotel who were watching girls in half naked condition at about 9.45 PM. He has stated that girls were called by some gang leader and they were directed to expose themselves in semi nude condition. He has stated that SIU officials disclosed to him that gang leader had already absconded from the hotel in a vehicle having registration No.PB-30-B-0027. He has stated that prosecutrix was impleaded as co-accused No.4 in document Ext D3. He has stated that after investigation accused persons were produced before Executive Magistrate Solan.

(A). Affidavit given by major prosecutrix on dated 1.12.2008 Ext D2 before Executive Magistrate District Solan placed on record is fatal to prosecution.

10. It is the case of prosecution that on intervening night of 30.11.2008 and 1.12.2008 prosecutrix along with her boy friend Rajesh came in vehicle having registration No.HP-64-1311 and stayed in room No. 28 of Krishna hotel situated at bypass road vegetable market Solan HP. It is further case of prosecution that on intervening night of 30.11.2008 and 1.12.2008 between 1.30 AM to 2.30 AM co-accused Naresh Kumar who was officiating manager of Krishna hotel entered into room No.28 through window of bath room and thereafter co-accused Naresh Kumar gagged mouth of prosecutrix due to which prosecutrix got up and tried to save her life and she lifted glass lying on the table but the same was snatched by co-accused Naresh Kumar forcibly and thrown on the floor of hotel. It is further case of prosecution that Rajesh boy friend of prosecutrix was under intoxication. It is further case of prosecution that thereafter co-accused Naresh Kumar telephonically called co-accused Vijay Kumar @ Tantu who reached in the room in short time and thereafter he lifted prosecutrix and took her to adjoining room No.27 and thereafter committed rape upon

prosecutrix. It is also proved on record that thereafter at 5.30 AM on dated 1.12.2008 prosecutrix filed FIR No. 255 of 2008 against accused persons under Section 376(2) read with Section 34 IPC. It is also proved on record that thereafter prosecutrix on dated 1.12.2008 had given affidavit Ext D2 before Executive Magistrate Solan. There is recital in affidavit Ext D2 placed on record that on dated 30.11.2008 prosecutrix along with her boy friend Rajesh came from Chandigarh to Solan and stayed at Krishna hotel Solan. There is further recital in affidavit that Rajesh boy friend of prosecutrix telephoned Vijay Kumar who brought dinner and thereafter he left the hotel. There is recital in affidavit that in the morning police officials came in the hotel and forcibly obtained signature of prosecutrix upon papers. There is further recital in affidavit that prosecutrix was pressurized by police officials to file complaint against accused persons. There is further recital in affidavit Ext D2 placed on record given by prosecutrix that medical examination of prosecutrix was got conducted forcibly. There is further recital in affidavit that no incident of rape took place. There is further recital in affidavit that accused persons did not commit any rape with prosecutrix. Affidavit is duly verified by prosecutrix and duly attested by Executive Magistrate Solan HP. Executive Magistrate Solan HP has also given certificate in the reverse page of affidavit Ext D2 that contents of affidavit were explained to prosecutrix and she had admitted the contents of the affidavit as correct. Prosecutrix has admitted when she appeared in witness box that affidavit Ext D2 bears her signature and admitted that she had signed the affidavit. Prosecutrix has specifically stated that she entered into compromise with accused persons subject to payment of Rs.1,00,000/- (One lac). Prosecutrix has stated that money was not paid to her. It is well settled law that in rape cases direct evidence is not available and testimony of the victim in the case of sexual assault is vital. It is well settled law that sole testimony of prosecutrix is sufficient to convict the accused if same is trustworthy, reliable and inspires confidence of Court. It is well settled law that for compelling reason the Court can look corroborative evidence. It is well settled law that prosecutrix in rape case is not accomplish and therefore rule requiring corroboration of accomplish evidence does not apply to the testimony of prosecutrix. It is well settled law that corroboration of evidence of an adult prosecutrix in sex offence case would be insisted only if the evidence of prosecutrix is seen infirmed and not trustworthy and rendered the testimony of prosecution un-worthy of credit. It is well settled law that rule requiring corroboration is not rule of law but rule of prudence. It is well settled law that when the evidence of prosecutrix is self contradictory Courts are under legal obligation to see corroborative evidence. It is proved on record in present case that affidavit Ext D2 was relied by prosecution and when the challan was filed before trial Court then prosecution in the list of documentary evidence had also relied upon affidavit Ext D2 given by prosecutrix before Executive Magistrate Solan (HP). Even affidavit Ext D2 was took into possession by prosecution during investigation stage vide seizure memo Ext PW3/B placed on record. Affidavit Ext D2 given by prosecutrix before Executive Magistrate was part of challan filed by prosecution against accused persons. It is well settled law that affidavit means a statement sworn before a person having authority to administer on oath. Under Section 296 Cr.PC. affidavit can be given relating to proof of fact. It is well settled law that affidavit can be attested by (1) Judge (2) Judicial Magistrate (3) Executive Magistrate (4) Oath Commissioner (5) Notary appointed under Notary Act 1952. It is held that in view of contradictory facts given by prosecutrix on the same date i.e. 1.12.2008 in FIR and in affidavit Ext D2 placed on record it is not expedient in the ends of justice to rely upon contradictory testimony of prosecutrix. Hence it is held that contradictory testimony of prosecutrix is fatal to the prosecution.

(B).Testimony of boy friend of prosecutrix namely PW12 Rajesh is also fatal to prosecution.

11. It is the case of prosecution that during intervening night of 30.11.2008 and 1.12.2008 prosecutrix and her boy friend Rajesh stayed in Krishna hotel and thereafter

between 1.30 AM and 2 AM co-accused Naresh Kumar entered into room of prosecutrix and thereafter co-accused Naresh Kumar called co-accused Vijay Kumar @ Tantu and thereafter co-accused Vijay Kumar lifted prosecutrix from room No.28 and took prosecutrix to room No.27 and committed offence of rape. PW12 Rajesh when he appeared in witness box has specifically stated that co-accused Naresh Kumar and co-accused Vijay Kumar @ Tantu did not commit any criminal offence of rape with prosecutrix. PW12 Rajesh boy friend of prosecutrix has specifically stated that both accused persons have been falsely implicated in the present case by police officials. PW12 Rajesh has specifically stated in positive manner that during the night period at about 2.30 PM police officials came in hotel and beaten him and kept him in a separate room. PW12 Rajesh has specifically stated in positive manner that he tried to talk with prosecutrix but police officials did not allow him to talk with prosecutrix. PW12 Rajesh boy friend of prosecutrix who was present in room No.28 of Krishna hotel during night period did not support the prosecution story as alleged by prosecution. PW12 Rajesh boy friend of prosecutrix has specifically stated in positive manner that he was not in intoxicated condition on intervening night of 30.11.2008 and 1.12.2008. Hence it is held that testimony of PW12 Rajesh is fatal to the prosecution.

(C).Affidavit Ext D1 given by PW12 Rajesh boy friend of prosecutrix is also fatal to prosecution.

12. We have carefully perused affidavit Ext D1 given by Rajesh Thakur placed on record. Affidavit Ext D1 is also relied by the prosecution because prosecution took into possession affidavit Ext D1 during investigation process vide seizure memo Ext PW3/A placed on record. Even prosecution has also relied upon affidavit Ext D1 when prosecution filed challan and in the list of documents filed along with challan prosecution had relied upon affidavit Ext D1 placed on record given by Rajesh Thakur. We have carefully perused the contents of affidavit Ext D1 placed on record. There is recital in affidavit Ext D1 placed on record that police officials have beaten deponent and also broken mobile phone of the deponent. There is further recital in affidavit that accused persons have not committed any sexual offence with prosecutrix. Affidavit Ext D1 placed on record is duly verified in accordance with law and duly attested by Executive Magistrate Solan. A certificate has also been given by Executive Magistrate Solan that contents of affidavit were read over and explained to deponent and deponent had admitted the contents of the affidavit as correct. Hence it is held that affidavit Ext D1 given by Rajesh boy friend of prosecutrix placed on record is also fatal to the prosecution.

(D). Testimony of DW1 Narayan Singh Tehsildar is also fatal to prosecution.

13 We have carefully perused the testimony of DW1 Narayan Singh Tehsildar. DW1 Narayan Singh has specifically stated in positive manner that prosecutrix and her boy friend Rajesh personally appeared before him and filed affidavits Ext D1 and D2. DW1 Narayan Singh has specifically stated that he explained the contents of affidavit Ext D1 and D2 to the deponents and thereafter deponents have admitted the contents of the affidavit as correct before him and thereafter he attested the affidavit. Testimony of DW1 Narayan Singh Tehsildar is also trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of DW1 Narayan Singh. There is no evidence on record that DW1 Narayan Singh Tehsildar has hostile animus against prosecutrix prior to the incident. Hence it is held that testimony of DW1 Narayan Singh Tehsildar Nagrota Bagwan is fatal to prosecution.

(E). Non-resistance on the part of prosecutrix is also fatal to the prosecution.

14. It is the case of prosecution that prosecutrix was major at the time of incident. PW18 Dr.Anju Madan has specifically stated that there was no abrasion or contusion upon the body of prosecutrix including external genitalia. PW18 Dr. Anju Madan

has specifically stated that there was no bleeding from valva and Medical Officer has specifically stated in positive manner that she did not observe any injury or bleeding in the vagina of prosecutrix. PW18 Dr. Anju Madan has specifically stated that hymen was torn at 3 O'clock position. PW18 Dr. Anju Madan has specifically stated that she did not observe any semen stains on external genitalia of prosecutrix. Hence it is held that above stated testimony of Medical Officer is fatal to prosecution.

(F). Testimony of PW20 Dr. Amrish Kapoor is also fatal to prosecution.

15. PW20 Dr. Amrish Kapoor has specifically stated when he appeared in witness box that DNA test of semen of accused persons and DNA test of blood of accused persons were not supplied by investigating agency for comparison and for connection of accused persons in criminal offence. There is no evidence on record in order to prove that DNA test of semen and DNA test of blood of accused persons were found upon vagina of prosecutrix or upon any other part of prosecutrix or upon the clothes of prosecutrix in order to connect accused persons with the commission of criminal offence of sexual assault. It is held that testimony of PW20 Dr.Amrish Kapoor is also fatal to prosecution.

(G). Report of FSL Junga Ext PW7/A is not helpful to the prosecution.

16. We have carefully perused the report of FSL Junga Ext PW7/A placed on record. As per chemical analyst report Ext PW7/A placed on record blood and semen was not detected upon pubic hair and bra of prosecutrix and upon pubic hair, vest and slides of accused persons. As per chemical analyst report blood was detected in traces of vaginal smear slides of prosecutrix but same was insufficient for further examination. As per chemical analyst report human semen was found on vaginal slides of prosecutrix but prosecution did not obtain semen of accused persons and did not sent semen of accused persons to chemical examiner for comparison in order to connect accused persons with human semen found upon vaginal slides of prosecutrix. Even blood found upon pad and bed sheet was insufficient for further examination and semen was not detected on the pad and bed sheet. In the absence of comparison of semen of accused persons with human semen found in vaginal smear slides of prosecutrix it is not expedient in the ends of justice to convict accused persons.

(H) Earlier case filed against prosecutrix under Section 41(2) and 109 Cr.PC is also fatal to prosecution.

17. It is proved on record that case under Section 41(2) and 109 Cr.PC was filed against prosecutrix in the Court of Sub Divisional Magistrate Solan HP prior to incident and same has created doubt in the mind of Court qua testimony of prosecutrix. It was held in case reported in 2005 (9) SCC 765 titled Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in 2010 (11) SCC 423 titled Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defence. It was held in case reported in AIR 1979 SC 1382 titled State (Delhi Administration) Vs. Gulzarilal Tandon that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. Also See: AIR 1984 SC 1622 titled Sharad Birdhichand Sarda Vs. State of Maharashtra, See AIR 1983 SC 906 titled Bhugdomal Gangaram and others Vs. State of Gujarat, See AIR 1985 SC 1224 titled State of UP Vs. Sukhbasi and others. It is well settled law that testimony of prosecutrix must be appreciated in the back ground of entire case and trial Court must be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. See AIR 1996 (2) titled SCC 384 titled State of Punjab Vs. Gurmit Singh and others, See 2000 (5) SCC 30 titled State of Rajasthan Vs. N.K, See 2000 (1) SCC 247 titled State of HP Vs. Lekh Raj and another, See 1992 (3) SCC 204 titled Madan Gopal Kakkad Vs. Naval Dubey and another.

18. In view of above stated facts it is held that learned trial Court had not properly appreciated oral as well as documentary evidence placed on record. Criminal Appeal No. 113 of 2013 titled Vijay Kumar Vs. State of HP and Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP are accepted and judgment and sentence passed by learned trial Court are set aside. Both appellants namely Vijay Kumar @ Tantu and Naresh Thakur are acquitted qua criminal offence punishable under Section 376 (2)(g) IPC by way of giving them benefit of doubt. Certified copy of judgment be placed in Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP. Record of learned trial Court along with certified copy of judgment be sent back forthwith. Registrar Judicial will issue release warrant in favour of appellants forthwith in accordance with law if appellants are not required in any other criminal case. Criminal Appeal No. 113 of 2013 titled Vijay Kumar @ Tantu Vs. State of HP and Criminal Appeal No. 177 of 2013 titled Naresh Thakur Vs. State of HP are disposed of. Pending application if any also stands disposed of.

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

Ashok Kapoor .....Petitioner/Defendant.

Versus

Murtu Devi .....Respondent/Plaintiff.

CMPMO No.52 of 2014.
Judgment reserved on : 18.06.2015.
Date of decision: 24.06.2015.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff sought a relief of injunction pleading that 'D' was owner to the extent of ½ share- successor of the 'D' got the suit land recorded in his exclusive possession in connivance with the revenue staff- he was threatening to raise construction without getting the suit land partitioned- defendant pleaded that he was exclusive owner of the suit land- he had started construction in the month of February, 2012 and had spent more than Rs.7 lakh- lower Courts had recorded a finding that plaintiff is owner to the extent of ¼ share, whereas defendant is owner to the extent of ½ share- a transfer by the co-owner makes the transferee a co-owner- such transferee is entitled to all the rights and obligation which the other co-owners have- a co-owner has right to enter upon the common property and to take possession of the whole subject to the equal rights of other co-owners- he is not entitled to injunction for restraining other co-owners from exceeding his rights in common property absolutely unless the act of co-owner amounts to ouster- mere making of construction or improvement in the common property does not amount to ouster- if the act of the co-owner amounts to diminution in the value of the property then a co-owner can seek an injunction to prevent the diminution- a co-owner out of possession can seek an injunction to prevent an act which is detrimental to his interest- plaintiff has to establish that the act complained of would cause some injury which would affect his position and enjoyment- defendant in the present case had claimed to raise construction over the suit land and he had claimed that he is in peaceful and uninterrupted possession of the suit land which amounts to ouster- therefore, in these circumstances, injunction was rightly granted. (Para-9 to 40)

Cases referred:

Kennedy versus De Trafford, 1897 AC 180

Sukh Dev versus Parsi and others AIR 1940 Lahore 473

Chhedi Lal and another versus Chhotey Lal AIR (38) 1951 Allahabad 199
Sant Ram Nagina Ram versus Daya Ram Nagina Ram AIR 1961 Punjab 528
Jose Caetano Vaz versus Julia Leocadia Lucretia Fernandes AIR 1969 Goa 90
Sachindra Nath Sarkar and others versus Binapani Basu and others AIR 1976 Calcutta 277
Gouri and others versus Dr. C.H. Ibrahim and another AIR 1980 Kerala 94
Bhartu versus Ram Sarup 1981 PLJ 204
Rukmani and others versus H.N. Thirumalai Chettiar AIR 1985 Madras 283
Prakash Chand Sachdeva versus The State and another AIR 1994 SC 1436
Prakash S.Akotkar and others vs. Mansoorkha Gulabkha and others AIR 1996 Bombay 36
Bachan Singh versus Swaran Singh AIR 2001 Punjab and Haryana 112
Tanusree Basu and others versus Ishani Prasad Basu and others (2008) 4 SCC 791
Jai Singh and others versus Gurmej Singh 2009 (1) SLJ (SC) 714,
Parduman Singh and another versus Narain Singh and another 1991 (2) SLC 215
Nagesh Kumar versus Kewal Krishan AIR 2000 HP 116
Shiv Chand versus Manghru and others, 2007 (1) Latest HLJ (H.P.) 413,
Payar Singh versus Narayan Dass and others 2010 (3) Shim. LC 205
Kalawati and another versus Sudhir Chand and others 2011 Law Suit (HP) 692
Brij Lal versus Puran Chand, 2011 (1) Him. L.R. 80
Jagdish Ram versus Vishwamitter and others Latest HLJ 2012(HP) 1427
Munshi Lal versus Rajiv Vaidya 2013 (2) Him.L.R. 1172
Prabhu Nath and another versus Sushma 2014 (2) Shim. LC 1003
Joginder Singh & others versus Suresh Kumar and others AIR 2015 HP 18

For the Petitioner : Mr.Rajneesh K.Lal, Advocate.
For the Respondent : Mr.B.S.Attri, 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 the learned District Judge, Kullu, on 21.11.2013 whereby he affirmed the order dated 22.05.2013 passed by the learned Civil Judge (Junior Division), Manali, District Kullu, and allowed the application filed under Order 39 Rule 1 and 2 CPC for grant of injunction filed by the applicant and at the same time dismissed the application preferred under Order 39 Rule 4 CPC.

2. The brief facts of the case are that the respondent-plaintiff filed a suit for declaration and injunction restraining the petitioner/defendant from raising any sort of construction over the suit land comprised in Khasra Nos. 877 and 878, Khatauni No.10 of Khata No.10, measuring 0-04-49 hect. and land measuring 0-02-85 hect. comprised in Khasra No.876 contained in Khatauni No.168 of Khata No.107, situated at Muhal Parsha Phati Shaleen Kothi, Manali, tehsil Manali, District Kullu. It was alleged that the suit land was previously owned and possessed by Dinu Ram to the extent of ½ share and S/Sh. Chetu and Dhalu, both in equal shares to the extent of ½ share. It was alleged that the petitioner was successor of Dinu and he in connivance with the revenue officials wrongly got the suit land entered in his exclusive possession. It was stated that suit land was joint and possessed by the respondent to the extent of 1/4 share but under the guise of wrong revenue entries, the petitioner without getting the suit land partitioned had started raising construction over the suit land in June, 2012, while he had no right to raise the said

construction till the partition was effected because this was the most valuable portion of the suit land on the National Highway.

3. The petitioner opposed the application by filing the reply wherein it was alleged that the application was not maintainable. It was also alleged that the respondent was not joint owner in possession of the suit land and claimed exclusive possession. It was also alleged that the petitioner started raising construction in February, 2012 and had spent more than Rs.7 lacs on the construction thereof. The petitioner denied the possession of the respondent over the suit land and further claimed the revenue entries to be correct.

4. The learned trial Court after perusing the revenue records which reflected Dinu, Chetu and Dhalu to be the owners of the suit land came to the conclusion that the respondent herein was co-owner of the suit land being daughter of Dhalu.

5. Aggrieved by the order passed by the learned trial Court, the petitioner preferred an appeal before the learned District Judge, Kullu, who endorsed the findings of the learned trial Court and dismissed the appeal.

6. It is against these orders that the present petition has been filed before this Court on the ground that the orders passed by the learned Courts below are factually and legally incorrect and, therefore, not sustainable in the eyes of law. It is further contended that since the petitioner is in exclusive occupation of the land in dispute right from the year 1992 when he purchased the same from Raj Kumar and half share from Keshav Ram, then there was no question of holding the respondent to be a co-owner and granting injunction. Lastly, it is contended that the learned Courts below have granted a blank stay on the entire suit land which is in exclusive possession of the petitioner and said orders cannot go on indefinitely because no suit for partition till date has been filed by the respondent which clearly reflects on her conduct.

7. I have heard learned counsel for the parties and have gone through the records of the case. Shri Lal, learned counsel for the petitioner, has placed strong reliance on the copy of jamabandi for the year 2000-01 to contend that the petitioner is in exclusive possession of Khasra No.876 and, therefore, no injunction could have been granted by the learned Courts below.

8. I have perused the copy of jamabandi which, no doubt, shows the petitioner to be in exclusive possession of the suit land over Khasra No.876, but the question is that would that give him a right to use it exclusively, particularly, when the respondent/plaintiff claims herself to be the co-sharer of the suit land. Infact, it has been specifically observed by the learned lower appellate Court that there is no dispute that the suit land is joint between the parties. It has further been observed that the respondent/plaintiff is co-sharer to the extent of 1/4th share, whereas, petitioner/defendant is co-sharer to the extent of ½ share. These findings have been recorded after taking into consideration the pleadings of the parties as also on the basis of the jamabandi available on the record. The respondent/plaintiff has specifically pointed out that the petitioner/defendant is going to raise construction over the best and valuable portion of the suit land which is adjacent to the National Highway. Since, the parties are, prima facie, proved to be the co-owners of the suit land, the question which, therefore, falls for consideration is as to whether the petitioner can be allowed to do an act over the joint land which may cause substantial loss or injury to the other co-sharers.

9. Property held in common, by two or more persons, whatever be its nature or origin, is said to be joint property and the owners thereof joint owners. Joint property envisages a community of interest (ownership) and a commonality of possession vested in

the entire body of owners called co-sharers/joint owners. This body of owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate. Inherent in his status as a co-sharer/joint owner and flowing from his status as a joint owner or a co-sharer of the joint property is the right to assert ownership with respect to every part and parcel of the joint property. The status as a co-sharer would be preceded by a tangible act of conferring proprietary status, whether by way of membership of a co-parcenary or by devolution of interest, pursuant to inheritance or by assignment of property by sale etc.

10. A co-sharer asserts joint title and possession even, where other co-sharers/joint owners are in separate possession of different parcels of land and as a natural consequences, a co-sharer in possession of a specific area of joint property possesses the property for and on behalf of all other co-sharers/joint owners. Co-sharers may and often do for the purpose of better management of the joint estate hold separate possession of parcels of joint land. This separation of possession, without a corresponding intent, to sever the joint status of the community of joint owners does not confer a right upon a co-sharer in separate possession to assert his separate ownership. A joint owner, therefore, would be owner of a specific share in the entire joint property but would not be entitled to claim separate ownership of any specific and particular portion of the joint property till such time, as the property remains joint.

11. A joint owner/co-owner, just as an individual owner, has an inherent right to alienate the joint property, limited to the extent and the nature of his share holding. Upon transfer of his share or a part thereof, a co-sharer transfer only such rights as vest in him as a joint owner, namely, his specified share or a part thereof in the community of joint owners with commonality of possession. A vendee from such a joint owner or a co-sharer would, therefore, receive the property so transferred, with all the rights and liabilities that vested in his vendor, namely, a right to assert a community of interest (ownership) and a commonality of possession in the entire joint estate and alongwith the entire body of joint/co-owners. This conclusion draws sustenance from Section 44 of the Transfer of Property Act which reads as under:

> "44. Transfer by one co-owner. – Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred."

12. The legal relationship between co-owners is not regulated by any statute. It is governed by judicial decisions, and the principles laid down by judicial decisions are based on the principle of equity, justice and good conscience.

13. In ***Kennedy*** *versus* ***De Trafford, 1897 AC 180*** it was held by the House of Lords that there was no fiduciary relation between tenants in common of real estate as such; nor could one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.

14. The statute (4 Ann. c. 16, Section 27) has long been repealed; but the principle under lying it has been adopted as a part of the common law of England in Britain as well as in countries which have adopted the English common law.

15. In India also the principle of the English common law on the point has been adopted by the Judges on grounds of justice, equity and good conscience.

16. It is well settled that a co-owner merely as a co-owner is not an agent for the other co-owners: ["See Abu Shahid v. Abdul Hoque, 1940 1 ILR (Cal) 110. But he may become an agent for the others by a contract, express or implied.

17. In ***Sukh Dev*** *versus* ***Parsi and others AIR 1940 Lahore 473***, a Division Bench of Lahore High Court held that a co-sharer, who is in exclusive possession of any portion of a joint Khata can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of partition and that the other co-sharers' rights will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferees in the land in dispute will be that of a co-sharer(s), subject to adjustment at the time of partition. It is apt to reproduce the following observations:-

> "The sole point for decision is whether a cosharer in a joint holding, who is in exclusive possession of a certain plot of land, has a right to sell the same, and if so whether the transferee has a right to remain in possession of such a plot until partition. It is not disputed on behalf of the respondent that the defendants could sell their share (or any fraction thereof) in the holding; but it is contended that no cosharer is entitled to sell any specific plot as he is not the sole owner thereof. In support of this contention the learned counsel relied chiefly on three rulings of the Allahabad High Court, viz. AIR 1920 All 111, AIR 1928 All 59 and AIR 1935 All 771.
>
> The facts of the present cases seem to be however distinguishable as the defendants in selling the plots did not assert that they were exclusive owners thereof. The learned Judge in Chambers has remarked in his judgment that there was an assertion of exclusive title by the defendants in the present suits by sale of specific plots. But this does not appear to be correct. No sale deeds were executed; and it appears from the mutations that the defendants merely purported to transfer their interest in these plots as cosharers. As cosharers they had a right to remain in possession of these plots till partition subject to adjustment at the time of partition and they seem to have transferred the same right to the vendees. This is indicated by the fact that the sale is shown in the column of cultivation and not in the column of proprietorship according to the rules governing mutation proceedings. Moreover, the defendants have made it clear in their written statements also that they only claim to hold the plots sold "until partition subject to the rights of the other cosharers and subject to adjustment at partition. If the defendants merely transferred the plots subject to the rights of the other cosharers and subject to adjustment at the time of partition," it is difficult to see how the rights of the other cosharers can be prejudiced in any way. It is well settled that if a cosharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition (see AIR 1938 Lah 465 and the other rulings cited therein).
>
> As a result, it has been held that a cosharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition (see AIR 1925 Lah 518, AIR 1929 Lah 168 and AIR 1939 Oudh 243. This view seems to be consistent with the principle embodied in S. 44, T.P. Act, regarding transfers of their 'interest' in joint property by cosharers. The

learned counsel for the respondent urged that the defendants in these cases were not in possession for a very long time. It appears however that they were in possession for some years at least before the sales and there seems to be no good ground for holding that they could not transfer the plots unless their possession extended to 12 years or more as suggested by the learned counsel. The defendants did not claim to have acquired any adverse title. All that they claimed was that they were entitled to remain in undisturbed possession till partition. They were certainly in possession for some years before the sales as stated above and the learned counsel for the respondent has not been able to show that the other cosharers had any right to disturb their possession until partition."

18. A Full Bench of the Allahabad High Court in ***Chhedi Lal and another*** *versus* ***Chhotey Lal AIR (38) 1951 Allahabad 199*** observed that while a co-sharer is entitled to object to another co-sharer exclusively appropriating the land to himself to the detriment of the other co-sharer, the question as to what relief should be granted was considered in light of all earlier decisions and it was held as follows:-

"25. As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers-either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for 'demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

19. The interse rights and liabilities of the co-sharers were a subject matter of a Division Bench decision of the Punjab and Haryana High Court in ***Sant Ram Nagina Ram*** *versus* ***Daya Ram Nagina Ram AIR 1961 Punjab 528*** and the following propositions inter alia were settled:-

"1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition."

20. In ***Jose Caetano Vaz*** *versus* ***Julia Leocadia Lucretia Fernandes AIR 1969 Goa 90***, it was held as under:-

"6. The upshot of the above discussion is that a co-owner, though in possession of the joint property, has no right to change the user of that property without the consent of the other co-owners, and that if the aggrieved co-owner comes to the Court with due promptness for restraining the defendant from raising a building on the joint property the Court can very legitimately decree prohibitory injunction, and if in the meantime any structure has been raised a decree for mandatory injunction can also be granted."

21. In ***Sachindra Nath Sarkar and others*** *versus* ***Binapani Basu and others AIR 1976 Calcutta 277***, the Calcutta High Court after taking into consideration the earlier judgments summed up the position of law as follows:-

"18. Consistent with the decisions of this Court, the position in law is as follows:--

(a) the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply be cause he is a co-owner.

(b) before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.

(c) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

22. In ***Gouri and others*** *versus* ***Dr. C.H. Ibrahim and another AIR 1980 Kerala 94***, on general principle it was laid down that if several owners are in possession of

an undivided property, none of them has a right to appropriate to his exclusive use any portion of the property as that will effect a compulsory partition in his own favour according to his choice. It is pertinent to note the observation of the Court at para 11 extracted hereunder:-

> "11. The law is that the right of a co-owner to raise construction or to make other improvement on the common property really depends on the consent, express or implied, or on the sufferance of the other co-owners. And when one co-owner commences to build without seeking the consent of the others and in spite of the protest to the construction, the possession, of the co-owner raising the construction at once becomes wrongful and the work will have to be stopped by an order of injunction. The wrongful possession or an ouster by a co-owner is itself an injury to the other co-owners and the latter would not he required to prove any other injury to them in order to sustain action for injunction. (See: Mitra's Co-ownership and Partition -- Fifth Edition pp. 127 & 128)."

23. The proposition as settled by the Division Bench of the Punjab and Haryana High Court in ***Sant Ram's case*** (supra) was affirmed by a Full Bench decision of the Punjab and Haryana High Court in ***Bhartu*** *versus* ***Ram Sarup 1981 PLJ 204***.

24. In ***Rukmani and others*** *versus* ***H.N. Thirumalai Chettiar AIR 1985 Madras 283***, a Division Bench of the Madras High Court held that a co-sharer cannot be allowed to cause prejudice to the other co-sharer by putting up a substantial construction during the pendency of the suit for partition filed by the co-sharer. It was held:-

> "The respondent, being a co-sharer, cannot be allowed to cause prejudice to the other co-sharers by putting up a substantial construction during the pendency of a suit for partition filed by the co-sharers."

25. In ***Prakash Chand Sachdeva*** *versus* ***The State and another AIR 1994 SC 1436***, the Hon'ble Supreme Court held:-

> "3....when claim or title are not in dispute and the parties on their own showing are co-owners and there is no partition, one cannot be permitted to act forcibly and unlawfully and ask the other to act in accordance with law....".

26. In ***Prakash S.Akotkar and others*** *versus* ***Mansoorkha Gulabkha and others AIR 1996 Bombay 36***, a learned single Judge of the Bombay High Court held that a co-owner in possession of the property is for and on behalf of other co-owners and the co-owners out of possession were not in possession cannot claim injunction against other co-sharers. The other co-sharer cannot claim injunction so as to exclude the other co-owners from exercising their rights as co-owners. It is apt to reproduce paras 4 and 5 of the report which reads thus:-

> "4. Here, nature of injunction sought is of importance. The plaintiff sought injunction against all the defendants from interfering with his exclusive possession. It should be noted that these defendants include not only the first defendant who executed the agreement to sell but also the three other sons of Noor Jahan. It goes without saying that these sons have since alienated the property to defendants 5 and 6. Even assuming that even if the plaintiff who was put in possession by the first defendant on the execution of agreement to sell, the question in the context is as to the character of possession which the first defendant could have conveyed, for the character of possession has nexus with the prima facie case pleaded by the plaintiff.

Ordinarily, a co-owner has equal right and interest in the whole property along with other co-owners. Every co-owner has right of enjoyment and possession equal to that of the other co-owners and he has interest even in every infinitesimal portion of the property. In other words, the title and possession of a co-owner is co-extensive with the interest of other co-owners. Being co-owner the first defendant cannot have any right to represent the title and possession of other co-owners. The learned counsel for their 1st respondent relied on AIR 1971 Madh Pra 23 (Tikam Chand Lunia v. Rahim Khan Ishak Khan) to contend that he is entitled to maintain the application for injunction in such circumstances. Even assuming that the first defendant has validly executed the agreement to sell, that agreement to sell cannot create any interest in the property, it can only create all obligation annexed to the ownership of the property. Therefore, the right of the respondent, if at all, is to enforce the agreement to sell. The photo copy of the plaint placed before me by Mr. Khapre, learned counsel for appellants, shows that the plaintiff seeks enforcement of the agreement to sell against all the six defendants. This certainly would mean that the plaintiff admits the title not only of the first defendant, but admits the title of defendants 2 to 4 - the brothers of 1st respondent - as well as that of the alienees defendants 5 and 6 in favour of whom defendants 1 to 4 have since executed a sale-deed. Necessarily it should follow that the plaintiff has no hostile claim except a prayer to enforce specifically the agreement to sell. Even the decision relied on by the learned counsel for respondents, AIR 1971 Madh Pra 23, cited supra, does not say that a stranger who obtained an agreement to sell from one of the co-sharers is in the same position of a co-owner. The learned counsel then relied on 1984 Mah LJ 915 (Nandkumar v. Laxmibai). There it is held, a person in possession under S. 53-A of Transfer of Property Act is entitled to maintain an application for injunction under O. 39, R. 1. There can be no dispute as to the said proposition. In the context, even if it is assumed that the plaintiff is in possession that possession can only be of a co-owner. The learned counsel also relied on a decision in AIR 1960 Ker 27 (Joseph v. John). All that is held in the said decision is that when a co-owner transfers the entire property as owner to a stranger the possession of such stranger will become hostile to that of the non-alienating co-owner. In this connection it is necessary to refer to a later decision of the apex court as to the character of possession of a co-owner in possession. In the decision in Karbalai Begum v. Mohd. Sayeed AIR 1981 sc 77: 1980 All LJ 902 the Supreme Court observed, the legal position of a co-owner in possession would be that of a constructive trustee on behalf of the other co-sharer who is not in possession and that right of the co-sharer would be deemed to be protected by the trustee. Then a person in such a position cannot prima facie without anything more unilaterally change the character of his possession so as to confer a better title to his assignee, much less on one in favour of whom he has executed only an agreement to sell. Here the agreement to sell itself was in 1994. There is no case that the first defendant-the son of Noor Jahan - was ever in hostile possession. In such circumstances, the learned counsel for respondents cannot build up an argument on the basis of such possession claiming that an alienee can maintain an application under Order XXXIX, Rule 1 against the non-alienating co-owner. The learned counsel for the 1st respondent further relied on AIR 1958 Cal 614 (Paresh Nath Biswas v. Kamal Krishna Choudhary). All that is held in that decision is, upon

transfer to a stranger of an undivided house by a co-owner, the co-owner cannot claim joint possession along with other co-owners under Section 44 of the Transfer of Property Act. It is further held that upon a transfer to a stranger of an undivided share of a family dwelling-house by a co-sharers can maintain a suit for injunction for restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred. This decision cannot help the respondents.

5. As noticed, the character of possession of the plaintiff in the circumstances can only be that of a co-owner even if the possession passed under agreement to sell. The Division Bench of Punjab High Court in the case of Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punj 528 has considered the whole question as to the rights and liabilities of co-owners and also the condition under which one could presume ouster. It is held therein that a co-owner has an interest in the whole property and also in every parcel of it; and that possession of the joint property by one co-owner is, in the eye of law, possession of all even if all but one are actually out of possession. Then it proceeds to hold that this condition will prevail unless ouster is proved. With due regard to the aforesaid facts and circumstances, particularly the fact that defendants 1 to 4 are governed by Mohammaden Law, there can be no doubt that their interest is that of co-owners. The first defendants has no right prima facie to bind the interest of defendants 2 to 4. Having found so, the aliences of the defendants 1 to 4 who are defendants 5 and 6 must be deemed to have stepped into shoes of at least defendants 2 to 4 though prima facie the rights of first defendant annexed with the obligation under the agreement to sell. Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner, in possession is entitled to an injunction of this nature against the other co-owners. Once it is found that the possession of co-owner is for the on behalf of other co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners. Therefore the respondents/plaintiffs have no prima facie case. Consequently on this short ground, the order of the Civil Judge, Sr. Dn., is liable to be set aside. The order is therefore set aside the the instant appeal is allowed. It needs hardly he mentioned that the observations made in this order are only for the purposes of disposal of the claim of the respondents under Order XXXIX, Rules 1 and 2, Code of Civil Procedure."

27. In ***Bachan Singh*** *versus* ***Swaran Singh AIR 2001 Punjab and Haryana 112,*** a Division Bench of the Punjab and Haryana High Court on consideration of judicial pronouncements on the rights and liabilities of the co-sharers and their right to raise constructions to the exclusion of the others was of the following opinion:-

"(i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been in exclusive possession of the common property unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of co-owner out of possession.

(ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest."

28. In ***Tanusree Basu and others*** *versus* ***Ishani Prasad Basu and others (2008) 4 SCC 791***, the Hon'ble Supreme Court was dealing with the cases of co-sharers and it was held that a co-owner in exclusive possession of the joint property would be entitled to an injunction and it was held as under:-

"13. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.

14. We have noticed hereinbefore that the plaintiffs-appellants themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, viz., flat Nos. 201, 202 and 301. If they were in possession of the separate flats, plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiffs-appellants immediately after the appeal preferred by them in the High Court was dismissed.

15. The padlock was directed to be removed by the learned Civil Judge by an order dated 21.11.2006. We do not find any illegality therein.

16. It is now a well-settled principle of law that Order 39, Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code. (See Manohar Lal Chopra v. Seth Hiralal AIR 1962 SC 527 and India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (2007) 5 SCC 510).

17. Strong reliance has been placed by Mr. Banerjee on a judgment of Bombay High Court in Bhaguji Bayaji Pokale & Ors. v. Kantilal Baban Gunjawate [1998 (3) CCC 377 (Bom.)] wherein it was held: (AIR p.117, para 8).

"8[7]. With regard to second substantial question of law, i.e. the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned jointly, the learned Counsel for the appellants had relied upon the Apex Court's judgment reported in Mohammad Baqar v. Naim-un-Nisa Bibi AIR 1956 SC 548 The Apex Court has very categorically held in para No. 7 as under:

"7.....The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their

> knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."

It was observed : (AIR p.117, para 10)

> "10....Similarly, the legal position that the co-owner or co-sharer of the property can never claim ownership by adverse possession of the other share. This is also a well settled law."

18. We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

19. Reliance has also been placed by Mr. Banerjee on Abu Shahid v. Abdul Hoque Dobhash AIR 1940 Cal 363, Hemanta Kumar Banerjee and others v. Satish Chandra Banerjee and others AIR 1941 Cal 635 and Jahuri Sah and others v. Dwarika Prasad Jhunjhunwala AIR 1967 SC 109.

20. In Abu Shahid (supra), the question which arose for consideration was in regard to plea of ouster vis-a-vis rendition of accounts. We are not concerned with such a question in this case.

21. In Hemanta Kumar Banerjee (supra), the question which arose for consideration was as to whether the rule against partition amongst co-sharers is an elastic one. Again, we are not concerned with such a question here.

22. In Jahuri Sah (supra), this Court opined: (AIR p.112, para 12)

> "12. What we have to consider then is whether the contract for payment of compensation is not enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay compensation arises only in such a case and no other. Co-owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation"

These observations do not assist the case of the appellants. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof."

29. In ***Jai Singh and others*** *versus* ***Gurmej Singh 2009 (1) SLJ (SC) 714***, the Hon'ble Supreme Court was seized of a matter involving interse rights and liabilities of a co-sharer and it upheld the principles as laid down in ***Bhartu's case*** (supra).

Before proceeding further and after having noticed the judgments of various Courts, let me now make a note of the position of law as laid down by this Court.

30. In ***Parduman Singh and another*** *versus* ***Narain Singh and another 1991 (2) SLC 215***, it was held that a co-sharer has no right to make construction over the land in dispute which is joint interse the parties to the disadvantage of the opposite party and it is not proper for the Court to allow the continuation and completion of the construction on the condition that it would be demolished if it is ultimately found that the party raising the construction had no right or had exceeded his right in raising the construction.

31. In ***Nagesh Kumar*** *versus* ***Kewal Krishan AIR 2000 HP 116***, this Court after relying upon ***Parduman Singh's case*** (supra), held as follows:-

> "16. A co-sharer is entitled to claim Injunction when another co-sharer threatens to exclusively appropriate joint land to himself to the detriment of other co-shares by constructing a structure thereon.
>
> 17. In view of the above, the plaintiff has made out a case for grant of temporary injunction as prayed for by him and as was granted by the learned Senior Sub-Judge.
>
> 18. In a cause when a co-sharer has sued for permanent prohibitory Injunction restraining the other co-sharer from raising any construction over the land jointly owned by them, it Is not just and proper to permit the co-sharer against when the relief of injunction has been claimed, to continue/ complete construction of a house/structure on such land.
>
> 19. The Apex Court while dealing with a similar situation in Harish Chander Verma v. Kayastha Pathshala Trust, 1988 (1) JT (SC) 625 has held as follows :
>
> > "I.....In appeal against the decree for permanent injunction the High Court by the impugned order has permitted the defendant-respondent herein to raise construction subject to the condition that In the event of the decree being affirmed the construction shall have to be pulled down.
> >
> > 2. Apart from the convenience the parties and equity arising in the facts of the case, a larger principle is involved in the matter. On the face of a decree for permanent injunction is it appropriate for the appellate Court to allow it to be nullified before the appeal is disposed of. We are of the view that the answer has to be in the negative."
>
> 20. Similar view has been taken by this Court in Parduman Singh v. Narain Singh, 1991 (2) Sim LC 215."

32. In ***Shiv Chand*** *versus* ***Manghru and others, 2007 (1) Latest HLJ (H.P.) 413***, this Court has held as follows:-

> "7. The view taken by the first appellate Court that one of the persons in joint possession can raise construction on a portion of the joint property provided the area sought to be covered does not exceed his share, is contrary to the proposition of law. The law is very clear that a person in joint possession of immovable property cannot change the nature of the suit property unless the property is partitioned or the other persons in joint possession consent to such change in the nature of the property....
>
> 8. Coming to the next question, the view taken by the learned first appellate Court is again erroneous. Persons in settled joint possession of immovable

property are supposed to respect the right to joint possession of each other in the same fashion and manner as the owners in joint possession. Therefore, the view taken by the learned first appellate Court that both the parties being encroachers, either of them can change the nature of the property without partition or without consent of the other is contrary to well settled proposition and principles of law. Hence, this question is also answered in favour of the plaintiff-appellant."

33. In ***Payar Singh*** *versus* ***Narayan Dass and others 2010 (3) Shim. LC 205***, after taking note of ***Nagesh Kumar and Parduman Singh's cases***, this Court held as follows:-

"12.The respondents in the written statement have specifically pleaded that parties are in separate possession under family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction on an area which is more than their share. The case of the respondents is that petitioner has constructed his house on a better portion of the land. The under construction house of the respondents is away from the National Highway 21 whereas the house of the petitioner abuts N.H. 21. The respondents have placed on record on the file of revision photographs of under construction house of the respondents. The photographs indicate sufficient gap between the already constructed house of petitioner and under construction house of the respondents over which even slab has been placed. It is the case of the respondents in written statement that they are in separate possession of the land in family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision the scope is limited as held in The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76. The suit is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record."

34. In ***Kalawati and another*** *versus* ***Sudhir Chand and others 2011 Law Suit (HP) 692 (CMPMO No.193 of 2010)*** decided on 13.04.2011, after taking into consideration the ratio of the judgment in ***Bachan Singh's case*** (supra), this Court held as follows:-

"8.**K**eeping in view the fact that substantial construction had been raised even before the suit had been filed and defendants have collected huge amount of material on the spot, in my view no irreparable harm and injury will be caused to the Plaintiffs in case such construction is allowed to go on. On the other hand, if the Defendants are permitted to continue to raise the construction, the interest of the Plaintiffs can be protected by making it clear that the construction raised shall be subject to the final decision of the suit and in case the suit is decreed in favour of the Plaintiffs then Defendants will either demolish the portion in excess of their share or shall

hand over the same to the Plaintiffs without asking for any compensation for building costs."

35. In ***Brij Lal*** *versus* ***Puran Chand, 2011 (1) Him. L.R. 80,*** it has been held as under:-

"8. The partition proceedings are pending before the competent authority. Though the defendant as DW-1 has made reference about some family partition, however, he has neither given any date nor month or year when the family partition took place. He has admitted that the suit land measuring 11-12 bighas was joint of the parties. In his written statement, he has claimed not only that he was in exclusive possession, but also exclusive title to suit land to the exclusion of plaintiff and other co-sharers. Since the land in question has not been partitioned, the defendant could not be permitted to raise any construction thereon without working out any arrangement or with consent of the co-owners. If he wanted to raise any construction, he ought to have sought consent of the other co-owners since the land was joint. The learned District Judge has rightly relied upon Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961, Punjab, 528 and the judgment rendered by this Court in Prithi Singh Vs. Bachitar Singh, 1969 DLT 583 while dismissing the appeal."

36. In ***Amin Chand and another; Chet Ram*** *versus* ***Chet Ram and others; Amin Chand and others*** in ***Civil Revision No.153 and 161 of 2005*** decided on 07.04.2010, after making note of the judgments in ***Bachan Singh and Nagesh Kumar's cases*** (supra), it was held as under:-

"12. It is true that in case the land is jointly owned and possessed by the plaintiff and other co-sharers and has not been partitioned, the plaintiff would have been held entitled to the grant of injunction in his favour restraining the defendants from changing the nature of the suit land or raising any construction till partition. However, that can be so in case the land had been sold by some other person than the plaintiff himself who did not place any restriction in the sale deed on the powers of defendant No.1 to raise construction till partition or made a reference as to which particular portion of the land, whether abutting the State Highway or on the backside, has been sold to defendant No.1. The sale deed in question is dated 26.6.1995 executed by the plaintiff in favour of defendant No.1 and a perusal of the same shows that it has been clearly mentioned that four biswas of land has been sold to defendant No.1 who shall be entitled to use it in any manner he likes and the possession has also been delivered to him. In case the plaintiff wanted to put some restrictions on the powers of defendant No.1 to raise construction or he had an idea that defendant No.1 may not encroach the whole land abutting the State Highway out of the total share of the plaintiff and other co-owners, he could have placed a restriction upon the powers of the defendant to raise construction over this particular portion of the land. It may be that the plaintiff represented to the defendant and showed him the land abutting the State Highway and once the defendant had purchased the land and the possession had been given to him of four biswas of land out of the total land and no restriction had been placed as to his powers to raise construction till partition. There is no specification as to whether the land abuts the State Highway or otherwise. In equity, the plaintiff cannot be held entitled to file the suit for an injunction and claim the relief of temporary injunction till the matter is settled by a civil court. In

equity, the plaintiff is not entitled to temporary injunction in his favour till the question is decided by the civil court as to which of the parties was in possession or which particular portion of the land was sold to defendant No.1 and which land was given in possession to defendant No.1 in pursuance of the sale deed effected by the plaintiff. All these questions are left open to be decided by the civil court but for the present, in equity, the plaintiff cannot be said to be entitled to the relief of an injunction in his favour. This is particularly so when the defendant has pleaded that he has raised construction over the suit land by spending Rs.1.00 lac, as pleaded in the written statement. The defendant shall not encroach or cover more land than what construction has been raised by him already, which he will be entitled to complete till the disposal of the suit. However, the construction being so raised by the defendant shall be subject to the rights of other co-sharers on partition and in case the defendant raises any construction beyond his share or that portion falls to the share of another co-sharer on partition, defendant No.1 will have to demolish this construction which shall be raised by him at his own risk. This will be subject to adjustment at the time of partition to which either of the parties are entitled to apply and get the appropriate relief."

37. In ***Jagdish Ram*** *versus* ***Vishwamitter and others Latest HLJ 2012(HP) 1427***, this Court held that the possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. Mere occupation of larger portion or even of entire joint property does not amount to ouster as the possession of one is deemed to be on behalf of all. The remedy of a co-owner who is out of possession and not in possession is by way of suit for partition or for actual joint possession.

38. In ***Munshi Lal*** *versus* ***Rajiv Vaidya 2013 (2) Him.L.R. 1172***, this Court held as follows:-

"13. The petitioner at the most is a co-sharer. He cannot change the nature of the suit land without the consent of other co-sharers and without partitioning the suit land. The petitioner at this stage has failed to identify his possession on specific 0-14-09 bigha land out of the suit land. The two courts below after appreciation of material on record have granted interim injunction in favour of respondent. It cannot be said that decisions taken by the two courts below are without jurisdiction or suffer from error of law, which require correction by way of petition under Article 227 of Constitution of India. There is no merit in the petition."

39. I myself in ***Prabhu Nath and another*** *versus* ***Sushma 2014 (2) Shim. LC 1003*** after taking into consideration the ratio of judgments in ***Nagesh Kumar, Shiv Chand and Brij Lal's cases*** (supra) held as under:-

"3. Admittedly the parties are co-owners and it is settled that every co-owner has every right over each inch of land. The possession of one co-sharer is possession of all, and therefore, the co-sharer cannot change the nature of the suit land to the detriment of another co-owner unless the land is partitioned or can do so with the consent of other co-sharers. This view has been consistently followed in a number of judgments by this Court."

40. In ***Joginder Singh & others*** *versus* ***Suresh Kumar and others AIR 2015 HP 18,*** after taking into consideration the judgments in ***Nagesh Kumar and Bachan Singh's cases***, it was held:-

"19. The defendant admittedly has raised the construction up to plinth level over a portion of the suit land, without getting the same partitioned. He, by

doing so, has threatened to evade the rights of other co-sharers including the plaintiffs therein. He, being not in exclusive possession of the vacant suit land over which he intends to raise the construction, hence cannot be permitted to go ahead with construction in violation of the rights and interest of other co-sharers therein."

41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.

8. The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

9.Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

42. It can further be safely concluded that co-owners hold property by several and distinct titles but by unity of possession. Actual physical possession is not indispensable, the requirement being of the right to possession of the common property.

43. As a corollary to the aforesaid right, any co-owner, in the absence of any agreement to the contrary, has a right to enter upon the common property and take possession of the whole, subject to the equal right of the other co-owners with whose right of possession he has no right to interfere.

44. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

45. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself.

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.

ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.

(iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.

(iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands.

48. A perusal of the order passed by the learned trial Court as also the appellate Court would go to show that both the Courts below have taken into consideration not only the pleadings, but also the law on the subject and thereafter granted the injunction. This Court while exercising powers under Article 227 of the Constitution of India will not normally interfere with the discretion of the Courts below and substitute its own discretion except where the discretion has been shown to have been exercised by the Courts below in an arbitrary, capricious or in a perverse manner or where the Court had ignored the settled principles of law regulating grant or refusal of the interlocutory injunction. This Court will also not re-assess the material and seek to reach a conclusion different from the one reached by the Courts below, if the one reached by the Courts below was reasonably possible on the material placed before it. Further, this Court would not normally be justified in interfering with the exercise of discretion solely on the ground that if it had considered the matter at the trial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the learned Courts below reasonably and in a judicious manner, then this Court would not take a different view and interfere with the discretion exercised by the Courts below.

49. Reverting to the facts, it would be seen that the petitioner on the sheer strength of his possession has claimed a right to raise construction over the suit land and has infact even added a flavour of adverse possession by claiming that he is in peaceful and uninterrupted possession of the suit land. The tone and tenor of the reply filed to the application under Order 39 Rule 1 and 2 CPC, coupled with the contents of the application separately preferred by the petitioner under Order 39 Rule 4 CPC does indicate that the petitioner is virtually claiming ouster of the respondent, who admittedly is a co-owner of the property. His exercise of rights is inconsistent with the rights of other co-owner. The petitioner has denied the rights of the other co-owner. Once it is so, then the petitioner cannot claim a right to raise construction without the consent of the other co-sharer nor does he have any right to put up any portion of the joint holding to such a use which is detrimental to the interest of the other co-sharer or may amount to change of user of the property or ouster of the other co-sharer from that portion.

50. Having said so, I find no merit in this petition and the same is dismissed with costs assessed at Rs.25,000/-.

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

Sh. Balwant Singh ....Revisionist

versus

Smt. Sheela Devi & another. ....Non-revisionists.

Cr. Revision No. 165 of 2015
Decided on: 24.6.2015.

Code of Criminal Procedure, 1973- Section 401- Compromise was entered between the parties- in view of compromise revisionist ordered to pay amount of Rs. 50,000/- as full and final settlement between the parties and the sentence of imprisonment imposed by trial Court and affirmed by appellate Court set aside.

For revisionist : Mr. B.R. Sharma, Advocate.
For the non-revisionistNo.1: Mr. Bhim Raj Sharma, Advocate.
For the non-revisionistNo.2.: Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Mr. Bhim Raj Sharma Advocate appears and waives service of notice on behalf of respondent No.1 and learned Assistant Advocate General waives service of notice on behalf of respondent No.2. Learned Advocate appearing on behalf of the revisionist submitted before the Court that a compromise has been executed inter-se the parties and present revision petition be disposed of as per the compromise executed inter-se the parties. Statements of the parties recorded. Court is satisfied that a lawful compromise inter-se the parties has been executed. In view of the compromise executed inter-se the parties it is ordered that revisionist Sh. Balwant Singh will pay compensation amount to the tune of Rs. 50,000/- (Rupees fifty thousand) as full and final settlement inter-se the parties. Sentence of imprisonment imposed by learned trial Court and affirmed by learned first appellate Court are set aside. Learned Advocates appearing on behalf of the parties submitted before the Court that Rs. 33,200/- (Rupees thirty three thousand and two hundred) paid by way of cash by Sh. Balwant Singh to Smt. Sheela Devi and an amount of Rs. 16,800/- (Rupees sixteen thousand and eight hundred) already stood deposited before the learned trial Court. Smt. Sheela Devi will be legally entitled to withdraw the amount of Rs. 16,800/- deposited before the learned trial Court. Statements of the parties recorded today will form part and parcel of this order. Judgment and sentence passed by learned trial Court and affirmed by learned appellate Court are modified to this extent only. In addition to this Sh. Balwant Singh will deposit 15% compounding fee before learned trial Court within one month. Thereafter learned trial Court will transmit compounding fee amount to the Legal Services Authorities. Revision petition is disposed. Pending applications are also disposed of.

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

Dr. Devkanya wife of Sh. Rahul Lodhta ....Petitioner
Versus
State of H.P. ....Non-petitioner

Cr.MP(M) No. 594 of 2015
Order Reserved on 5th June 2015
Date of Order 24th June, 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was lodged against the petitioner for the commission of offences punishable under Sections 341, 504, 506 of 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- petitioner had joined investigation- no recovery is to be effected from the petitioner- petitioner being female is entitled to special provision of bail - therefore, bail granted to the petitioner. (Para-7)

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. Rajiv Rai, Advocate.
For the Non-petitioner: Mr. J.S.Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 174 of 2015 dated 12.5.2015 registered under Sections 341, 504, 506 IPC at P.S. Dhalli Shimla.

2. It is pleaded that petitioner has purchased the flat from Rajesh Kumar Sektu and Rajesh Kumar has filed a false complaint against the petitioner. It is pleaded that Rajesh Kumar Sektu complainant had sold the flat to the petitioner without completion report from Municipal Corporation. It is further pleaded that after selling the flat to petitioner Rajesh Kumar Sektu had constructed one more storey illegally without approval from Municipal Corporation. It is pleaded that petitioner has also filed the complaint against Rajesh Kumar Sektu in the Municipal Corporation against the unauthorized construction. It is pleaded that FIR has been filed by petitioner Rajesh Kumar Sektu just to keep the petitioner mum relating to illegal construction raised by Rajesh Kumar Sektu. It is further pleaded that petitioner would join the investigation of the case whenever and wherever required by police and petitioner shall abide by terms and conditions imposed by the Court. Prayer for acceptance of anticipatory bail application is sought.

3. Per contra police report filed. As per police report FIR No. 174 of 2015 dated 12.5.2015 registered against the petitioner under Sections 341, 504 and 506 IPC in P.S. Dhalli Shimla. There is recital in police report that complainant Rajesh Kumar Sektu had sold the flat to petitioner Smt. Dev Kanya. There is further recital in police report that petitioner Dev Kanya used to quarrel with Rajesh Kumar Sektu and his wife Reeta and also used abusive language against Rajesh Kumar Sektu and also threatened Rajesh Kumar to kill him. There is further recital in police report that there is dispute between Rajesh Kumar Sektu and petitioner namely Dev Kanya relating to parking of vehicle. There is further recital in police report that on dated 12.5.2005 at about 6.30 PM Dev Kanya wrongly parked her vehicle and blocked the path and abused Rajesh Kumar Sektu and his wife. There is further recital in police report that after registration of case matter was investigated by Investigating Officer and site plan was prepared and photographs obtained and statements of witnesses recorded under Section 161 Cr.P.C. There is further recital in police report that petitioner has joined the investigation of case and no recovery is to be effected from the petitioner.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Assistant 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 anticipatory bail application filed under Section 438 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

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that any condition imposed by Court will be binding upon the petitioner and petitioner is female and on this ground anticipatory 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. There is special provision of bail to female. As per police report petitioner has joined the investigation of case and no recovery is to be effected from the petitioner. There is no recital in police report that custodial interrogation of petitioner is required. Court is of the opinion that if anticipatory bail is granted to the petitioner then investigation of present case will not be hampered. Court is of the opinion that if anticipatory bail is granted then interest of State and general public will not be hampered.

8. Submission of learned Assistant Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that conditional anticipatory bail will be granted to petitioner and if petitioner will flout the terms and conditions of anticipatory bail order then prosecution will be at liberty to file application for cancellation of bail strictly 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 438 Cr.P.C. is allowed and interim order dated 22.5.2015 is made absolute on following terms and conditions. (i) That petitioner will join the investigation of case as and when required by Investigating Agency in accordance with law. (ii) That petitioner shall join proceedings of trial of case regularly till conclusion of trial. (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 the petitioner will not leave India without the prior permission of the Court. (v) That petitioner will give her residential address in written manner to the Investigating Officer and Court. (vi) That petitioner will not commit similar offence qua which she 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 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

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

CWPs No. 3012, 3013 and 3014/ 2015.
Date of decision: 24.6.2015.

CWP No. 3012/2015.	
Micromax Informatics Ltd.	..... Petitioner.
Versus	
State of HP and others	....Respondents
CWP No. 3013/2015.	
Micromax Informatics Ltd.	..... Petitioner.
Versus	
State of HP and others	....Respondents
CWP No. 3014/2015.	
Micromax Informatics Ltd.	..... Petitioner.
Versus	
State of HP and others	....Respondents

Constitution of India, 1950- Article 226- Show cause notice was issued to the petitioner asking them to show cause as to why action be not taken for not paying proper VAT on mobile chargers- petitioners have efficacious and alternative remedy under Section 48 of the Act- petitioners have to appear before the authority and to file reply- it would be open for the petitioners to take all the grounds which have been taken before the High Court – a show cause notice cannot be quashed by the Writ Court- hence, Writ Petition dismissed as not maintainable. (Para-6 to 23)

Cases referred:

Oryx Fisheries Private Limited v. UOI (2010) 13 SCC 427
CCE, Bangalore V. Brindavan Beverages (P) Ltd. 2007, (213) ELT 487 (S.C.),
Malabar Industries Co. Ltd. V. Commissioner of Income Tax, Kerala State (2000) 2 SCC 718
Keshardeo Chamaria V. Radha Kissen Chamaria and others AIR 1953 SC 23
M/s D.L.F. Housing and Construction Company (O) Ltd., New Delhi V. Sarup Singh and others, 1969 (3) SCC 807
Narayan Sonagi Sagne V. Seshrao Vithoba and others, AIR 1948 Nag 258
Motibhai Jesingbhai Patel V. Ranchodbhai Shambhubhai Patel 1934 (LIX) ILR 430
Kristamma Naidu and others versus Chapa Naidu and others (1894) ILR 17 Mad 410
HPCL versus Dibahar Singh (2014) 9 SCC 78
Asst. Commissioner Income Tax Rajkot V. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171
Commissioner of Income Tax, Bhopal Versus G.M. Mittal Stainless Steel (P) Ltd. (2003) 11 SCC 441
CIT V. Max India Ltd. (2007) 15 SCC 401
Rukmini Amma Saradamma V. Kallyani Sulochana and others (1993) 1 SCC 499
Sri Raja Lakshmi Dyeing Works and others Versus Rangaswamy Chettair (1980) 4 SCC 259
Dattonpant Gopalvarao Devakate Versus Vithalrao Marutirao Janagaval (1975) 2 SCC 246
Amir Hassan Khan versus Sheo Baksh Singh (1884) ILR 11 P.C. 6
Major S.S. Khanna V. Brig. F.J. Dhillon (1964) 4 SCR 409
General Industrial Society Ltd. V. Collector of Central Excise 1993 (68) ELT 839 (Tri.- Del)

State of Punjab and others versus Nokia India Pvt. Ltd., Civil Appeal No. 11486 – 14487 of 2014, dated 17.12.2014 (Supreme Court)
State of Punjab vs. Nokia India Pvt. Ltd., AIR 2015 SC 106
Union of India and others versus Major General Shri Kant Sharma and another 2015 AIR SCW 2497
Union of India and Anr. v. Kunisetty Satyanarayana, 2007 AIR SCW 607
Special Director and another v. Mohd. Ghulam Ghouse and another, 2004 AIR SCW 416.

For the petitioner(s): M/s Surij Ghosh and Rahul Mahajan, Advocates.
For the respondent(s): 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)*

The petitioners, by the medium of these writ petitions, have questioned the show-cause notice(s) dated 13.5.2015, Annexure P1, issued in terms of Section 46 of the Himachal Pradesh Value Added Tax Act, 2005, for short "the Act", by respondent No.2 in all the writ petitions, on the grounds taken in the writ petitions.

2. The writ petitioners have questioned the show-cause notice(s) dated 13.5.2015, the foundation of which is similar and the petitioners have also taken the similar grounds to question these notices in all the writ petitions, thus we deem it proper to determine all these writ petitions by this common judgment.

3. Respondent No. 2 has invoked the powers, authority and the jurisdiction as per the mandate of Section 46 (1) of the Act, and has asked the petitioners to show-cause. The contents of show-cause notices in all the writ petitions are same, except the assessment years. It is apt to reproduce one of the show-cause notices herein:

> ***"BEFORE DR. SUNIL KUMAR, DY. EXCISE AND TAXATION COMMISSIONER, FLYING SQUAD, SOUTH ZONE, PARWANOO***
>
> ***FORM-XXXX***
>
> *{See rule 80(1)}*
>
> ***Notice under section 46 of the Himachal Pradesh Value Added Tax Act, 2005***
>
> ***To***
>
> ***M/s Micromax Informatics Ltd.,***
> ***Plot No.234-HPSIDC,***
> ***Industrial Area Baddi,***
> ***TIN-02020500697.***
>
> ***Whereas:-***
>
> ***(a) You are a dealer registered under the Himachal Pradesh Value Added Tax Act, 2005;***
>
> ***(b) The assessment for the year 2010-11 which has been disposed of by the AETC-cum-***

Assessing Authority, Solan, district Solan vide order dated 19.12.2014 therein,

(c) In order to satisfy myself as to legality and propriety of the aforesaid, the aforesaid order was called for and it has been found that you have underpaid VAT on mobile chargers.

2. In view of the aforesaid, the said order appears not to be legal and proper and as such the same requires to be revised under sub-section (1) of section 46 of the Act.

3. Now, therefore, in exercise of powers conferred upon me under section 46(1) of the Himachal Pradesh Value Added Tax Act, 2005, it is proposed to take action in the matter and to pass appropriate consequential orders in relation to the said order. Before, however, the requisite order under section 46(1) is passed, you are hereby afforded the opportunity of being heard and directed to attend in person or by a duly authorized agent in my office located at the HIG-1-A, Sector-1A, Parwanoo on 21.05.2015 at 11.30 A.M and there to prefer any objection, which you may wish to prefer in this behalf as to why the appropriate order under section 46 of the aforesaid Act should not be passed.

4. In the event of your failure to comply with this notice, I shall proceed to pass the order as aforesaid without further reference to you.

(Dr. Sunil Kumar)
Dy. Excise & Taxation Commissioner
Flying Squad, South Zone, Parwanoo.

Copy to the AETC-cum-Assessing Authority, Solan with direction to depute an official who is familiar with the case to appear before the undersigned at the above given time and date alongwith entire record of the case.

(Dr. Sunil Kumar)
Dy. Excise & Taxation Commissioner,
Flying Squad, South Zone, Parwanoo."

4. Respondent No. 2 has stated in the notice(s) that the order dated 19.12.2014, for the assessment year 2010-11 in CWP No. 3012/2015, dated 8.1.2015 for the assessment year 2011-12 in CWP No. 3013/2015 and the order dated 8.1.2015 in CWP No. 3014/2015, for the assessment year 2012-13, appear not to be legal and proper and as such the same require to be revised under sub-section (1) of section 46 of the Act. In this

backdrop, the petitioners have been asked to show-cause why the proposed action be not drawn.

5. It is moot question-whether the show-cause notices can be questioned by the medium of these writ petitions and whether the writ petitions are maintainable?

6. The petitioners have questioned the said notice(s) mainly on the following grounds:

(i) That respondent No.2 has recorded the final findings in the impugned notices, thus nothing remains to be determined,

(ii) That it is violative of principles of natural justice,

(iii) That the petitioners have no efficacious, alternative remedy available,

(iv) That respondent No. 2 has acted illegally and arbitrarily and is not having power and jurisdiction,

(v) That the ratio laid down by the apex Court in case titled ***State of Punjab vs. Nokia India Pvt. Ltd. reported in AIR 2015 SC 1068*** is not applicable.

7. The petitioners, in the respective writ petitions, have given details in support of the said grounds and in support of their submissions, the learned counsel for the petitioners have also relied upon the decisions in case titled Oryx Fisheries Private Limited v. UOI (2010) 13 SCC 427, *CCE, Bangalore V. Brindavan Beverages (P) Ltd. 2007, (213) ELT 487 (S.C.),Malabar Industries Co. Ltd. V. Commissioner of Income Tax, Kerala State (2000) 2 SCC 718, Keshardeo Chamaria V. Radha Kissen Chamaria and others AIR 1953 SC 23,M/s D.L.F. Housing and Construction Company (O) Ltd., New Delhi V. Sarup Singh and others, 1969 (3) SCC 807,Narayan Sonagi Sagne V. Seshrao Vithoba and others, AIR 1948 Nag 258,Motibhai Jesingbhai Patel V. Ranchodbhai Shambhubhai Patel 1934 (LIX) ILR 430,Kristamma Naidu and others versus Chapa Naidu and others (1894) ILR 17 Mad 410,HPCL versus Dibahar Singh (2014) 9 SCC 78,Asst. Commissioner Income Tax Rajkot V. Saurashtra Kutch Stock Exchange Ltd. (2008) 14 SCC 171,Commissioner of Income Tax, Bhopal Versus G.M. Mittal Stainless Steel (P) Ltd. (2003) 11 SCC 441,CIT V. Max India Ltd. (2007) 15 SCC 401,Rukmini Amma Saradamma V. Kallyani Sulochana and others (1993) 1 SCC 499,Sri Raja Lakshmi Dyeing Works and others Versus Rangaswamy Chettair (1980) 4 SCC 259,Dattonpant Gopalvarao Devakate Versus Vithalrao Marutirao Janagaval (1975) 2 SCC 246,Amir Hassan Khan versus Sheo Baksh Singh (1884) ILR 11 P.C. 6,Major S.S. Khanna V. Brig. F.J. Dhillon (1964) 4 SCR 409, General Industrial Society Ltd. V. Collector of Central Excise 1993 (68) ELT 839 (Tri.- Del) and State of Punjab and others versus Nokia India Pvt. Ltd., Civil Appeal No. 11486 – 14487 of 2014, dated 17.12.2014 (Supreme Court).*

8. Respondent No.2 has invoked the jurisdiction under Section 46 of the of the Act. It is apt to reproduce Section 46 (1) of the Act herein:

"46. Revision.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated".

9. Respondent No. 2 has not made any decision in terms of Section 46(3) of the Act, only the petitioners have been asked to show-cause. In case they satisfy respondent No. 2, show-cause notices can be dropped and in case the order goes against the petitioners, they have remedy available under Section 48 of the Act. It is profitable to reproduce Section 48 of the Act herein.

"48. Revision to High Court. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.

(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:

Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned."

10. Thus, the petitioners have efficacious remedy available, as per the mandate of Section 48 of the Act.

11. It is beaten law of the land that when the efficacious remedy is available, the writ petition is not maintainable.

12. This Court in batch of writ petitions, the lead case of which is ***CWP No. 4779 of 2014*** titled ***M/s Indian Technomac Company Ltd. versus State of H.P. & others*** decided on 4.8.2014, held that the petitions are not maintainable. It is apt to reproduce paras 11 to 14, 16 and 18 of the said judgment herein:

"11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court,

without availing the remedy(ies) provided, must be deprecated, unless express case is made out.

12. The Apex Court in **Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,** while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> "23. ..... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."

9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)

"11.....The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."

10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).

11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:

"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."

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14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/ assessee."

13. The Apex Court in **Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,** after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in **Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1**

SCC 603, has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343-45 paras 12-14)

"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not

permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of

India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'"

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15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

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16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17... ....

18.Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

13. The said judgment was questioned before the apex Court and the apex Court has dismissed the SLP vide order dated 22.8.2014 in SLP (C) Nos.22626-22641 of 2014.

14. The petitioners have also stated that the judgment delivered by the apex Court in case titled ***State of Punjab vs. Nokia India Pvt. Ltd.,*** reported in ***AIR 2015 SC 106,*** is not applicable in the present case.

15. The learned counsel for the petitioners has tried to distinguish the said judgment in the given facts and circumstances of the case. It is for the petitioners to take all these grounds before respondent No.2 while filing reply to show-cause notices.

16. The petitioners have been asked to show-cause. Then how it is violative of the principles of natural justice and how it can be said that the writ petitioners have been condemned unheard. They have to carve out a case by the medium of reply and arguments before respondent No.2. In fact, they want to give a slip to the law and bye-pass the remedy available to them, which is not permissible.

17. This Court in case titled ***M/s Samsung India Electronics Pvt. Ltd. vs. State of H.P. and others (CWP No. 1596 of 2015),*** while dealing with the similar, as is raised in these writ petitions, held that the writ petition is not maintainable. It is apt to reproduce paras 1 and 17 of the said judgment herein:

> ***"1.By medium of this petition, the petitioner has called in question the show cause notice issued by respondent No. 4 on 22.12.2014 under section 16(8) of the Himachal Pradesh Value Added Tax Act, 2005 (for short, H.P. VAT Act, 2005). The petitioner has been asked to personally appear alongwith the relevant documents for the years 2010-2012 to 2014-2015 (up to 30.11.2014) for the reason that petitioner was paying VAT at the rate of 5% on the sale of cellphone chargers and other accessories instead of 13.75%. The petitioner is further aggrieved by the show cause notice dated 30.12.2014 issued under section 46 of the Act by respondent No. 3, which seeks to revise the assessment order dated 16.11.2012 for the year 2011-2012 on the ground that the assessment order is not legal and proper as the same needs to be revised on the grounds that tax on sale of battery charger was levied at 5% whereas the same should have been levied at 13.75% in view of the judgement of Hon'ble Supreme Court in State of Punjab vs. Nokia India Pvt. Ltd. AIR 2015 SC 1068.***
>
> ***2 to 16.... .....***
>
> ***18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file***

appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

18. The apex Court in case titled ***Union of India and others versus Major General Shri Kant Sharma and another reported in 2015 AIR SCW 2497*** has also held that in the given circumstances, the writ petition is not maintainable. It is apt to reproduce paras 34, 37 and 38 of the said judgment herein:

"34. The aforesaid decisions rendered by this Court can be summarised as follows:

The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra and S.N. Mukherjee).

(ii)The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii)When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv)The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma).

35-36.... ....

37.Likelihood of anomalous situation

If the High Court entertains a petition under Article 226 of the Constitution of India against order passed by Armed Forces Tribunal under Section 14 or Section 15 of the Act bypassing the machinery of statute i.e. Sections 30 and 31 of the Act, there is likelihood of anomalous situation for the aggrieved person in praying for relief from this Court.

Section 30 provides for an appeal to this Court subject to leave granted under Section 31 of the Act. By clause (2) of Article 136 of the Constitution of India, the appellate jurisdiction of this Court under Article 136 has been excluded in relation to any judgment, determination, sentence or order passed or made by any

court or Tribunal constituted by or under any law relating to the Armed Forces. If any person aggrieved by the order of the Tribunal, moves before the High Court under Article 226 and the High Court entertains the petition and passes a judgment or order, the person who may be aggrieved against both the orders passed by the Armed Forces Tribunal and the High Court, cannot challenge both the orders in one joint appeal. The aggrieved person may file leave to appeal under Article 136 of the Constitution against the judgment passed by the High Court but in view of the bar of jurisdiction by clause (2) of Article 136, this Court cannot entertain appeal against the order of the Armed Forces Tribunal. Once, the High Court entertains a petition under Article 226 of the Constitution against the order of Armed Forces Tribunal and decides the matter, the person who thus approached the High Court, will also be precluded from filing an appeal under Section 30 with leave to appeal under Section 31 of the Act against the order of the Armed Forces Tribunal as he cannot challenge the order passed by the High Court under Article 226 of the Constitution under Section 30 read with Section 31 of the Act. Thereby, there is a chance of anomalous situation. Therefore, it is always desirable for the High Court to act in terms of the law laid down by this Court as referred to above, which is binding on the High Court under Article 141 of the Constitution of India, allowing the aggrieved person to avail the remedy under Section 30 read with Section 31 Armed Forces Act.

38.The High Court (Delhi High Court) while entertaining the writ petition under Article 226 of the Constitution bypassed the machinery created under Sections 30 and 31 of Act. However, we find that Andhra Pradesh High Court and the Allahabad High Court had not entertained the petitions under Article 226 and directed the writ petitioners to seek resort under Sections 30 and 31 of the Act. Further, the law laid down by this Court, as referred to above, being binding on the High Court, we are of the view that Delhi High Court was not justified in entertaining the petition under Article 226 of the Constitution of India."

19. The show-cause notice(s) is not a final order. It is for the petitioners to show-cause and take all the grounds, which are available as weapons in their armory.

20. The learned counsel for the petitioners argued that the requisite notification, in terms of sub-section 2 of Section 46 has not been issued. Thus, respondent No. 2, is not having power and jurisdiction to issue show-cause notice(s). The argument though attractive, is misconceived for the reasons that the petitioners can take these grounds before respondent No. 2, while replying the show-cause notice(s).

21. This Court has also held in ***CWP No. 1159 of 2014-F*** titled ***Sandeep Sethi versus State of H.P. and others***, that the show-cause notice cannot be questioned by the medium of the writ petition. The apex Court has also laid down the same principles of law in ***Union of India and Anr. v. Kunisetty Satyanarayana***, reported in 2007 AIR SCW 607 and ***Special Director and another v. Mohd. Ghulam Ghouse and another***, reported in 2004 AIR SCW 416.

22. While going through the writ petitions on hand, it appears that the petitioners have tried to give a slip to the law. The same issue has already been determined by this Court in ***M/s Technomac's*** and ***M/s Samsung's*** cases supra.

23. Having glance of the above discussion, the writ petitions deserve to be dismissed in *limine* and the same are dismissed as such. However, the dismissal of these writ petitions shall not cause any prejudice to the writ petitioners to appear and file reply to the show-cause notice(s) before respondent No2 and take all the grounds, which have been taken in the writ petitions on hand.

24. All the writ petitions stand dismissed, alongwith pending applications, if any.

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

Pankaj Sood & another ....Petitioners
versus
State of H.P. & others. ....Respondents.

Cr.MMO No. 76 of 2014
Decided on: 24.6.2015.

Code of Criminal Procedure, 1973- Section 482- Reply filed by State showed that cancellation report of FIR stood already filed before the trial Court, hence petitioner withdrew the petition with liberty to file a fresh petition on same cause of action.

For the petitioners : Mr. Amitesh Mishra and Ms. Ritu Chauhan, Advocates.
For the respondents: Mr. J.S. Rana, Assistant Advocate General, for respondent No.1 to 3.
Ms. Meera Devi, Advocate, for respondents No. 4 and 5.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Court perused the response filed by the State of Himachal Pradesh. There is positive recital in the response that cancellation report of FIR already stood filed before the learned trial Court. Learned Advocate appearing on behalf of the petitioners submitted before the Court that in view of the fact that cancellation report of FIR already stood filed before the learned trial Court petitioners do not want to continue present petition and same be dismissed as withdrawn with liberty to file fresh petition on the same cause of action as per exigencies of the subsequent circumstances. In view of the above stated facts petition is dismissed as withdrawn with liberty to file fresh petition on the same cause of action as per exigencies of compelling subsequent circumstances. Petition is disposed of. Pending applications also disposed of. Dasti copy.

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

State of H.P. through Secretary (IPH) to Govt. of H.P. and another ....Petitioners
Versus
Raj Kumar son of Shri Jaisi Ram ....Respondent

CWP No. 4541 of 2014
Order Reserved on 5th June 2015
Date of Order 24th June 2015

Constitution of India, 1950- Article 226- Respondent was working on daily wages basis as Beldar- his services were retrenched- he filed a petition before the Labour Court which was allowed- held, that while retrenching the employee, the principle of last come first go has to be applied- while giving re-employment preference has to be given to the retrenched employee- petitioner was not re-employed but his juniors were re-employed- thus, seniority was rightly granted to the respondent- reference can be made at any time and there is no limitation for making the reference. (Para-5 to 9)

Cases referred:
Ajit Singh and others vs. State of Punjab and others (Constitutional Bench), AIR 1999 SC 3471
Collector Land Acquisition Anantnag and another vs. Mst. Katji and ors, AIR 1987 SC 1353
Jasmer Singh vs. State of Haryana and others, (2015)4 SCC 458
Raghuvir vs. G.M. Haryana Roadways Hissar, (2014)10 SCC 301

For the Petitioners: Mr. M.L.Chauhan, Additional Advocate General.
For the Respondent: Mr. Naresh Kaul, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India against the award of learned Labour Court-cum-Industrial Tribunal passed in reference No. 456 of 2009 decided on dated 7.9.2013.

2. Brief facts of the case as pleaded are that respondent Raj Kumar was working on daily wages basis as Beldar in the office of Executive Engineer I&PH Division Dalhousie w.e.f. July 1995 and worked for 70 days in 1995, 172 days in 1996, 162 days in 1997, 200 days in 1998, 155 days in 1999 and 115 days in 2000. It is pleaded that all surplus workers were disengaged after complying the provisions of 25 (F) of H.P. Industrial Dispute Act. It is pleaded that concept last come first go was strictly complied with. It is further pleaded that respondent has challenged the retrenchment before learned Labour Court by way of filing claim petition and learned Labour Court set aside the retrenchment order of respondent and directed that respondent would be re-engaged forthwith and would be entitled to continuity and seniority for the service w.e.f. 21.8.2000 except back wages. It is pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala further directed that case of the respondent would be considered for regularization of their service as per policy framed by Government of Himachal Pradesh from time to time. It is further pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala further directed that if service of any person junior to the respondent

already stood regularized then respondent shall be entitled for regularization from the date/month of regularization of service of his junior.

3. Per contra reply filed by the respondent pleaded therein that respondent namely Raj Kumar was engaged as daily wages Beldar in the year 1987 and worked till 2000 and also worked for 240 days in certain years. It is pleaded that there was artificial break in service. It is pleaded that after dated 26.11.2000 fresh Beldars were employed by the petitioners. It is pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala has passed the award strictly in accordance with law and proved facts and prayer for dismissal of writ petition sought.

4. Court heard learned Additional Advocate General appearing on behalf of the petitioners and learned Advocate appearing on behalf of the respondent and Court also perused the entire record carefully.

5. Submission of learned Additional Advocate General appearing for the petitioners that respondent had not completed 240 days of continuity in service in preceding 12 months and on this ground civil writ petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 25(G) of Industrial Disputes Act 1948 procedure for retrenchment has been defined and as per Section 25(H) of the Industrial Disputes Act 1947 procedure for re-employment of retrenchment workmen has been defined. As per Section 25(G) of Industrial Disputes Act 1947 the employer shall ordinarily retrench the workman who was the last person to be employed in that category unless for the reasons to be recorded the employer retrenches any other workman. As per Section 25(H) of Industrial Disputes Act 1947 where any workman was retrenched and the employer proposes to employee any person the employer would give an opportunity to retrenched workers for re-employment who offers themselves for re-employment and preference would be given to retrenched workmen. In present case the facts proved that petitioners did not comply the provisions of Sections 25(G) and 25(H) of Industrial Dispute Act 1947. It is held that for compliance of provisions of Sections 25(G) and 25(H) of Industrial Disputes Act 1947 condition of continuity of service of 240 days is not mandatory. It is held that as per provisions of Section 25(G) and 25(H) of Industrial Disputes Act 1947 only the concept of last come first go would apply.

6. Another submission of learned Additional Advocate General that retrenchment of respondent was made strictly as per provisions of Sections 25(G) of Industrial Disputes Act 1947 and provision of 25(H) was also complied and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Although it is proved on record that retrenchment of respondent was strictly as per provision of Section 25(G) of Industrial Dispute Act 1947 but it is proved on record that petitioners did not comply the provisions of Section 25(H) of Industrial Disputes Act 1947 in case of re-employment of retrenched workmen. In present case it is proved on record that as per seniority list name of respondent falls at Sr. No. 399 and it is proved on record that petitioners had re-employed Biasa Devi and Hem Raj who fall at Sr. No. 414 and 435. No offer of reemployment was sent to the respondent who was at Sr. No. 399 in seniority list before the re-employment of Biasa Devi and Hem Raj.

7. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that learned Labour Court has illegally granted the seniority to respondent is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that service of person junior to the respondent has already been regularized. It is held that respondent will be legally entitled for regularization from the date and month of regularization of service of the juniors. Even as per Article 14 of Constitution

of India junior persons cannot be given seniority if senior person is meritorious and qualified all conditions for regularization. In present case there is no evidence on record that respondent Raj Kumar is not meritorious person and there is no evidence on record that any disciplinary proceedings were initiated against Raj Kumar and there is no evidence on record that Raj Kumar was punished by disciplinary authority in accordance with law.

8. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that seniority has been granted to the respondent without working in the department which is contrary to law and on this ground petition be allowed is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the award passed by learned Labour Court. Learned Labour Court has not given any monetary benefits to the respondent. Seniority has been granted by learned Labour Court except back wages. It was held in case reported in ***AIR 1999 SC 3471 titled Ajit Singh and others vs. State of Punjab and others (Constitutional Bench)*** that promotion and seniority is granted to employee under Article 16(1) of Constitution of India subject to ACR. There is no positive evidence of adverse entries in ACRs of respondent.

9. Another submission of learned Additional Advocate General appearing on behalf of the petitioners that claim petition was barred and respondent was retrenched w.e.f. 21.8.2000 and he filed OA No. 457 of 2000 before H.P. Administrative Tribunal against termination which was disposed of on dated 21.3.2002 and thereafter he raised the industrial dispute in the year 2007 after five years and on this ground petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Petitioner did not place on record certified copy of OA No. 457 of 2000 for perusal. It is proved on record that reference No. 456 of 2009 was sent to learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala and same was instituted on dated 14.9.2009. It is held that as per Section 10 of Industrial Dispute Act 1947 the reference can be sent to learned Labour Court-cum-Industrial Tribunal "at any point of time" by the appropriate Government. There is no limitation for sending the reference to learned Labour Court as per Section 10 of Industrial Disputes Act 1947. It was held in case reported in ***AIR 1987 SC 1353 titled Collector Land Acquisition Anantnag and another vs. Mst. Katji and others*** that (1) Ordinarily a litigant does not stand to benefit by lodging matter late. (2) Refusing to condone delay can result meritorious matter thrown out at the very threshold and cause of justice defeated. It was held that if delay is condoned then highest that would happen would that case 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 further held that doctrine must be applied in a rational common sense. (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. (5) It was held that there is no presumption that delay is occasioned deliberately or on account of culpable negligence or on account of mala fides. It was held that litigant does not stand to benefit by resorting to delay and in fact he runs a serious risk. (6) 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 and is expected to do so. It was held in case reported in ***(2015)4 SCC 458 titled Jasmer Singh vs. State of Haryana and others*** that provisions of Article 137 of Limitation Act 1963 would not be applicable to Industrial Disputes Act 1947 and it was held that relief would not be denied to workman merely on ground of delay. It was held that no reference to Labour Court should be questioned on the ground of delay. It was further held that even in case where delay was condoned by Labour Court then Labour Court could mould the relief by declining the back wages to workman till he raised the demand regarding his illegal retrenchment, dismissal or termination. It was held in case reported in ***(2014)10 SCC 301 titled Raghuvir vs. G.M. Haryana Roadways Hissar*** that there is no limitation

for reference to Labour Court under Section 10 of Industrial Disputes Act 1947. It was held that words "At any time" mentioned in Section 10 of Industrial Disputes Act 1947 clearly define that law of limitation would not be applicable qua proceedings of reference under Section 10 of Industrial Disputes Act 1947. Operative part of Section 10 of Industrial Disputes Act 1947 is quoted in toto. Section 10 of Industrial Disputes Act 1947:-Reference of dispute to Boards, Courts or Tribunals-(1) Where the appropriate Government is of the opinion that any industrial dispute exists or is apprehended, it may at any time by order in writing. (a) Refer the dispute to a Board for promoting a settlement thereof. (b) Refer any matter appearing to be connected with or relevant to the dispute to a Court for inquiry.

10. In view of above stated facts it is held that award of learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference No. 456 of 2009 decided on 7.9.2013 is in accordance with proved facts and is in accordance with law. It is further held that there is no illegality in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala. Award passed by Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala (H.P.) dated 07-09-2013 titled Raj Kumar vs. Executive Engineer I&PH Division Dalhousie District Chamba (H.P.) is affirmed. Civil writ petition is dismissed. No order as to costs. All pending miscellaneous application(s) if any also stands disposed of.

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

Sumit Kumar son of Shri Yogendra Singh ....Plaintiff

Versus

Mrs. Sudesh Dogra wife of late Sh. Suresh Chander Dogra and another ....Defendants.

Civil Suit No. 67 of 2011
Judgment reserved on 20th May 2015
Date of Judgment 24th June 2015

Specific Relief Act, 1963- Section 20- Plaintiff sought specific performance of the contract- it was specifically mentioned in condition No. 4 of the agreement that case No. 38/2004 is pending before High Court of H.P and sale deed will be executed only if the said case is decided in favour of seller - no evidence was led to prove that case was decided in favour of the seller- since, decision of case is the pre-condition for the execution of the sale deed, therefore, plaintiff cannot be held entitled for the relief of specific performance – however, plaintiff held entitled for the refund of the amount paid by him along with interest.

(Para-10 and 13)

Cases referred:

Jiwan Dass Rawal vs. Narain Dass, AIR 1981 Delhi 291

Imtiaz Ali vs. Nasim Ahmed, AIR 1987 Delhi 36

Amulya Gopal Majumdar vs. United Industrial Bank Ltd. and others, AIR 1981 Calcutta 404

Indira Fruits and General Market Meerut vs. Bijendra Kumar Gupta and others, AIR 1995 Allahabad 316

Crest Hotel Ltd. and another vs. The Assistant Superintendent of Stamps and another, AIR 1994 Bombay 228

Vidyadhar vs. Mankikrao and another, AIR 1999 SC 1441

Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another, 1999(1) S.L.J. 724

For the Plaintiff: Mr. Anuj Nag, Advocate.
For the Defendants: Mr. Gulzar Rathore, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Plaintiff Sumit Kumar filed suit for specific performance of contract dated 12.3.2007 pleaded therein that an agreement dated 12.3.2007 was executed between the plaintiff and co-defendant No.1. It is pleaded that at the time of execution of agreement plaintiff paid Rs.1 lac (Rupees one lac only) as an advance amount to co-defendant No.1. It is pleaded that in addition plaintiff also paid Rs.5 lacs (Rupees five lacs only) to co-defendant No.1. It is further pleaded that plaintiff has performed his part of contract and balance amount of Rs.39 lacs (Rupees thirty nine lacs only) was to be paid to co-defendant No. 1 at the time of execution of sale deed which was to be executed on or before 31.7.2011. It is pleaded that plaintiff is still ready and willing to perform his part of contract dated 12.3.2007. It is also pleaded that plaintiff requested co-defendant No. 1 to execute the sale deed as per terms of agreement and on dated 27.6.2011 plaintiff requested co-defendant No.1 to remain present at Shimla to execute the sale deed in favour of the plaintiff. It is pleaded that co-defendant No. 1 is under legal obligation to execute the sale deed in favour of the plaintiff on the basis of agreement dated 12.3.2007. It is pleaded that cause of action arisen on dated 12.3.2007 when agreement to sell flat No. 9 was executed between plaintiff and co-defendant No.1. It is pleaded that cause of action further arisen on dated 25.7.2011 when plaintiff submitted an application before the Sub Registrar Shimla and further pleaded that cause of action again arisen on dated 1.8.2011 when plaintiff issued legal notice to the co-defendant No.1 asking her to perform her part of agreement. It is also pleaded that further cause of action arisen in favour of plaintiff in first week of August 2011 when co-defendant No.1 refused to execute the sale deed in favour of the plaintiff. Plaintiff sought the following relief. (1) That decree for specific performance of contract on the basis of agreement dated 12.3.2007 be passed. (2) That defendants be directed to hand over the possession of flat to the plaintiff and to execute the sale deed. (3) That defendants or their representatives be restrained by way of passing decree of permanent prohibitory injunction not to interfere in any manner in the ownership and possession of plaintiff in flat. (4) That any decree as Court deem just and proper be also passed. (5) That in alternative decree for recovery of earnest money received along with interest of 12% per annum be passed in favour of plaintiff.

2. Per contra written statement filed on behalf of the co-defendant Sudesh Dogra pleaded therein that present suit is bad for non-joinder of necessary parties. It is pleaded that Ms. Urvashi Dogra is owner of the property in dispute. It is further pleaded that co-defendant No. 1 by way of family settlement transferred the property in dispute in the name of her daughter Ms. Urvashi Dogra who thereafter transferred the said property in the name of her sister Sunita Anand by way of gift. It is pleaded that however possession of premises remained with Ms. Urvashi Dogra. It is pleaded that both daughters are aware about the existence of agreement. It is pleaded that Ms. Urvashi Dogra and Sunita Anand are necessary parties. It is admitted that an agreement to sell was executed inter se the plaintiff and co-defendant No. 1 on dated 12.3.2007. It is pleaded that co-defendant No. 1 is not owner of flat in question and therefore she is not in a position to execute the sale deed. Prayer for dismissal of suit is sought.

3. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint.

4. On dated 4.5.2012 Ms. Urvashi Dogra was impleaded as co-defendant No. 2 in present suit. During the pendency of civil suit Ms. Sunita Anand filed application under Order 1 Rule 10 CPC read with Section 151 CPC for impleading her as co-defendant and same was registered as OMP No. 299 of 2012. Hon'ble High Court of H.P. on dated 27.12.2012 dismissed the application filed by Sunita Anand under Order 1 Rule 10 CPC read with Section 151 CPC. Co-defendant No. 2 did not file any separate written statement despite opportunity granted.

5. As per the pleadings of parties the following issues were framed on dated 23.5.2013:-

1. Whether plaintiff is entitled for a decree of specific performance of contract on the basis of agreement to sell dated 12.3.2007? OPP
2. Whether the suit is bad for non-joinder of parties? ……OPD
3. Whether the suit in the present form is not maintainable? …..OPD
4. Whether the agreement sought to be enforced is not enforceable in view of the suit filed by Smt. Sunita Anand? ……OPD
5. Relief.

6. Oral evidence examined by parties:-

Sr.No.	Name of witness
PW1	Shri Sumit Kumar
PW2	Shri M.R.Bhardwaj
PW3	Rajinder Singh
DW1	Ms. Urvashi Dogra

7. Documentary evidence produced by parties:-

Exhibit	Description of document
Ext.PW1/A	Agreement to sell dated 12.3.2007
Ext.PW1/B	Letter issued to Sub Registrar-cum-Tehsildar District Shimla (H.P.) dated 25.7.2011 by Sumit Kumar.
Ext.PW1/C	Affidavit given by Sumit Kumar.
Ext.PW1/D	Legal notice given by plaintiff to Ms.Sudesh Dogra
Ext.PW1/E	Postal receipt
Admitted plaint of CS No. 26/1of 2011 titled Ms.Sunita Anand vs. Ms.Urvashi Dogra.	
Written statement filed by Ms. Urvashi Dogra and others in CS No. 26/1 of 2011 titled Ms.Sunita Anand vs. Ms.Urvashi Dogra and others.	

8. Court heard learned counsel appearing on behalf of the parties and perused the entire record carefully.

9. Testimonies of oral evidence adduced by the parties:-

9.1 PW1 Sumit Kumar has stated that defendants are known to him. He has stated that he intended to purchase the flat at Shimla. He has stated that agreement Ext.PW1/A dated 12.3.2007 was executed which bears his signatures and also bears

signatures of co-defendant No. 1 and witnesses Rajvir Singh and Rajender Kumar. He has stated that after execution of agreement Ext.PW1/A defendant disclosed that there were some tenants in flats and some time was required for their vacation. He has stated that thereafter co-defendant told that some family dispute had occurred and she was not in a position to execute the sale deed and further stated that co-defendant No. 1 sought some time for execution of sale deed and thereafter date 31.7.2011 was fixed for execution of sale deed. He has stated that co-defendant No. 1 agreed that she would sell the flat in question for consideration amount of Rs.45 lacs (Rupees forty five lacs only). He has stated that he paid Rs.1 lac (Rupees one lac only) as advance. He has stated that he had also paid an amount of Rs.5 lacs (Rupees five lacs only) as part payment of sale consideration amount. He has stated that thereafter he contacted co-defendant No.1 in July 2011 and co-defendant No.1 told him to reach Shimla on dated 25.7.2011. He has stated that thereafter he reached Shimla and again contacted co-defendant No.1 who told him to reach in office of Sub Registrar Shimla on dated 25.7.2011. He has stated that thereafter he reached in office of Sub Registrar Shimla on dated 25.7.2011 in the morning at 10 AM along with balance sale consideration amount but defendant No.1 did not come to execute the sale deed. He has stated that thereafter he contacted co-defendant No.1 by way of mobile but mobile of co-defendant No. 1 was switched off. He has stated that thereafter he filed an application before Sub Registrar to mark his presence in office and further stated that in addition he also executed an affidavit in token of his presence in the office of Sub Registrar Shimla on dated 25.7.2011 Ext.PW1/C. He has stated that thereafter he came back to Delhi and served a legal notice through his Advocate upon co-defendant No.1 and postal receipt is Ext.PW1/E. He has stated that co-defendant No. 1 did not respond to legal notice and further stated that he was and is always willing to perform his part of agreement. He has stated that co-defendant No. 1 did not comply the terms and conditions of agreement and his suit be decreed as prayed for. He has denied suggestion that he did not pay the remaining amount of sale consideration of Rs.39 lacs (Rupees thirty nine lacs only). He has denied suggestion that he was not ready and willing to perform his part of agreement. He has stated that he does not know that flat in dispute was gifted to Ms. Sunita Anand. He has denied suggestion that he did not serve any notice upon co-defendant No.1. He has denied suggestion that he could not arrange sale consideration amount. He has stated that he was not aware that market value of flat in question is about Rs.65 lacs (Rupees sixty five lacs only).

9.2 PW2 M.R. Bhardwaj SDM Theog has stated that he has brought the summoned record. He has stated that on dated 25.7.2011 he was posted as Tehsildar in urban Shimla. He has stated that on dated 25.7.2011 plaintiff Sumit Kumar appeared before him and marked his presence and plaintiff also filed an application Ext.PW1/B.

9.3 PW3 Rajinder Singh has stated that plaintiff is known to him and co-defendant No.1 Sudesh Dogra is also known to him. He has stated that agreement Ext.PW1/A was executed in his presence and he is marginal witness of agreement. He has stated that parties have signed the agreement in his presence. He has stated that other marginal witness has signed the agreement in his presence. He has stated that agreement Ext.PW1/A was executed at Shimla on dated 12.3.2007 and a sum of Rs.1 lac (Rupees one lac only) was paid by the plaintiff to co-defendant No.1 at the time of execution of agreement Ext.PW1/A as earnest money. He has denied suggestion that he did not come to Shimla and he has also denied suggestion that he had signed agreement Ext.PW1/A at Noida. He has stated that agreement was relating to sale of flat by co-defendant No.1 in favour of the plaintiff.

9.4 DW1 Ms. Urvashi Dogra has stated that she is owner of flat in question. She has stated that agreement was executed by plaintiff and by her mother in the year 2007.

She has stated that agreement was for consideration amount of Rs.45 lacs (Rupees forty five lacs only). She has stated that total amount of Rs.6 lacs (Rupees six lacs only) paid by plaintiff and remaining amount of Rs.39 lacs (Rupees thirty nine lacs only) is not paid by plaintiff which was to be paid by July 2011 as per terms of agreement. She has stated that her mother had transferred the flat by way of family settlement in the year 2008 to her and thereafter she gifted the flat to her sister Sunita Anand in the year 2009. She has stated that thereafter her sister had given GPA in favour of her mother and thereafter flat in question was gifted back to her and she is still owner of flat in question. She has stated that in case plaintiff would give balance amount along with interest then she would execute the sale deed. She has stated that plaintiff did not come forward to execute the sale deed as per terms of agreement. She has stated that balance sale consideration amount is only Rs.39 lacs (Rupees thirty nine lacs only). She has stated that she is ready to receive the remaining sale consideration amount of Rs.39 lacs (Rupees thirty nine lacs only). She has stated that she is ready to execute the sale deed in favour of the plaintiff after the receipt of sale consideration amount along with interest in the office of Sub Registrar.

Findings upon issue No.1

10. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is entitled for decree of specific performance of contract on the basis of agreement to sell dated 12.3.2007 is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused agreement Ext.PW1/A placed on record. It has been specifically mentioned in condition No. 4 of agreement that case No. 38 of 2004 is pending before Hon'ble High Court of H.P. relating to suit property and sale deed will be executed only if case No. 38 of 2004 is decided in favour of seller namely Mrs. Sudesh Dogra. There is no evidence on record in order to prove that case No. 38 of 2004 has been decided in favour of Mrs. Sudesh Dogra by Hon'ble High Court of H.P. No certified copy of decision of case No. 38 of 2004 has been placed on record. It is held that decision of case No. 38 of 2004 in favour of Sudesh Dogra by Hon'ble High Court of H.P. is the pre-condition for execution of sale deed in favour of plaintiff. The pre-condition relating to decision of Case No. 38 of 2004 in favour of seller Mrs. Sudesh Dogra mentioned in agreement dated 12.3.2007 Ext.PW1/A is not proved on record. In view of the fact that pre-condition of decision of case No. 38 of 2004 in favour of Sudesh Dogra not proved on record in present case it is not expedient in the ends of justice to direct the defendants to execute and register the sale deed of flat No. 9 situated in third floor at Brockhurst Chhota Shimla Tehsil and District Shimla.

11. Another submission of learned Advocate appearing on behalf of the plaintiff that possession of flat in dispute be also handed over to the plaintiff is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that mere agreement of sale of immovable property does not create title, interest or charge in immovable property. ***(See AIR 1981 Delhi 291 titled Jiwan Dass Rawal vs. Narain Dass. See AIR 1987 Delhi 36 titled Imtiaz Ali vs. Nasim Ahmed. See AIR 1981 Calcutta 404 titled Amulya Gopal Majumdar vs. United Industrial Bank Ltd. and others. . See AIR 1995 Allahabad 316 titled Indira Fruits and General Market Meerut vs. Bijendra Kumar Gupta and others)*** Hence it is held that plaintiff is also not entitled for possession of flat in dispute. Even as per Section 54 of Transfer of Property Act contract of sale of immovable property itself does not create any interest or charge upon the immovable property. It was held in case reported in ***AIR 1994 Bombay 228 titled Crest Hotel Ltd. and another vs. The Assistant Superintendent of Stamps and another*** that contract of sale of immovable property is a contract that sale of such property shall take place on terms settled between the parties. It was held that merely contract does not by itself create any interest in or charge in the property. It was further held that an agreement to sell is merely a document creating a right to obtain another document of sale on fulfillment of the conditions specified

in agreement. It was held that on the strength of agreement only buyer does not become owner of the property and ownership remain with seller. It was held that ownership shall be transferred to buyer only on execution of sale deed by seller. It was also held that what the buyer gets from an agreement for sale is only a right to obtain a sale deed executed in his favour.

12. Submission of learned Advocate appearing on behalf of the plaintiff that plaintiff is also entitled for decree of permanent prohibitory injunction as prayed for in the relief clause is rejected being devoid of any force for the reasons hereinafter mentioned. There is no recital in agreement dated 12.3.2007 Ext.PW1/A placed on record that possession of flat was delivered to the plaintiff. In absence of recital in agreement that possession of flat was delivered to plaintiff it is not expedient in the ends of justice to grant relief of injunction in favour of plaintiff as sought in relief clause of plaint.

13. Another submission of learned Advocate appearing on behalf of plaintiff that in alternative plaintiff is also legally entitled for recovery of Rs.6 lacs (Rupees six lacs only) along with interest is accepted for the reasons hereinafter mentioned. It is proved on record that plaintiff has paid Rs.6 lacs (Rupees six lacs only) as earnest money. Plaintiff has specifically stated when he appeared in witness box that he paid Rs.6 lacs (Rupees six lacs only) to co-defendant No.1 namely Sudesh Dogra. Ms. Sudesh Dogra did not appear in witness box for the purpose of cross examination. Hence adverse inference is drawn against Sudesh Dogra under Section 114 (g) of Indian Evidence Act. It was held in case reported in ***AIR 1999 SC 1441 titled Vidyadhar vs. Mankikrao and another*** that if party does not enter into the witness box then adverse inference should be drawn against that party. ***(Also see 1999(1) S.L.J. 724 titled Iswar Bhai C. Patel @ Bachu Bhai Patel vs. Harihar Behera and another)*** Even DW1 Urvashi when appeared in witness box has admitted that agreement dated 12.3.2007 was executed between the plaintiff and co-defendant No. 1 for consideration amount of Rs.45 lacs (Rupees forty five lacs only). DW1 Urvashi has admitted that out of Rs.45 lacs (Rupees forty five lacs only) an amount to the tune of Rs.6 lacs (Rupees six lacs only) was paid by plaintiff. In view of the fact that co-defendant No. 1 did not appear in witness box for the purpose of cross examination and in view of the fact that DW1 Urvashi had admitted that plaintiff had paid Rs.6 lacs (Rupees six lacs only) to co-defendant No. 1 Court is of the opinion that it is expedient in the ends of justice to grant decree of recovery of Rs.6 lacs (Rupees six lacs only) along with interest at the rate of 6% per annum. Issue No. 1 is party decided in favour of the plaintiff.

Findings upon Issue No.2

14. Another submission of learned Advocate appearing on behalf of the defendants that suit is bad for non-joinder of necessary parties is rejected being devoid of any force for the reasons hereinafter mentioned. Agreement dated 12.3.2007 Ext.PW1/A was executed between the plaintiff and co-defendant No.1. It is proved on record that thereafter Hon'ble High Court of H.P. impleaded Ms. Urvashi Dogra as co-defendant No. 2 vide order dated 4.5.2012. It is proved on record that thereafter Hon'ble High Court of H.P. vide OMP No. 299 of 2012 dismissed the application of Sunita Anand to be impleaded as co-defendant. It is proved on record that agreement was executed between the plaintiff and co-defendatn No.1 only and it is well settled law that liability of agreement is *personam* in nature in accordance with law. Since signatories of agreement Ext.PW1/A dated 12.03.2007 are only the plaintiff and co-defendant No. 1 it is held that present suit is not bad for non-joinder of necessary parties. Issue No. 2 is decided against the defendants.

Findings upon issue No.3.

15. Submission of learned Advocate appearing on behalf of defendants that suit in present form is not maintainable is also rejected being devoid of any force for the reasons hereinafter mentioned. Plaintiff has filed the suit for specific performance on the basis of agreement Ext.PW1/A dated 12.3.2007. It is well settled law that suit for specific performance of agreement can be filed on the basis of agreement. It is proved on record that written agreement was executed inter se the parties. However written agreement Ext.PW1/A relating to execution of sale deed could not be executed due to pre-condition mentioned in agreement that sale deed would be executed only if case No. 38 of 2004 pending in Hon'ble High Court of H.P. is decided in favour of vendor. There is no evidence on record in order to prove that Hon'ble High Court of H.P. had decided case No. 38 of 2004 in favour of Mrs. Sudesh Dogra. Issue No. 3 is decided against the defendants.

Findings upon issue No.4

16. Submission of learned Advocate appearing on behalf of the defendants that agreement is not enforceable in view of suit filed by Sunita Anand titled Ms.Sunita Anand vs. Ms. Urvashi Dogra is rejected being devoid of any force for the reasons hereinafter recorded. Court is of the opinion that Sunita Anand and Urvashi Dogra are not signatories to agreement Ext.PW1/A dated 12.3.2007 executed between the plaintiff and co-defendant No.1. Even it is not proved on record that Sumit Kumar is co-party in civil suit filed by Ms. Sunita Anand before the Civil Court. It is well settled law that judgments are of two types i.e. judgment *in-rem* and judgment *in-personam*. It is well settled law that judgment *in-personam* could not be enforced against third person who is not party in civil suit. It is held that civil suit filed by Sunita Anand could only be enforced against Urvashi and Sudesh Dogra and could not be enforced against the plaintiff because plaintiff is not co-party in civil suit filed by Sunita Anand titled Ms.Sunita Anand vs. Ms.Urvashi Dogra. In view of above stated facts issue No. 4 is decided against the defendants.

Relief.

17. In view of findings upon above issues civil suit filed by plaintiff is partly decreed. Relief No.1, relief No.2 and relief No. 3 declined. However alternative relief is granted and decree for recovery of Rs.6 lacs (Rupees six lacs only) is passed in favour of plaintiff and against the defendants jointly and severally. In addition interest at the rate of 6% per annum qua decreetal amount is also awarded from the date of institution of suit till recovery of decreetal amount in favour of plaintiff against defendants as per Section 34 of Code of Civil Procedure 1908 in the absence of contractual rate of interest in agreement Ext.PW1/A dated 12.03.2007 in favour of plaintiff. Condition of 12% interest per annum in agreement Ext.PW1/A is unilateral only in favour of vendor only. Parties are left to bears their own costs. Learned Registrar (Judicial) will prepare the decree sheet strictly in accordance with law. Civil suit stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Amar Singh ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.Revision No.207 of 2012.
Date of decision: 25.06.2015.

Code of Criminal Procedure, 1973- Section 468- An offence punishable under Section 323 of IPC is punishable with imprisonment for a period of one year- FIR was registered on 01.06.2008 and final report was presented on 4.1.2010 beyond the period of limitation- therefore, charge-sheet presented against the petitioner was time barred. (Para-13 to 16)

Indian Penal Code, 1860- Sections 109, 147, 148, 149 and 323- A charge was framed against the petitioner for the commission of offences punishable under Sections 109, 147, 148, 149 and 323 of IPC- only petitioner was arrayed as accused and other persons were arrayed as suspects- held, that offence can be committed by an unlawful assembly of 5 or more than five persons - when only one accused has been arrayed before the Court, he cannot be charged for the commission of offence punishable under Section 149. (Para-4 to 12)

Cases referred:

Subran alias Subramanian and others versus State of Kerala (1993) 3 SCC 32,

Amar Singh and others versus State of Punjab AIR 1987 SC 826

For the Petitioner	:	Mr.Sunil Mohan Goel, Advocate.
For the Respondent	:	Mr.Virender Kumar Verma, Ms. Meenakshi Sharma, Mr.Rupinder Singh, Additional Advocate Generals with Ms.Parul Negi, Deputy Advocate General. Inspector Vikrant Bonsra, Addl.SHO, P.S.,West, Shimla at P.P. Summerhill, present.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge **(Oral).**

By medium of this revision petition, the petitioner has sought quashing of charges framed against him under Sections 109, 147, 148, 149 and 323 of the Indian Penal Code (for short 'IPC').

The essential facts may be noticed.

2. An FIR No.138/2008 was registered against the petitioner on 01.06.2008 under the aforesaid sections on the basis of the inquiry report submitted by the District Magistrate, Shimla with the SHO, Police Station, Boileauganj, Shimla. It is not in dispute that it is the petitioner alone, who has been arraigned as accused in the FIR and a number of other persons have been arraigned as suspects and kept in column No.12 in the Final Report submitted to the Court.

3. Learned counsel for the petitioner has made two-fold legal submissions:-

i) that the offences under Sections 109, 147, 148 and 149 IPC can only be committed by two or more persons and, therefore, charges framed against him deserve to be quashed and;

ii) that since the maximum punishment under Section 323 IPC is imprisonment for one year or fine of 1,000/- rupees or both, then the charge is not sustainable in view of the charge sheet having not been presented within one year of the date of commission of offence as prescribed under Section 468 of the Code of Criminal Procedure (for short 'Code').

4. Section 107 IPC provides for abetment of a thing and reads thus:-

"**107. Abetment of a thing**.- A person abets the doing of a thing, who-

First.-Instigates any person to do that thing; or

Secondly.- Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

Thirdly.- Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.- A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.-Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitate the commission thereof, is said to aid the doing of that act."

5. Section 108 IPC defines abettor to mean:-

"**108. Abettor**.- A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor."

i. *Explanation 1.*-The abetment of the illegal omission of an act may amount to an offence although the abettor may not himself be bound to do that act.

ii. *Explanation 2.*-To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

iii. *Explanation 3.*-It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the same guilty intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Explanation 4.-The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

iv. *Explanation 5.*-It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed."

6. Section 109 IPC only provides for punishment of abetment. A combined reading of Sections 107, 108 would suggest that in order to constitute an offence of abetment, there must be a combining together two or more persons in an act or an illegal omission and, therefore, the abetment of an offence cannot be committed singly.

7. Sections 147, 148 and 149 IPC for which the petitioner has been charged reads thus:-

"**147. Punishment for rioting**.- Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Rioting, armed with deadly weapon.-Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with

imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. Every member of unlawful assembly guilty of offence committed in prosecution of common object.- If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence."

8. Rioting as mentioned in Sections 147 and 148 IPC has been defined in Section 146 to mean:-

"**146. Rioting.-** Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting."

Whereas unlawful assembly as mentioned in Section 149 IPC has been defined in Section 141 IPC to mean:-

"**141. Unlawful assembly**.- An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First.- To overawe by criminal force, or show of criminal force, [the Central or any State Government or Parliament or the Legislature of any State], or any public servant in the exercise of the lawful power of such public servant, or

Second.- To resist the execution of any law, or of any legal process; or

Third.- To commit any mischief or criminal trespass, or other offence; or

Fourth.- By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.- By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation.- An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."

9. A combined reading of Sections 141, 146, 147, 148 and 149 IPC would suggest that the offence of rioting can only be committed by an unlawful assembly for which there have to be an assembly of five or more persons. To constitute the offence of an unlawful assembly, there must be five or more persons and less than five is not an unlawful assembly within the meaning of Section 141 IPC and, therefore, cannot form the basis of an offence with the aid of Section 149 IPC.

10. In ***Subran alias Subramanian and others*** *versus* ***State of Kerala (1993) 3 SCC 32,*** the Hon'ble Supreme Court held as under:-

"10. A combined reading of Section 141 and Section 149 IPC (supra) show that an assembly of less than five members is not an unlawful assembly within the meaning of Section 141 and cannot, therefore, form the basis for conviction for an offence with the aid of Section 149 IPC. The effect of the

> acquittal of the two accused persons by the High Court and without the High Court finding that some other known or unknown persons were also involved in the assault, would be that for all intent and purposes the two acquitted accused persons were not members of the unlawful assembly. Thus, only four accused could be said to have been the members of the assembly but such an assembly which comprises of less than five members is not an unlawful assembly within the meaning of Section 141 IPC. The existence of an unlawful assembly is a necessary postulate for invoking Section 149 IPC. Where the existence of such an unlawful assembly is not proved, the conviction with the aid of Section 149 IPC cannot be recorded or sustained. The failure of the prosecution to show that the assembly was unlawful must necessarily result in the failure of the charge under Section 149 IPC. Consequently, the conviction of appellants 2 to 4 for an offence under Section 326/149 IPC cannot be sustained and the same would be the position with regard to the conviction of all the appellants for other offences with the aid of Section 149 IPC also."

11. In ***Amar Singh and others*** *versus* ***State of Punjab AIR 1987 SC 826***, it was held as under:-

> "8. In our opinion, there is much force in the contention. As the appellants were only four in number, there was no question of their forming an unlawful assembly within the meaning of section 141, IPC. It is not the prosecution case that apart from the said seven accused persons, there were other persons who were involved in the crime. Therefore, on the acquittal of three accused persons, the remaining four accused, that is, the appellants, cannot be convicted under Section 148 or section 149, IPC for any offence, for, the first condition to be fulfilled in designating an assembly an "unlawful assembly" is that such assembly must be of five or more persons, as required under sections 141, IPC. In our opinion, the convictions of the appellants under sections 148 and 149 IPC cannot be sustained."

12. It is more than settled that Section 149 IPC deals with liability for constructive criminality i.e. vicarious liability of a person for acts of others. It is combination of persons, who become punishable as sharers in an offence. Admittedly, in this case, there is only one accused and, therefore, cannot be charged for the commission of the aforesaid offences.

13. Now, I proceed to deal with the second contention regarding the offence under Section 323 IPC being time barred. Section 323 IPC reads thus:-

> "**323. Punishment for voluntarily causing hurt.**- Whoever, except in the case provided for by section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

14. Section 468 of the Code provides of bar to taking cognizance after lapse of the period of limitation and reads thus:-

> "**468. Bar to taking cognizance after lapse of the period of limitation.**- (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation.
>
> (2) The period of limitation shall be –

(a) Six months, if the offence is punishable with fine only;

(b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;

(c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

[(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.]"

15. A bare perusal of the aforesaid provisions would show that no Court is competent to take cognizance of an offence after the expiry of the period of limitation and insofar as the present case is concerned, admittedly, the punishment prescribed under Section 323 IPC is one year. If that be so, then the prescribed period of limitation is only one year.

16. In the present case, the FIR was registered on 01.06.2008 while the final report was presented only on 04.01.2010 which is far beyond the prescribed period of limitation. Therefore, it can safely be concluded that the charge sheet presented against the petitioner for commission of offence under Section 323 IPC was time barred.

17. In view of the aforesaid discussion, I find merit in this petition and the same is allowed and the proceedings against the petitioner arising out of FIR No.138/2008, registered on 01.06.2008 including the proceedings pending before the learned Judicial Magistrate 1st Class, Court No.6, in Case No.176-2 of 2010, titled 'State versus Amar Singh' are hereby quashed and set aside, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Karan Laroiya & another ....Petitioners

versus

State of H.P. & others. ....Respondents.

Cr. MMO No. 247 of 2014
ORDER on: 25.6.2015.

Code of Criminal Procedure, 1973- Section 482- Cancellation report has been filed before the trial Court, therefore, the petition dismissed as infructuous- however, petitioners will be at liberty to file fresh petition on the same cause of action.

For the petitioners : Mr. Hamender Chandel, Advocate.
For respondents No. 1 & 2: Mr. J.S. Rana, Assistant Advocate General.
Respondent No.4 exparte.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Assistant Advocate General appearing on behalf of the State submitted that cancellation report of FIR already stood filed before the learned trial Court. In view of the above stated facts present petition has become infructuous. However

petitioners will be at liberty to file fresh petition on the same cause of action as per exigencies of subsequent circumstances. Petition is disposed of. Pending applications are also disposed of.

****

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

Narinder Lal Negi .....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No. 9859 of 2013
Reserved on : 22.04.2015
Date of decision: 25.06.2015

Himachal Pradesh Nautor Land Rules, 1968- Rules 13 and 14- Petitioner was a government employee at the time of allotment of nautor land- land was granted to him for the construction of cow-shed - he had mentioned his annual income as Rs. 4,800/- from all sources- he had spent a sum of Rs. 80,000/- on the construction of the shops- he was not even resident of estate for which he had applied for the grant of nautor land- he had violated the Rule 7 as he had used the land for the purpose other than for which the land was sanctioned by constructing a shop- his income was Rs. 48,000/- but he had given his income as Rs. 4,800/- p.a. which was more than Rs. 2,000/- prescribed under the Rules- the object of nautor land rules was to help the persons who were landless or were in dire need of land for cultivation- petitioner cannot be called to be a landless or needy person- nautor land was allotted in 5,769 cases in the State- Financial Commissioner directed to call for the records in all the cases and to pass the order of resumption/cancellation if the allotment had been made contrary to the provision of Rules – a further direction issued to refund the amount with interest if the land has been acquired.

Cases referred:

Gopinder Singh *Vs.* The Forest Department of Himachal Pradesh & Ors., AIR 1991 SC 433
Percy Chauhan Vs. State and another, Indian Law Reports (Himachal Series) 1979 (Vol.-8) 35
S.C. Prashar and another Vs. Vasantsen Dwarkadas and others, AIR 1963 Supreme Court 1356
Mangheru Vs. State of Himachal Pradesh and others, ILR 1981 Vol.X 283
Kanshi Ram and another Vs. Lachhman and others (2001) 5 Supreme Court Cases 546
Gopinder Singh Vs. The Forest Department of Himachal Pradesh and others, AIR 1991 Supreme Court 433
Ibrahimpatnam Taluk Vyavasaya Collie Sangham Vs. K. Suresh Reddy and others (2003) 7 Supreme Court Cases 667
Saurabh Chaudri and others Vs. Union of India and others (2004)5 SCC 618
M.A. Murthy Vs. State of Karnataka and others (2003) 7 Supreme Court Cases 517

For the petitioner: Mr. T. S. Chauhan, Advocate.
For the respondents: Mr. M.A. Khan, Additional Advocate General, with Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Though the present petition is a private litigation, but it has been treated as a Public Interest Litigation, since a question of great public importance has been raised and also on the basis of the material placed on record by the State Government in sequel to various orders, passed by this Court, which shows total recklessness on the part of the statutory authorities under The Himachal Pradesh Nautor Land Rules, 1968 to allot Nautor land in contravention of the Rules.

2. Petitioner was granted Nautor land measuring 0-00-79 hectares, situated in Up Mohal Chirgaon, Tehsill Nichar, District Kinnaur vide order, dated 27th December, 1989. The Sub-Divisional Officer (Civil) reviewed the said order vide order, dated 5th March, 1993 and cancelled the order of Nautor land granted in favour of the petitioner. Petitioner filed an appeal before the Deputy Commissioner, Kinnaur against the order, dated 5th March, 1993. The appeal was dismissed vide order, dated 5th June, 1993. Petitioner filed the revision petition before the Financial Commissioner bearing Civil Revision No. 264 of 1994, which was partly accepted by the Financial Commissioner on 16.08.1996 and the case was remanded back to the Deputy Commissioner, Shimla. The Deputy Commissioner, Shimla dismissed the same on 24.02.1997. The petitioner filed the revision petition against the order, dated 24.02.1997 before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla bearing Revision Petition No. 58/97. The case was remanded back to the Sub-Divisional Officer (C), Nichar vide order, dated 05.11.2003. The Sub-Divisional Officer (C), conducted the spot investigation on 20.01.2004. He recommended the cancellation of the Nautor land granted in favour of the petitioner vide Annexure P-4. Thereafter, on the recommendations made by the SDO (C), the Nautor land granted in favour of the petitioner was cancelled by the Deputy Commissioner, Kinnur. Petitioner filed a revision petition before the Divisional Commissioner, Shimla, which was dismissed in default and an application for restoration of the same was also dismissed on 04.04.2011 vide Annexure P-5. Thereafter, the petitioner filed a revision petition against the order, dated 04.04.2011, before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla-2. The Financial Commissioner (Appeals), H.P. dismissed the revision petition on 27.08.2013 by upholding the order, dated 04.04.2011, passed by the Divisional Commissioner, Shimla.

3. The respondent-State has framed the Rules called "The Himachal Pradesh Nautor Land Rules, 1968". Rule-3 defines the expressions "Nautor Land", "Tenant", "Landowner", "Circle", "Resident" and "State Government". Rule-5 provides the purpose for which Nautor Land could be granted, which reads thus:

> *"5. Purpose for which nautor land may be granted:- Nautor land may be granted only for one or more of the following purposes, namely:-*
>
> *(a) Horticulture.*
>
> *(b) Agriculture, including raising of fodder, growing of vegetables, growing of any special grasses, herbs, shrubs and trees for domestic use or for cash income and dairy farming.*
>
> *(c) Construction of :-*
>
> *(i) Any building subservient to agriculture;*
>
> *(ii) thrashing floor;*
>
> *(iii) water mill; and*
>
> *(iv) water channel*

(d) construction of a building for resident.

(e) Consolidation of Holdings.

(f) For genuine public purposes like construction of Dharmsala, etc."

4. Rule-6 prescribes the maximum limit of grant of Nautor Land, which reads as under:

"6. The maximum limit of grant-Maximum limits to grant nautor land shall be as under:-

(i) For horticultural purposes.....20 bighas

(ii) (a) For Agriculture ....20 bighas

(b) For raising of fodder, growing of vegetables, growing of any special grasses, herbs, shrubs and trees for domestic use or for cash income and dairy farming.

(iii) for water mills ....2 bighas

(the land actually required for taking out a water channel for the water mill shall be sanctioned in addition as actually needed or, in alternative, only the right to take out the water channel through Government land shall be allowed if grant of nautor land be against public interest in any case).

(iv) For a thrashing floor .....2 biswas

(v) For a building subservient to agriculture or construction of a residential house. ....1 bigha.

Provided that if an applicant already holds some land under him, the grant of nautor land under sub-rule (i) and (ii) above shall be restricted only to the extent by which his total holding falls short of 20 bighas, except in the case of Pangi and Bharmaur areas of Chamba District, Panddrabis and Dodra Kwar areas of Shimla District and the whole of Lahaul and Spiti and Kinnaur Districts where dhanks and ghasnis, if any, comprised in his holding shall be excluded therefrom while calculating this limit of 20 bighas.

and(ii) severally or collectively. The grants for other purposes, can be obtained in addition thereto.

Provided further that a person who is granted nautor for a house site shall not become by virtue of this grant, right holder in the revenue estate in which such grant is made and it shall not entitle him to acquire nautor under these Rules.

Explanation:-In the case of a joint holding i.e. a holding held jointly by more persons than one, the respective proportionate share of each joint holder, as entered in the revenue records shall be taken to be holding, for the purposes of the limits within which nautor land may be granted, in respect of each joint holder."

5. Rule-7 lays down the eligibility for the grant of Nautor land, which reads as under:

"7. Eligibility for nautor land:-Save for the widow and the children of a member of an armed force or semi-armed force, who has laid down his life for the country (whose widow and children were eligible for grant anywhere within the Tehsil subject to the conditions

mentioned in the wajib-ul-Ari in respect of the areas where the land applied for is situated) no one who is not the resident in the estate in which the land applied for is situated, shall be eligible for the grant. Every resident of the estate in which the land appoied for lies will be eligible in the following orders of preference:-

(a) *Such persons who have less than ten bighas of land under self cultivation on 1.1.1974, whether as owners, or as tenants, or as lessees, either individually or collectively, or have an income of less than Rs.2000/- per annum from all sources including lands. Provided that in this category a dependent of one who has laid down his life for the defence of the country will get preference over his counterparts.*

(b) *Scheduled Castes and Scheduled Tribes applicants; and*

(c) *The deponents of those who have laid down their lives for the defence of the country Service, for the defence of the country will mean service in a uniformed force as well aqs in the capacity of civilian, so long as the death occurs on a front, be it military or civil.*

(d) *Services personnel in the armed forces and Ex-servicemen.*

(e) *Panchayats.*

(f) *Others.*

Provided that a bonafide landless resident of Spiti shall be eligible for the grant of land in Nautor within the Spiti Sub-Division."

6. Rule-12 prescribes for resumption of the Nautor land, which reads as under:

"12. *Resumption-The grant of nautor land shall be cancelled and the land granted resumed by the State Government without payment of any compensation in the following events:*

(a) *if, in the case of ordinary agriculture, the grantee fails to break the land granted to him within two years from the date of the patta.*

(b) *if, in the case of horticulture, the grantee fails to plant the area with fruit trees within two years from the date of the patta.*

(c) *If, in the case of a water mill and a water channel, the grantee fails to set up the water mill, or to dig out the water channel, as the case may be, within two years from the date of the patta.*

(d) *If, in the case of nautor for any other purpose the gurantee fails substantially to start utilization of the land for the purpose for which the nautor land has been granted to him within two years of the grant of the patta.*

(e) If the grantee, at any time, uses the land for any purpose other than the purpose for which the grant was made to him.

(f) If, the grantee or his legal representative successor alienates the land granted in nautor, within 15 years from the date of the patta, or if he alienates, it, at any time for a purpose other than the one for which the land was granted to him in the event of other kind of alienation the power to the State Government to cancel the grant and to resume the land shall govern the alience also; and

(g) <u>if, the grantee secures the sanction of nautor by suppression of material facts in his nautor application</u>

Provided that the periods laid down in (a), (b), (c) and (d) shall in each case, by counted after the removal of trees by the Forest Department/Deputy Commissioner whenever it becomes the responsibility of that Department, Deputy Commissioner to dispose of trees under these rules.

7. The manner in which an application has to be submitted for grant of Nautor land is provided under Rule-13, which reads thus:

"13. Application for Nautor Land-Application in form (c) appended to these rules, duly accompanied by three blank application forms shall be made to the Sub-Divisional Officer (Civil) of the Sub-Division in whose jurisdiction, the land applied for is situated. The original application shall bear a court fee stamp of Rs.2.50 and shall be accompanied by a Tatima Shajra (Supplementary Map) to be prepared by the Patwari on the spot showing the arda applied for. The Tatima Shajra should indicate the boundaries of the Land applied for, on all the sides, with specific reference to at least two permanent boundary marks or fixed marks near enough which should be easily identified on the spot and with the help of which the plot applied for could undoubtedly be located on the spot. Such a copy of the Tatima Shajra shall invariably be attached to the patta to be executed according to rules, the Tatima Shajra should also contain the following additional details to be given thereon by the Patwari:-

(h) The area and the field No. of the land applied for in the Nautor;

(i) the total area of the waste land and its Khasra No. out of which nautor has been applied for; and

(j) the number of standing trees, if any on the land applied for.

8. The application form (c) was required to be duly accompanied by three blank application forms to be made to the Sub-Divisional Officer (Civil) of the Sub-Division in whose jurisdiction the land applied for was situated. It was required to be accompanied by a Tatima Shajra (Supplementary Map) to be prepared by the Patwari on the spot showing the area applied for. The Tatima Shajra was required to indicate the boundaries of the land applied for on all sides with specific reference to at least two permanent boundary marks or fixed marks, which could be easily identified on the spot and with the help of which the plot applied for could undoubtedly be located on the spot. The Tatima Shajra was required to contain the additional details to be given thereon by the Patwari, i.e., the area and the field number of the land applied for in the Nautor, the total area of the waste land and its Khasra

number out of which nautor has been applied for and the number of standing trees, if any on the land applied for.

9. Rule-14 lays down the procedure in which the application submitted under Rule-13 was to be processed. Rule-16 provides that the Sub-Divisional Officer (Civil) of the Sub-Division shall be competent to grant nautor land up to the maximum limits prescribed in Rule-6 and such application was to be disposed of by him within a maximum period of three months from the date of the receipt thereof from the Tehsil Revenue Officer. Rule-18 lays down the procedure after sanction of nautor lands. According to sub-rule (2) of Rule-18, after the expiry of the period prescribed for filing an appeal/revision, the patta shall be issued under the seal and signature of the Collector of the District to whom it will be put up by the Tehsil Revenue Officer after due completion and after the execution of the Patta in Form 'D' for purposes other than Horticulture and in Form 'E' for Horticulture, the mutation memorandum in Form 'B' shall be completed in the office of the Sub-Divisional Officer (Civil) and issued under his signatures to the Revenue Officer of the area concerned for entry and attestation of mutation. Rule-18 made the grantee bound by the conditions of patta. Rule-25 authorizes the Deputy Commissioner to pass orders as he deems fit after giving an opportunity to the person affected to be heard. Rule-28 provides that an appeal from the order of the S.D.O. (C) under Rule-16 shall lie to the Deputy Commissioner within 60 days from the date of the order and a further appeal from the appellate order of the Deputy Commissioner shall lie to the Commissioner within 60 days from the date of the order and in case of original grant made by the Deputy Commissioner, an appeal from his order shall lie to the Commissioner within 60 days from the date of order and a second appeal to the Financial Commissioner within 90 days from the date of order and no second appeal could lie when the original order is confirmed on first appeal.

10. Rule-29 deals with review. It reads as under:

> *"29. Review-The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (c) may either of his own motion or on application of any party interested review, and modify, reverse or confirm any order passed by himself or any of his predecessors in office, provided as follows:-*
>
> *(a) When the Sub-Divisional Officer (C) thinks it necessary to review any order, he shall first obtain the sanction of the Deputy Commissioner;*
>
> *(b) when the Commissioner or the Deputy Commissioner think it necessary to review any order which he has not himself passed, he shall first obtain the sanction of the Financial Commissioner in the case of the Commissioner and the Commissioner in the case of the Deputy Commissioner;*
>
> *(c) the application for review of an order shall not be entertained unless it is made within 90 days from the passing of the order and unless the applicant satisfied the Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (Civil) as the case may be, that he had sufficient cause for not making the application within that period;*
>
> *(d) an order shall not modified or reversed in review unless reasonable notice has been given to the parties effected thereby to appear and be heard in support of the order;*
>
> *(e) an order against which an appeal has been preferred shall not be reviewed."*

11. Rules-30 lays down that the Financial Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him and the Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him and if in any case, in which the Commissioner has called for the record and if order made should be modified or reversed, he shall report the case with his opinion thereon for the orders of the Financial Commissioner. The Financial Commissioner may in any case called for by himself under Sub-rule (i) or reported to him under Sub-rule (iii), pass such order as he thinks fit. However, the authorities were required to hear the parties before reversing the order or modifying any proceedings or order of the Subordinate Revenue Officer.

12. In the instant case, the petitioner was Government employee at the time of allotment of Nautor land on 27.12.1989. He was granted land for the construction of a cow shed. Petitioner has mentioned his annual income as Rs.4800/- from all sources. He has spent a sum of Rs.80,000/- on the construction of the shops as per the orders passed by the Deputy Commissioner, Kinnaur on 05.06.1993. The Financial Commissioner (Appeals), Himachal Pradesh, Shimla vide order, dated 05.11.2003 has remanded the case back to the Sub-Divisional Officer (C) Nichar to inquire afresh into the matter and to submit a factual report to the District Collector, Kinnaur. The Sub-Divisional Officer (C) conducted the spot investigation on 20.01.2004. He recommended the cancellation of the Nautor land granted in favour of the petitioner vide Annexure P-4. Thereafter, on the recommendations made by the SDO (C), the Nautor land granted in favour of the petitioner was cancelled by the Deputy Commissioner, Kinnur. Petitioner filed a revision petition before the Divisional Commissioner, Shimla, which was dismissed in default and an application for restoration of the same was also dismissed on 04.04.2011 vide Annexure P-5. Thereafter, the petitioner filed a revision petition against the order, dated 04.04.2011, before the Financial Commissioner (Appeals), Himachal Pradesh, Shimla-2. The Financial Commissioner (Appeals), H.P. dismissed the revision petition on 27.08.2013 by upholding the order, dated 04.04.2011, passed by the Divisional Commissioner, Shimla. The Financial Commissioner has given the reasons the manner in which the petitioner had applied for the grant of Nautor land by suppressing the material facts qua his income. He was also not even resident of the estate for which he had applied for the grant of Nautor land. Petitioner was a resident of Mohal Chagaon, whereas he applied for nautor land for the construction of a cow shed in revenue estate Tapri. The petitioner has violated Rule-7 of the H.P. Nautor Rules, 1968. He has used the land for the purpose other than for which the land was sanctioned. He was sanctioned land, as noticed above, for the construction of cow shed, but he has constructed shops for commercial purpose. Petitioner could not apply for the grant of land since his income was more than Rs.2000/- per annum, rather his income was Rs.48,000/-, but he has given his income as Rs.4800/- per annum. His case was rejected by the Divisional Commissioner on 04.04.2011. He filed the revision only on 22.12.2011 without explaining the delay.

13. Case of the petitioner is that the income criteria would not apply to him since he belongs to Scheduled Tribes category and his case would be covered under Clause (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968. However, the fact of the matter is that the petitioner has suppressed the material facts at the time of submission of application for allotment of Nautor land. He has used the land for the purpose other than for which it was allotted by constructing shops for commercial use. He belongs to Mohal Chagaon, but he has applied for the land in revenue estate Tapri. The object of grant of Nautor land was to implement the policy of the Government to help certain persons who were either landless or in dire need of land for cultivation for their sustenance. Petitioner was Deputy Ranger employed in the Forest Department. His income was more than Rs.2000/- per annum. He

can not be held to be eligible even though he belongs to Scheduled Tribes category as per Sub-rule (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968. Moreover, he has also violated the conditions of Patta executed between him and the State. Petitioner cannot be termed either landless or needy person for the purpose of allotment of Nautor land. The criteria of holding less than 10 bighas of land under his cultivation read with income criteria would apply to Scheduled Castes and Scheduled Tribes as well. Since objective of the Scheme was to help the needy and landless persons, the persons with more than 10 bighas of land and having income more than Rs.2000/- per annum, cannot be presumed to be needy for whom Nautor land could be granted.

14. The Court has passed the following order on 27.12.2013:

> *"The issue which arises for consideration is as to whether a Government employee is entitled for allotment of land under the H.P. Nautor Land Rules, 1968. We direct respondent No. 4 to file response by his personal affidavit, disclosing the number of Government employees within the State, to whom the land stands allotted under the Rules. The response shall positively be filed within a period of three weeks and rejoinder within one week thereafter. List on 28.02.2014.*
>
> *2. In the meanwhile, we direct the parties to maintain status quo, qua nature and possession of the land, which is subject matter of the present writ petition."*

In sequel thereto, an affidavit, dated 19.02.2014, was filed by the Chief Secretary, Government of Himachal Pradesh. According to the averments made in the affidavit, Nautor land was sanctioned/granted to 5532 Government employees including employees of Central Government and Defence/Army/Para Military Forces.

15. The Court passed the following order on 28.02.2014:

> *"Affidavit dated 19.2.2014 perused. Chief Secretary, Government of Himachal Pradesh is directed to furnish list of all the Officers presently serving the State Government, to whom, land stands allotted in terms of Nautor Policy. Needful be positively done within a period of two weeks.*
>
> *List on 22.3.2014."*

In sequel to order, dated 28.02.2014, the Chief Secretary, Government of Himachal Pradesh filed the affidavit, dated 22nd March, 2014. According to the averments made in the affidavit, dated 22nd March, 2014, the Deputy Commissioner Lahaul & Spiti has reported 237 more allotment cases of Government employees. Hence, the figure 5532 mentioned in earlier affidavit, dated 19.02.2014 was requested to be read as 5769.

16. The Court passed the following order on 28.04.2014:

> *"Affidavit dated 22nd March, 2014 is not in respect of order dated 27.12.2013. Mr. Anup Rattan, learned Additional Advocate General submits that order shall positively be complied with and affidavit disclosing the list of recipients of land under the policy, shall be filed within four weeks.*
>
> List on 29th May, 2014."

In sequel thereto, the Chief Secretary, Government of Himachal Pradesh filed an affidavit, dated 21.06.2014.

17. The Court passed the following order on 31.07.2014:

> *"For the reasons explained by Mr. B.S. Parmar, learned Additional Advocate General, personal appearance of Chief Secretary, State of Himachal Pradesh is exempted. He shall not appear unless so directed by us. On the request of Sh. Parmar, matter is adjourned by two weeks. List on 21.8.2014."*

In sequel thereto, an affidavit was filed on 01.09.2014 and the information with regard to Deputy Commissioner, Lahaul & Spiti, Kinnaur and Chamba was given.

18. The Court passed the following order on 18.09.2014:

> *"The Himachal Pradesh Nautor Land Rules, 1968 came up for consideration before the Hon'ble Apex Court in Gopinder Singh Vs. The Forest Department of Himachal Pradesh & Ors., AIR 1991 SC 433. Respondent No. 4 is directed to file his personal affidavit, disclosing the names of all the applicants/Government officials, whether in service or retired, to whom nautor land stands allotted in violation of the directions issued in Gopinder Singh (supra). At this point in time, we refrain from passing any order qua the allottees, whose names stand disclosed in terms of affidavit dated 01.09.2014. Needful be positively done within a period of four weeks. List on 30.10.2014."*

Thereafter, affidavits, dated 25th November, 2014 and 6th January, 2015, were filed by the Chief Secretary, Government of Himachal Pradesh, whereby the details of Districts Una, Hamirpur, Kangra, Sirmaur and Bilaspur have been given. According to the details given vide Annexure R/4-1, no land was allotted in Districts Una, Hamirpur and Kangra under the provisions of Nautor Rules. 1968. The Deputy Commissioner, Sirmaur has informed that no land has been allotted in violation of the directions issued by the Hon'ble Apex Court vide judgment *in* **Gopinder Singh** *Vs.* **The Forest Department of Himachal Pradesh & Ors.**, AIR 1991 SC 433. In District Bilaspur, 425 Government employees have been allotted Nautor land. It is clear from the details given that the applicants, though Government employees, have been allotted Nautor land, but they have not mentioned their income in the respective case files in all the 425 cases. It was a serious lapse on the part of the authorities, who have sanctioned the Nautor land in favour of the Government employees, who have not given their details of income. Thus, the allotment of Nautor land was made in violation of Sub-rule (a) of Rule-7 The Himachal Pradesh Nautor Land Rules, 1968. Similarly, in District Lahaul and Spiti, 537 Government employees have been granted Nautor land under the H.P. Nautor Rules, 1968. It is submitted that in all 537 cases, the allotments were made under Clause (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968 as the whole Lahaul and Spiti District is tribal area. It is evident from the affidavit that the income of all the allottees in District Lahaul and Spiti was more than Rs.2000/- per annum.

19. Now, we will advert to District Chamba. In District Chamba, 656 Government employees have been granted nautor land under The Himachal Pradesh Nautor Land Rules, 1968. It is evident from the details given therein that the income of all the Government employees was more than Rs.2000/- per annum. Thus, they were not entitled to grant of Nautor land under The Himachal Pradesh Nautor Land Rules, 1968.

20. In District Mandi, 198 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. It is duly established from the details that the income of all the Government employees, who have been granted Nautor

land was more than Rs.2000/- per annum. The Government employees in most of the cases have not mentioned their income in the application forms. Thus, they were also not entitled to Nautor land under The Himachal Pradesh Nautor Land Rules, 1968.

21. In District Kinnaur, 534 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. Even in these cases, income of few of the Government employees who have been granted Nautor land was even more than Rs.2000/- per annum. What has to be seen, is the objective of the Scheme, which was to help the persons who were having less than 10 bighas of land and their income was less than Rs.2000/- per annum and were also Scheduled Castes and Scheduled Tribes. Cases of those Scheduled Castes and Scheduled Tribes persons can be considered for grant of Nautor land, who are landless and are in need of land for the purpose of cultivation, construction of their houses, cow shed, any building subservient to agriculture, thrashing floor, water mill, water channel, consolidation of Holdings and for public purposes like construction of Dharamshala etc. The affluent persons, who were Government employees and whose income was more than Rs.2000/- per annum and were already in possession of land, were not entitled to get the land under Sub-rule (b) of Rule-7 of The Himachal Pradesh Nautor Land Rules, 1968.

22. In District Shimla also, 848 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. They have shown their income more than Rs.2000/- per annum, but still they have been granted Nautor land in contravention of The Himachal Pradesh Nautor Land Rules, 1968.

23. In District Kullu, 44 Government employees have been granted Nautor land under The Himachal Pradesh Nautor Land Rules, 1968. There is a standard pattern whereby the income has been shown less than Rs.1900/- per annum. All the incumbents have made false declarations qua their income. Their income even at the time of allotment of Nautor land could not be less than Rs.2000/- per annum, even if their salary is assumed to be less than Rs.400/- per month.

24. State largess has been distributed without due application of mind to Government employees, who were not eligible for the grant of Nautor land and those who were landless, Scheduled Cast and Scheduled Tribes with meager income, have been left out.

25. In District Chamba, 13 Government employees have been granted Nautor land whose income was more than Rs.2000/- per annum, in violation of the directions issued by the Hon'ble Apex Court in **Gopinder Singh** *Vs.* **The Forest Department of Himachal Pradesh & Ors.**, AIR 1991 SC 433. In District Mandi, after the judgment rendered by the Hon'ble Apex Court on 17.08.1990, 180 Government employees have been granted Nautor land whose income was more than Rs.2000/- per annum. In District Shimla, 12 Government employees have been granted Nautor land, though their income was more than Rs.2000/- per annum, in violation of the judgment rendered by the Hon'ble Apex Court on 17.08.1990. In District Solan, two Government employees have been granted Nautor land, though their income was more than Rs.2000/- per annum, in violation of the judgment rendered by the Hon'ble Apex Court on 17.08.1990. The state has undertaken to issue notices to those 207 allottees as per the affidavit dated 8th April, 2015.

26. The details discussed hereinabove make a startling revelation the manner in which the land has been allotted to the Government employees, who were not entitled to the same under The Himachal Pradesh Nautor Land Rules, 1968. The Government land can be allotted only for the purposes of Horticulture, Agriculture, construction of any building

subservient to agriculture, thrashing color, water mill, water channel, construction of a building for resident, consolidation of holdings and for public purposes like construction of Dharamshala etc. The maximum limit has been prescribed under Rule-6. The grant of Nautor land could be cancelled as per Rule 12 on the grounds if the grantee secured the sanction of nautor land by suppression of material facts in his nautor application. According to Rule-7, a person could only submit his application for the grant of Nautor land in the Mohal where he permanently resides. In the instant case, all the Government employees have violated Rule-7(a) or (b) and they have suppressed the material facts at the time of submission of their applications under Rule-13. Under Rule-25, the Deputy Commissioner could resume the possession. Thereafter, the same is required to be taken back by the Tehsil Revenue Officer. Rule-29 deals with review. The Financial Commissioner or the Commissioner or the Deputy Commissioner or the Sub-Divisional Officer (C) may either of his own motion or on application of any party interested review, modify, reverse or confirm any order passed by himself or any of his predecessors-in-office on the conditions stipulated therein. We have already discussed the scope of Rule-30 which deals with the revision. The Financial Commissioner may at any time call for the record of any case pending before or disposed of by any officer subordinate to him, however, provided that before exercising this power, the parties concerned are to be heard inconformity with the principles of natural justice.

27. The Nautor Rules have all the ingredients of law. According to Form (c) prescribed under Rule-13 of The Himachal Pradesh Nautor Land Rules, 1968, the applicant has to disclose the income criteria accruing to the applicant from all sources. It has to be in the shape of an affidavit.

28. Mr. P.M. Negi, learned Deputy Advocate General submitted that the power of review and revision has to be exercised within a reasonable period. We are of the considered opinion that a revision would lie within three years from the date of detection of fraud. In the instant case, nobody knew about the large scale scam the manner in which the Nautor land has been granted to the Government employees in violation of The Himachal Pradesh Nautor Land Rules, 1968. It is only by way of the affidavits filed during the course of proceedings that the Court has noticed that the land has been obtained under The Himachal Pradesh Nautor Land Rules, 1968 by concealing the material facts qua income. Fraud vitiates every action. It is the duty of all the statutory functionaries to protect, preserve and safeguard the State property. It cannot be distributed in an indiscriminate manner. The order of grant of land can be reviewed or revised after grant of *patta* as laid down by this Court in **Percy Chauhan Vs. State and another,** Indian Law Reports (Himachal Series) 1979 (Vol.-8) 35.

29. Their Lordships of the Hon'ble Supreme Court in **S.C. Prashar and another** Vs. **Vasantsen Dwarkadas and others**, AIR 1963 Supreme Court 1356 have held that the words "any time" means that the action to be taken without any limit of time. Their Lordships have held as under:

> *"69. The next requirement of S. 4 of the Act of 1959 is that the notice must have been issued at any time before the commencement of that Act. The present notice which had been issued in 1954 had clearly been so issued. When the section uses the words "at any time", I suppose it means at any time; it does not thereby say that the notice must be issued at any time before the 1959 Act but after a certain other point of time. The other limit is not to be found in the section at all; all that it requires is that the notice must be issued before the 1959 Act.*

In the instant case, the expression "at any time" mentioned in The Himachal Pradesh Nautor Land Rules, 1968 has to be read taking into consideration the objectives of these Rules.

30. The Full Bench of this Court in **Mangheru** Vs. **State of Himachal Pradesh and others**, ILR 1981 Vol.X 283 has held that Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud and the Court was of the opinion that it would be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the *suo motu* powers can be exercised. Their Lordships have further held that arbitration clause cannot take away the *suo motu* powers of review and revision granted to various authorities. Their Lordships have held as under:

> *"20. Now, there is no dispute that the peculiar facts and circumstances of each case should determine 'a reasonable time'. For example, if a grantee has suppressed material facts or has obtained the allotment by playing a fraud or a deception 'the reasonable time' will have to be determined with reference to the time when the fraud or deception came to light. Various cases where a party had concealed material facts and succeeded in obtaining the allotment have come to our notice. We cannot all a party to reap the fruits of his deception or fraud simply on the ground that it had successfully kept them concealed over a sufficiently long period of time. However, once the fraud is uncovered, then action is required to be taken within a reasonable time thereafter. Article 56 of the Limitation Act lays down a limitation of three years from the date of the knowledge of fraud, and we are of the opinion that it will be reasonable to lay down that ordinarily within a period of three years from the date of knowledge of fraud the suo motu powers can be exercised.*
>
> *23. It will be noticed that only where the differences have arisen "in any way touching or concerning this grant……" the matter shall be referred to arbitration. If the differences are arising in respect of 'this grant' then the matter has to be referred to the arbitration. This intention is clear also from the use of the words: "save in so far as the decision of any such matter has been hereinbefore provided for……" Moreover, rule 19 unambiguously provides that the conditions of the patta are to be enforced subject to the provisions of the rules. Since rules 29 and 30 provide for sou motu review and revision, this power could not be taken away by the arbitration clause. It has to be remembered that in the scheme of things, the patta may be granted at a very early stage and the aggrieved persons may be filing the appeals etc. in terms of rule 28. An application for review can also be made under Clause © of rule 29. It cannot be held that the moment the patta is granted the rights of other persons to file appeals and applications for review are automatically taken away. Indeed they are not parties to the patta and they cannot be held bound by the arbitration clause. The arbitration clause cannot also take away the sou motu powers of review and revision granted to various authorities. We may at this stage also record that this arbitration clause has since been deleted by a gazette notification dated 21st September, 1974."*

31. Their Lordships of the Hon'ble Supreme Court in **Kanshi Ram and another** Vs. **Lachhman and others** (2001) 5 Supreme Court Cases 546 have held that the use of

expression “at any time” for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. Their Lordships have held as under:

> *“15. The object of the Act and the scheme underlying it as obtained from the provisions made therein is to grant relief to debtors and enable them to get back properties mortgaged by them with possession for a loan. The use of expression "at any time" for making an application or filing a suit is indicative of the legislative intent that the Act provides a fresh opportunity to the debtor for getting relief under the Act. The legislature has taken care to make the relevant provisions of the Act granting relief to debtors by giving overriding effect over any law, agreement, contract or decree contrary to the provisions of the Act. It was not disputed before us during hearing of the case that the plaintiffs filed the suit under provisions of the Act for restoration of the possession of the mortgaged property. Undisputedly there is no decree for foreclosure in favour of the creditor/mortgagee.*
>
> *16. In the backdrop of the above the question of limitation is to be considered. The reason given by the High Court in support of the finding that the suit was barred by limitation is that more than 30 years had elapsed since the date of the mortgage (February, 1946) when the suit was filed in 1981. Therefore the mortgagor had lost his right to redeem the property mortgaged. The provisions in Section 27 of the Limitation Act have been considered in support of the finding. This reasoning appears to us to be fallacious. It defeats the object and the purpose of the statute enacted by the legislature specially to give relief to debtors in the State. The first appellate Court had given cogent reasons in support of its finding in favour of the appellants. The Court held and in our view, rightly that the suit was one for recovery of possession from the mortgagee who was in unauthorised possession of the mortgaged property after the mortgage loan was satisfied. The cause of action for filing such a suit under the Act arose when the enactment was enforced in 1979. Viewed from that angle the suit was filed in time and the trial Court and the first appellate Court rightly recorded the findings to that effect. The High Court erred in reversing the concurrent finding of the Courts below on the erroneous assumption that the suit was one for redemption of the mortgage simpliciter. It is relevant to note here that the present suit is not one filed under Section 60 or 62 of the Transfer of Property Act. It is a suit filed for relief on the basis of the Himachal Pradesh Debt Reduction Act, 1976.”*

32. Their Lordships of the Hon’ble Supreme Court in **Gopinder Singh** Vs. **The Forest Department of Himachal Pradesh and others**, AIR 1991 Supreme Court 433 have held as under:

> *“6. We have carefully examined the provisions of clause (a) of R. 7 reproduced above. The clause reads "such persons who have less than 10 bighas of land .... or have an income of less than 2,000 per annum from all sources including lands". There is thus inherent evidence in the clause itself to show that the two parts cannot be read disjuntively.*

> *The second part makes it clear that an income of less than Rs. 2,000/- per annum should be from all sources including lands. It is thus obvious that a person who has got less than 10 bighas of land but has an income of more than Rs. 2,000/- from the said land is not eligible for allotment of nautor land under clause (a). Even otherwise if we interpret the clause the way learned couasel for the appellant wants us to do it would produce absurd result. A person having two bighas of land but otherwise earning Rs. 20,000/- per annum would be eligible for allotment of nautor land if we accept the appellant's interpretation. The object of granting nautor land under the rules is to help poor and unprovided for residents of Himachal Pradesh. Considering the nature, scope and the clear intention of the framers of the Rules it is necessary to read the word "or" in between the first and the second part of clause (a) as "and". The appellant's income was admittedly more than Rs. 2,000 / per annum and as such his claim for nautor land was rightly rejected.*

33. Mr. P.M. Negi, learned Deputy Advocate General submitted that since the judgment in ***Gopinder Singh's*** case (supra) was delivered by the Hon'ble Supreme Court on 17.08.1990, therefore, the Nautor land allotted to the Government employees before this date may not be disturbed. In other words, his submission is that the judgment rendered in ***Gopinder Singh's*** case would apply prospectively. Their Lordships of the Hon'ble Supreme Court in ***Gopinder Singh's*** case (supra) have categorically laid down that the two parts, i.e., such persons who have less than 10 bighas of land or have an income of less than Rs.2000/- per annum from all sources including lands, cannot be read disjunctively. The second part makes it clear that an income of less than Rs.2000/- per annum should be from all sources including lands. It is thus obvious that a person who has got less than 10 bighas of land but has an income of more than Rs.2000/- from the said land was not eligible for allotment of nautor land under Clause (a). The object of granting nautor land under the rules is to help poor and unprovided for residents of Himachal Pradesh. We are also of the considered view that the scope and clear intention of framing of the Rules is required to be looked into while interpreting all the clauses of The Himachal Pradesh Nautor Land Rules, 1968. The judgment would also cover the previous cases where land has been illegally granted to those employees whose income was more than Rs.2000/- per annum from all the sources, even if their land holding was less than 10 bighas.

Thus, there is no merit in the contention of Mr. P.M. Negi, learned Deputy Advocate General that the cases before and after 17.08.1990 be treated differently.

34. Their Lordships of the Hon'ble Supreme Court in **Ibrahimpatnam Taluk Vyavasaya Collie Sangham** Vs. **K. Suresh Reddy and others** (2003) 7 Supreme Court Cases 667 have laid down that expression 'at any time" for exercising of the power by the Collector under revision in case of fraud can be exercised within a reasonable time from the date of detection of the fraud. Their Lordships have held as under:

> *"12. The learned Single Judge has referred to and relied on various decisions including the decisions of this Court as to how the use of the words "at any time" in sub-section (4) of Section 50-B of the Act should be understood. In the impugned order the Division Bench of the High Court approves and affirms the decision of the learned Single Judge. Where a statute provides any suo motu power of revision without prescribing any period of limitation, the power must be*

exercised within a reasonable time and what is "reasonable time" has to be determined on the facts of each case.

13. In the light of what is stated above, we are of the view that the Division Bench of the High Court was right in affirming the view of the learned Single Judge of the High Court that the suo motu power under sub-section (4) of Section 50-B of the Act is to be exercised within a reasonable time.

35. Their Lordships of the Hon'ble Supreme Court in **Saurabh Chaudri and others** Vs. **Union of India and others** (2004)5 Supreme Court Cases 618 have held that by reason of a judgment, a law is declared. Declaration of such law may affect the rights of the parties retrospectively. Prospective application of a judgment by the Court must, therefore, be expressly stated. Their Lordships have held as under:

"20. By reason of a judgment, as is well known, a law is declared. Declaration of such law may affect the rights of the parties retrospectively. Prospective application of a judgment by the Court must, therefore, be expressly stated. The order dated 1.5.2003 furthermore is a pointer to the fact that this Court refused to interfere at that stage having regard to the fact that the admission of the students had already taken place. Despite the same, such admissions were made subject to the result of the writ petition. The parties, therefore, could not have any doubt as regards the fact that the judgment will be implemented in relation to the students who were to take admission in 2004 and onwards. The students appearing at the All-India Entrance Examination held by AIIMS or by the State Government or the universities, presumably were aware of the said fact."

In the instant case, it cannot be gathered from the judgment in ***Gopinder Singh's*** case (supra) that it was to apply prospectively. Thus, it would also cover the cases of those persons who have been allotted land before the date of judgment, i.e., 17.08.1990.

36. Their Lordships of the Hon'ble Supreme Court in **M.A. Murthy** Vs. **State of Karnataka and others** (2003) 7 Supreme Court Cases 517 have held that normally, the decision of the Supreme Court enunciating a principle of law is applicable to all cases irrespective of stage of pendency thereof because it is assumed that what is enunciated by the Supreme Court. There is, in fact, the law from inception. Their Lordships have held as under:

"8. Learned counsel for the appellant submitted that the approach of the High Court is erroneous as the law declared by this Court is presumed to be the law at all times. Normally, the decision of this Court enunciating a principle of law is applicable to all cases irrespective its stage of pendency because it is assumed that what is enunciated by the Supreme Court is, in fact, the law from inception. The doctrine of prospective overruling which is a feature of American jurisprudence is an exception to the normal principle of law, was imported and applied for the first time in L.C. Golak Nath and others v. State of Punjab and another, (AIR 1967 SC 1643). In Managing Director, ECIL, Hyderabad and others v. B. Karunakar and others, (1993 (4) SC 727) the view was adopted. Prospective overruling is a part of the principles of constitutional canon of interpretation and can be resorted to by this Court while superseding law declared by it

earlier. It is a device innovated to avoid reopening of settled issues, to prevent multiplicity of proceedings, and to avoid uncertainty and avoidable litigation. In other words, actions taken contrary to the law declared prior to the date of declaration are validated in larger public interest. The law as declared applies to future cases. (See Ashok Kumar Gupta v. State of U. P., (1997) 5 SCC 201, Baburam v. C. C. Jacob, (1999) 3 SCC 362). It is for this Court to indicate as to whether the decision in question will operate prospectively. In other words, there shall be no prospective overruling, unless it is so indicated in the particular decision. It is not open to be held that the decision in a particular case will be prospective in its application by application of the doctrine of prospective overruling. The doctrine of binding precedent helps in promoting certainty and consistency in judicial decisions and enables an organic development of the law besides providing assurance to the individual as to the consequences of transactions forming part of the daily affairs. That being the position, the High Court was in error by holding that the judgment which operated on the date of selection was operative and not the review judgment in Ashok Kumar Sharma's case No. II. All the moreso when the subsequent judgment is by way of Review of the first judgment in which case there are no judgments at all and the subsequent judgment rendered on review petitions is the one and only judgment rendered, effectively and for all purposes, the earlier decision having been erased by countenancing the review applications. The impugned judgments of the High Court are, therefore, set aside.

37. Accordingly, the writ petition is dismissed, however, in larger public interest, the following mandatory directions are issued to the State Government:

1. The Financial Commissioner (Appeals) is directed to call for the records of 5769 cases in which the Government employees have been granted Nauator land under The Himachal Pradesh Nautor Land Rules, 1968, whose income was more than Rs.2000/- per annum at the time of submission of application(s). It is made clear by way of abundant precaution that the records of all the cases shall be called whether the land has been allotted under The Himachal Pradesh Nautor Land Rules, 1968 before or after 17.08.1990.
2. The Financial Commissioner (Appeals) shall decide all the revisions within a period of one year from today after hearing the parties and shall pass detailed/speaking orders in all the cases in which grant of Nautor land was found to be in violation of The Himachal Pradesh Nautor Land Rules, 1968. Thereafter, the possession shall be resumed within a period of eight weeks after resumption/ cancellation of the grant of Nautor land to allottees.
3. If the Financial Commissioner comes to the conclusion that the Nautor land has been granted for horticulture, agriculture, construction of any building subservient to agriculture, thrashing floor, water mill, water channel, construction of a building for residence, consolidation of

holdings and for public purposes like construction of Dharamsala etc. in violation of The Himachal Pradesh Nautor Land Rules, 1968, the same shall vest in the State of Himachal Pradesh free from all encumbrances and these persons shall not be entitled to any compensation.

4. Since the Financial Commissioner (Appeals) has to deal with 5769 cases, the respondent-State is directed to appoint/post, two more Financial Commissioner (Appeals) to hear the revisions, within a period of six weeks from today.

5. It is made clear that in all the cases where the land has been allotted/granted to the Government employees in breach of The Himachal Pradesh Nautor Land Rules, 1968 and the same has been acquired under the Land Acquisition Act, in those cases also, the amount received by the allottees/grantees shall be refunded to the State Government with interest @9% per annum.

38. The miscellaneous application(s), if any, also stand(s), disposed of.

****

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

Smt. Satya Devi widow of late Shri Udho Ram ....Appellant/Defendant

Versus

Hari Chand son of Udho Ram ...Respondent/Plaintiff.

RSA No. 162 of 2013
Order reserved on 22nd May 2015
Date of Judgment 25th June 2015

H.P. Land Revenue Act, 1954- Section 134- A person can apply for delivery of possession within three years from the date of preparation of instrument of partition – if the possession is not delivered within three years, aggrieved person can seek possession on the basis of title before the Civil Court. (Para-12)

Specific Relief Act, 1963- Section 5- Plaintiff filed a Civil suit for recovery of possession pleading that plaintiff and defendant were co-sharers of the suit land- plaintiff applied for partition and the possession was delivered to him- defendant occupied the suit land forcibly- defendant pleaded that he was never dispossessed from the suit land- a wrong report was made in the rapat roznamcha- held, that joint status of co-owner is extinguished after preparation of instrument of partition- allottee becomes exclusive owner of the allotted land- defendant had not pleaded adverse possession- plaintiff is entitled to the relief of possession on the basis of his title. (Para-11)

Cases referred:

Darbara Singh and another vs. Gurdial Singh and another, 1994 (1) S.L.J. 433 (Punjab and Haryana)

Mohinder Singh (died) through his LRs. and others vs. Kashmir Singh and another, 1985 SLJ 94

For the Appellant: Mr. Ajay Sharma, Advocate.

For the Respondent: Mr. K.D. Sood Sr. Advocate with Mr.Mukul Sood, Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Present regular second appeal is filed against the judgment and decree dated 30.10.2012 passed by learned District Judge Hamirpur in Civil Appeal No. 12 of 2010 titled Satya Devi vs. Hari Chand.

2. Brief facts of the case as pleaded are that Hari Chand plaintiff filed suit for possession in respect of the immovable land comprised in Khata No. 83 min, Khatauni No. 89 Khasra No. 283/1 measuring 0-09-23 hectares and Khasra No. 754/1 measuring 0-01-90 hectares situated in Tikka Samoh Tappa Bani Tehsil Barsar District Hamirpur (H.P.) It is pleaded that previously plaintiff and defendant were co-shares of suit land and plaintiff applied for partition of land before A.C. 1st Grade Barsar and after hearing both parties learned A.C. 1st Grade Barsar ordered for partition of suit land. It is pleaded that land was partitioned on dated 9.5.2005 and plaintiff was allotted Khasra No. 283/1 measuring 0-09-23 hectares and Khasra No. 754/1 measuring 0-01-90 hectares. It is pleaded that after partition of land plaintiff applied for warrant of possession and thereafter warrant of possession was issued. It is further pleaded that after delivery of possession of partitioned land to the plaintiff on dated 23.5.2007 defendant again occupied the land of plaintiff in the third week of June 2007 forcibly and thereafter plaintiff requested the defendant to hand over the peaceful possession of suit land but defendant has refused. Prayer for decree of suit as mentioned in relief clause of plaint sought.

3. Per contra written statement filed on behalf of defendant pleaded therein that suit of the plaintiff is not maintainable and plaintiff is estopped from filing the present suit by his act and conduct and further pleaded that suit is bad for non-joinder of necessary parties. It is pleaded that no warrant of possession was delivered at the spot and suit land is joint between the parties. It is pleaded that defendant is entitled to special costs under Section 35-A CPC. It is pleaded that rapat No. 438 was drawn by revenue authorities in connivance with the plaintiff. It is pleaded that defendant was not dispossessed from Khasra No. 238 and 754 and plaintiff was not in possession of suit land. It is denied that defendant had occupied the suit land in third week of June 2007. It is pleaded that plaintiff has no cause of action and locus standi to file the present suit. Prayer for dismissal of suit sought.

4. Plaintiffs also filed replication and re-asserted the allegations mentioned in plaint. As per the pleadings of parties learned trial Court framed following issues on dated 3.12.2007:-

1. Whether plaintiff is entitled for a decree of possession as prayed for? OPP
2. Whether suit of the plaintiff is not legally maintainable in the present form? OPD
3. Whether plaintiff is estopped from filing the present suit by his act and conduct? .....OPD
4. Whether suit of the plaintiff is bad for non-joinder or mis-joinder of necessary parties? ……OPD
5. Whether no warrant of possession has been delivered and suit land is in defendant's possession? ……OPD
6. Whether the defendant is entitled to special costs under Section 35-A CPC? ……OPD

7. Relief.

5. Following oral witnesses examined:-

Sr.No.	Name of witness
PW1	Hari Chand
PW2	Vinay Kumar
PW3	Prakash Chand
PW4	Madan Lal
PW5	Jai Chand
PW6	Prakash Chand
PW7	Jai Chand
PW8	Seeta Devi
PW9	Hari Ram
DW1	Satya Devi
DW2	Tirath Ram
DW3	Vijay Kumar

6. Following documentary evidence produced:-

Exhibit	Description
Ext.P1	Copy of Jamabandi
Ext.PW2/A	Rapat
Ext.PW3/A	Application for possession of land on basis of partition proceedings.
Ext.PW4/A	Copy of mutation on basis of partition proceedings.
Ext.PW5/A	Warrant of possession on basis of partition proceedings.
Ext.PW6/A	Application for demarcation.
Ext.PW6/B	Demarcation report
Ext.PW6/C &Ext.PW6/D	Statements of parties during demarcation proceedings.

7. Learned trial Court decided issue No. 1 in favour of plaintiff and decided issues Nos. 2 to 6 against the defendant. Learned trial Court passed the decree of possession in favour of the plaintiff and against the defendant directing the defendant to hand over possession of suit land to the plaintiff.

8. Feeling aggrieved against the judgment and decree passed by learned trial Court appellant Smt. Satya Devi filed Civil Appeal No. 12 of 2010 titled Satya Devi vs. Hari Chand before learned District Judge Hamirpur. Learned first Appellate Court affirmed the judgment and decree passed by learned trial Court and dismissed the appeal filed by appellant Satya Devi.

9. Feeling aggrieved against the judgment and decree passed by learned first Appellate Court Satya devi filed RSA No. 162 of 2013. On dated 31.7.2014 Hon'ble High Court admitted the appeal and framed following substantial questions of law:-

1. Whether both 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 judgment and decree?

2. Whether both learned Courts below misread and mis-appreciated the provisions of H.P. Land Revenue Act and Rules with respect to delivery of property after partition, thereby vitiating the impugned judgments and decrees?
3. Whether learned Courts below misread and mis-appreciated the statements of PW1 to PW9 and Ext.PW1/A to Ext.PW6/D more particularly documents Ext.PW2/A and Ext.PW4/A thereby vitiating the impugned judgments and decrees?

Court heard learned Advocate appearing on behalf of parties and also perused the entire record carefully.

10. Oral evidence adduced by the parties:-

10.1 PW1 Hari Chand has filed affidavit Ext.PW1/A in his examination in chief. There is recital in affidavit that defendant had forcibly occupied the suit land without any title. There is further recital in affidavit that partition application was filed and thereafter A.C. 1st Grade had delivered the possession to the plaintiff in partition proceedings. There is further recital in affidavit that defendant forcibly took possession of suit land in the month of June. There is further recital in affidavit that possession be delivered to the plaintiff. In cross examination PW1 stated that possession was given on dated 23.5.2007. PW1 stated that spot was visited by Patwari Halqua, Tehsildar and Chowkidar. PW1 has denied suggestion that Satya Devi is in possession of suit land since her ancestors.

10.2 PW2 Vinay Kumar Patwari has stated that he is Patwari since 1½-2 years. He has brought the original record of rapat No. 438 Ext.PW2/A which is correct as per original record. He has stated that he was present at the spot when possession was delivered to plaintiff.

10.3 PW3 Parkash Chand Reader to Tehsildar Barsar has stated that he has brought the original file. He has stated that he had seen application titled Hari Chand vs. Satya Devi relating to delivery of possession. He has stated that copy Ext.PW3/A is correct as per original record. He has stated that he is Reader to Tehsildar since 2004 and further stated that partition appeal was filed and after dismissal of partition appeal possession was delivered to plaintiff.

10.4 PW4 Madan Lal Assistant Kanungo has stated that he is posted as Assistant Kanungo in the office of Tehsildar. He has stated that he has brought the original record of mutation No. 104. He has stated that copy Ext.PW4/A is correct as per original record. He has denied suggestion that he has deposed falsely in Court.

10.5 PW5 Jai Chand Tehsildar has stated that he is posted as Tehsildar Barsar since 16.3.2006 and application for possession Ext.PW3/A was produced before him. He has stated that he had issued order of delivery of possession Ext.PW5/A. He has stated that mutation Ext.PW4/A was attested by him. He has stated that possession of four khasra numbers was given i.e. 283/1, 735/1, 754/1 and 756/2. He has stated that he had verified delivery of possession of four khasra numbers at the time of attestation of mutation. He has denied suggestion that he has attested the mutation in collusion with the plaintiff.

10.6 PW6 Parkash Chand Reader to Tehsildar Barsar has stated that he has brought the summoned record. He has stated that he had seen application for demarcation

Ext.PW6/A. He has stated that demarcation report is Ext.PW6/B and statements are Ext.PW6/C and Ext.PW6/D.

10.7 PW7 Jai Chand has stated that he is retired as Tehsildar on dated 31.7.2008 and further stated that he perused original file. He has stated that application for demarcation was received by him and he submitted the demarcation report Ext.PW6/B. He has stated that he also recorded statements Ext.PW6/C and Ext.PW6/D. He has stated that he has personally conducted the demarcation on dated 8.6.2008. He has stated that he located three points prior to demarcation. He has stated that tatima (Field book) was already prepared as per partition papers. He has denied suggestion that he did not demarcate the land as per instructions of Financial Commissioner.

10.8 PW8 Seeta Devi has stated that she was present when demarcation was conducted. She has stated that her statement was also recorded in demarcation proceedings. She has stated that her statement is Ext.PW6/D. She has stated that before partition Smt. Satya Devi was in possession of suit property and Smt. Satya had cultivated the wheat crop. She has denied suggestion that she was not present at the time of demarcation. She has stated that even after partition Smt. Satya Devi is in cultivating possession of suit land.

10.9 PW9 Hari Ram has tendered affidavit in his examination in chief. There is recital in affidavit that deponent has seen the suit property. There is recital in affidavit that suit land was joint inter se the plaintiff and defendant. There is further recital in affidavit that thereafter partition proceedings took place. There is recital in affidavit that warrant of possession was issued in partition proceedings. There is recital in affidavit that defendant forcibly possessed the suit property and plaintiff requested the defendant to deliver the possession but defendant refused to deliver the possession. There is further recital in affidavit that demarcation was conducted on dated 8.6.2008 by Tehsildar in presence of deponent. PW9 has stated that before partition defendant was in possession of suit land and defendant had cultivated the wheat crop over the suit property. He has denied suggestion that no possession of suit property was delivered to plaintiff by revenue department.

10.10 DW1 Satya Devi has filed her affidavit in examination-in-chief. There is recital in affidavit that no possession of suit land was delivered to plaintiff. There is further recital in affidavit that defendant is in settled possession of suit land since her ancestors. There is also recital in affidavit that deponent was not dispossessed from suit land. There is recital in affidavit that suit land is still joint inter se the parties. There is further recital in affidavit that no possession was delivered on dated 23.5.2007. There is recital in affidavit that present suit filed by the plaintiff just to harass the deponent. Defendant has admitted in cross examination that earlier the suit land was joint inter se the parties and thereafter plaintiff Hari Chand filed partition proceedings before the revenue officer. She has denied suggestion that partition was effected by revenue officials. She has denied suggestion that Khasra Nos. 283/1 and 754/1 were allotted to the plaintiff in partition proceedings. She has denied suggestion that appeal was filed qua partition proceedings. She has denied suggestion that partition appeal was dismissed by the Collector. She has denied suggestion that possession was delivered to the plaintiff in partition proceedings. She has denied suggestion that she forcibly took possession of suit property.

10.11 DW2 Tirath Ram has filed affidavit in examination in chief. There is recital in affidavit that deponent is familiar with parties. There is recital in affidavit that Satya Devi is in possession of suit property since her ancestors. There is further recital in affidavit that no warrant of possession was executed on dated 23.5.2007. There is further recital in affidavit that defendant Satya Devi had inherited the suit property from her husband. There is also

recital in affidavit that defendant did not possess the suit land forcibly in third week of June 2007. There is also recital in affidavit that false suit was filed by plaintiff. DW2 has stated in cross examination that he does not know whether defendant Satya Devi had filed appeal before Collector qua partition proceedings. He has stated that he does not know that appeal filed by Satya Devi was dismissed by Collector. He has denied suggestion that defendant had forcibly occupied the suit property without any title.

10.12 DW3 Vijay Kumar has tendered affidavit in examination in chief. There is recital in affidavit that parties are known to deponent. There is further recital in affidavit that Satya Devi is in possession of suit property since the time of her ancestors. There is recital in affidavit that no possession was delivered on dated 23.5.2007 in partition proceedings. There is recital in affidavit that plaintiff filed the present suit just to harass the defendant. In cross examination DW3 has denied suggestion that Hari Chand plaintiff is owner of suit property. DW3 has admitted that suit property was joint inter se the parties. DW3 has stated that demarcation did not take place in his presence. DW3 has denied suggestion that Satya Devi had forcibly occupied the suit land. DW3 has admitted that plaintiff had filed criminal complaint in police and police had visited spot. DW3 has admitted that there is civil litigation between him and plaintiff relating to path and flow of water.

Findings on Point No. 1 of Substantial question of law

11. Submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned first Appellate Court have not properly appreciated the provisions of law applicable in present case and further submission of learned Advocate that learned trial Court and learned first Appellate Court have not properly appreciated pleadings of parties and oral as well as documentary evidence adduced by parties is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that suit land was joint inter se the parties. It is also proved on record that thereafter partition proceedings were filed by Hari Chand plaintiff before A.C. 1st Grade Barsar. It is also proved on record that thereafter final partition was effected inter se the parties by A.C. 1st Grade Barsar. It is also proved on record that thereafter appeal was filed before the Collector Sub Division Barsar and same was dismissed on dated 28.9.2006. As per Chapter IX and Section 123 of H.P. Land Revenue Act 1953 a joint co-owner can file an application for partition relating to immovable land. As per Section 133 of H.P. Land Revenue Act 1953 instrument of partition is prepared. It was held in case reported in ***1994 (1) S.L.J. 433 (Punjab and Haryana) titled Darbara Singh and another vs. Gurdial Singh and another*** that after preparation of instrument of partition joint status of co-owner is extinguished. It is proved on record that suit land was allotted to plaintiff in partition proceedings. It is also proved on record that partition proceedings have attained the stage of finality. It is well settled law that after completion of partition proceedings and after preparation of instrument of partition allottee becomes exclusive owner of allotted land. It is proved on record that Khasra Nos. 283/1 and 754/1 were allotted to plaintiff in partition proceedings. It is held that title of appellant in suit property was extinguished after the completion of partition proceedings and after preparation of instrument of partition. It is further held that plaintiff acquired title in suit property after completion of partition proceedings and after preparation of instrument of partition. It is well settled law that as per Section 65 of Limitation Act 1963 suit for possession of immovable property on the basis of title could be filed within twelve years when possession of defendant becomes adverse to the plaintiff. In present case defendant did not plead right of adverse possession over the suit property. It is well settled law that there is no period of limitation for possession when suit is filed on the basis of title unless the right of plaintiff is defeated by way of right of adverse possession. ***(See 1985 SLJ 94 titled Mohinder Singh (died) through his LRs. and others vs. Kashmir Singh and another).*** In present case plaintiff has sought the relief of possession on the basis of title

and it is held that plaintiff is legally entitled for possession of suit land on the basis of title. It is held that after completion of partition proceedings and after preparation of instrument of partition title of appellant is extinguished automatically from suit property. Point No.1 of substantial question of law is decided against appellant.

Findings upon point No. 2 of substantial question of law

12. Submission of learned Advocate appearing on behalf of the appellant that both learned trial Court and learned first Appellate Court have misread and mis-appreciated the provisions of H.P. Land Revenue Act and Rules with respect to delivery of possession of property after partition is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that as per rapat No. 438 placed on record as Ext.PW2/A possession of Khasra No. 735/1 was delivered and possession of Khasra No. 283/1 and 754/1 was not delivered. It is held that as per Section 134 of H.P. Land Revenue Act a person can apply for delivery of possession within three years from the date of preparation of instrument of partition. It is held that if possession is not delivered within three years by revenue Court qua partition land then aggrieved person can file a suit for possession on the basis of title before Civil Court. It is held that learned trial Court and learned Appellate Court have rightly granted decree of possession in favour of plaintiff on the basis of title. Point No. 2 of substantial question of law is decided against the appellant.

Findings upon Point No. 3 of substantial question of law

13. Another submission of learned Advocate appearing on behalf of the appellant that learned trial Court and learned first Appellate Court have misread and mis-appreciated the statements of PW1 to PW9 and have also not properly appreciated documents Ext.PW1/A to Ext.PW6/D is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimonies of PW1 to PW9. It is proved on record that partition application was filed before A.C.1st Grade Barsar by plaintiff and it is also proved on record that thereafter partition proceedings were completed. It is also proved on record that thereafter appeal was filed relating to partition proceedings before the Collector and same was dismissed and thereafter instrument of partition was prepared. It is held that after preparation of instrument of partition in partition proceedings status of joint ownership extinguishes and allottee becomes exclusive owner of immovable property allotted in partition proceedings. It is proved on record that suit land was allotted to plaintiff in partition proceedings and defendant did not adduce any positive cogent and reliable evidence in order to prove that suit land was allotted to her in partition proceedings. On contrary it is proved on record that suit land was allotted to plaintiff in partition proceedings which has attained the stage of finality. It is held that title was accrued in favour of plaintiff qua suit land after partition proceedings and it is further held that plaintiff is entitled for relief of possession on the basis of title. Appellant did not plead right of adverse possession over the suit property. It is held that plaintiff is legally entitled for relief of possession on the basis of title. Title of plaintiff over suit land remained un-rebutted on record. It is held that after completion of partition proceedings and after preparation of instrument of partition by revenue officer possession of defendant/appellant over suit land is illegal and plaintiff is legally entitled for relief of possession from Civil Court on the basis of title over suit property. It is held that status of appellant over suit property as co-owner is extinguished after completion of partition proceedings and after preparation of instrument of partition over suit property.

14. In view of above stated facts appeal filed by appellant is dismissed. Judgment and decree passed by learned trial Court and learned first Appellate Court are affirmed. Parties are left to bear their own costs. Files of learned trial Court and learned first Appellate Court along with certified copy of this judgment and decree sheet be sent back

forthwith. The Registrar (Judicial) will prepare the decree sheet as required under Section 100 of Code of Civil Procedure 1908. Appeal stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

SPS Steels Rolling Mills Ltd. ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

CWP No. 2783 of 2015-I
Reserved on: 18.06.2015
Decided on: 25.06.2015

Constitution of India, 1950- Article 226- **Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002** (SARFAESI Act) – Section 13(4)- Petitioner filed a Writ Petition against an action taken against it in terms of Section 13(4) of SARFAESI Act- petitioner has a remedy of appeal under Section 17 of the Act- held that when an alternative remedy is available, writ petition is not maintainable. (Para- 4 to 11)

Cases referred:

United Bank of India versus Satyawati Tondon and others, (2010) 8 SCC 110

Union Bank of India and another versus Panchanan Subudhi, (2010) 15 SCC 552

Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors., 2010 AIR SCW 4751

Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others, (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, (2013) 9 SCC 620

J. Rajiv Subramaniyan and another versus Pandiyas and others, (2014) 5 SCC 651

Keshavlal Khemchand and sons Private Limited and others versus Union of India and others, (2015) 4 Supreme Court Cases 770

Union of India and others versus Major General Shri Kant Sharma and another, 2015 AIR SCW 2497

Sadashiv Prasad Singh versus Harender Singh and others, (2015) 5 SCC 574

KSL and Industries Limited versus Arihant Threads Limited and others, (2015) 1 SCC 166

For the petitioner: Mr. Naresh K. Sood, Senior Advocate, with Mr.Ajay Vaidya, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondents No. 1 and 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

The writ petitioner, on the grounds taken in the memo of the writ petition, has sought the following reliefs amongst others:

> *"a) Issue a Writ of and in the nature of certiorari calling upon the concerned respondent and each of them to*

forthwith certify and transmit to this Hon'ble Court all records of the case culminating in the order dated 07.02.2015 passed by the Respondent No. 2 so that upon consideration thereof, the same may be quashed and conscionable justice be rendered to the Petitioners;

b) Issue a Writ of and in the nature of certiorari declaring that the notices dated 18.06.2014, 02.09.2014 (Ann. P-10), 03.12.2014 (Ann. P-11), 06.12.2014 (Ann. P-12) and 05.05.2015 (Ann. P-17) (including all actions taken pursuant thereto) issued by the Respondent No. 3 are void ab initio and non-est in law and consequently quash the same,

c) Issue a Writ of and in the nature of a mandamus directing the Respondent No. 3 to forthwith restore physical possession of the Plot No. 1, Phase No. II, Industrial Area Gwalthai, District Bilaspur, Himachal Pradesh back to the Petitioners along with all fixtures, fittings, plant and machinery,

d) Direct the Respondents not to take any coercive measures against the properties of the Petitioners including inter alia the properties which are the subject matter of the notices dated 03.12.2014 (Ann. P-11), 06.12.2014 (Ann. P-12) and 05.05.2015 (Ann. P-17) issued."

2. The writ petition came up for admission before this Court on 28.05.2015. Learned counsel for the writ petitioner was asked to justify the maintainability of the writ petition.

3. Mr. Ajay Vaidya, learned counsel for the writ petitioner, stated at the Bar that during the pendency of the writ petition, reliefs (a), (b) and (c) sought by the writ petitioner have become infructuous and the writ petition survives only so far it relates to relief (d). His statement is taken on record.

4. The question is - whether the writ petition is maintainable and whether this Court has jurisdiction to pass appropriate orders while keeping in view relief (d) sought by the writ petitioner?

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, whcih 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 Recvoery Officer made under this Act may, within thirty days*

from the date on whcih 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.

12. However, learned counsel for the writ petitioner submitted that reference is pending before respondent No. 3, mention of which has been made in para 5 (iv) and (xix) of the writ petition, but the authority was not functioning for the reason that Chairman was not selected/appointed. Further stated that now the Chairman has taken over and respondent No. 3 be directed to determine the said reference/application within time frame and till then, some interim direction be granted to the writ petitioner in view of relief (d).

13. In the given circumstances, we deem it proper to direct respondent No. 3 to decide the reference/application within four weeks. The writ petitioner is at liberty to apply for interim relief before the said authority.

14. The writ petition is disposed of accordingly alongwith all pending applications.

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

D.S.R. No. 4001 of 2013 a/w
Cr. Appeal No. 186 of 2014
Reserved on: 24.06.2015
Date of decision: 25.06. 2015

D.S.R. No. 4001 of 2013

State of Himachal Pradesh .....Appellant

Vs.

Om Parkash @ Pappu .....Accused.

Cr. Appeal No. 186 of 2014

Om Parkash alias Pappu ....Appellant.

Vs.

State of Himachal Pradesh. ....Respondent.

Indian Penal Code, 1860- Section 302- Accused resided with his wife, mother and sister-in-law in a temporary shed- PW-16, father-in-law of the accused, was asked by PW-7 to call mother of the accused to milk the cattle- temporary shed occupied by the accused was

bolted from inside and his daughter refused to open the same -on the second day same reply was received – matter was reported to police and the door was got opened- dead bodies of the parents of the accused were found- accused made a disclosure statement and got darat and scissor recovered- there was contradiction regarding the person who had asked the father-in-law of the accused to leave- further, he had not informed his employer that the door was found locked from the inside – it is difficult to believe that accused, his children, his wife and sister-in-law would have remained inside the room for 48 hours after the commission of crime and would not have run away from the scene of crime- in normal course, the occupants of the house would have come out of the room and would have raised hue and cry- wife of the accused who was present in the room was also not examined- clothes of the accused were recovered but no blood stains were found - blood stains were bound to be on the clothes if the accused had committed the crime- there was contradiction as to who had informed the police- the motive for killing the parents was not established- held, that these circumstances made prosecution case doubtful- accused acquitted.

(Para-20 to 23)

D.S.R. No. 4001 of 2013

For the appellant-State: Mr. M.A. Khan, Additional Advocate General.

For the respondent/convict: Mr. V.S. Rathore, Advocate.

Cr. Appeal No. 186 of 2014

For the appellant : Mr. V.S. Rathore, Advocate.

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

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

Since both the Death Sentence Reference No. 4001 of 2013 and Criminal Appeal No. 186 of 2014 have arisen out of the common judgment and order, dated 10.09.2013/18.09.2013, the same were taken up together for hearing and are being disposed of by this common judgment.

2. Criminal Appeal No. 186 of 2014 is instituted against the judgment and order, dated 10.09.2013/18.09.2013, rendered by the learned Sessions Judge (Forests), Shimla, H.P., whereby the appellant-accused, who was charged with and tried for an offence punishable under Section 302 of the Indian Penal Code, was convicted and awarded death sentence and a fine of Rs.5000/-. He was ordered to be hanged by neck till he was dead. The sentence was deferred until and unless confirmed by this Court. Learned Sessions Judge (Forests) submitted a Reference Petition to this Court for confirmation of death sentence bearing Death Sentence Reference No. 4001 of 2013.

3. Case of the prosecution, in a nut-shell, is that PW-7, Sh. Daulat Ram Chauhan was owner in possession of an orchard at village Chalnehar. He has constructed two sheds in his orchard, one of which was occupied by the accused and the other was occupied by his father-in-law PW-16 Man Bahadur. The accused was putting up in his temporary shed alongwith his wife, mother and sister-in-law. PW-16 Man Bahadur was employed by PW-7 Daulat Ram Chauhan to look after his orchard and mother and father of the accused used to take care of the cattle of PW-7 and also to milk the cow. On 17.01.2012, PW-16 Man Bahadur was asked by PW-7 to call Parvati, mother of the accused to milk the cattle. However, the temporary shed occupied by the accused was bolted from inside and his daughter refused to open the same. On the second day, again the same reply was received from inside the temporary shed. Thereafter, PW-7 directed PW-16 to inform the police. The police was informed. PW-17 Sub-Inspector Rattan Chand alongwith police party reached on

the spot. Thereafter, the door was opened by the police in the presence of villagers and witnesses. The Investigating Officer recorded the statement Ex. PW-12/A of Mohan Chauhan, Pradhan of village under Section 154 Cr. P.C., on the basis of which FIR Ex. PW1/A was registered. The photographs were clicked on the spot and the spot map Ex. PW-17/A was prepared by the Investigating Officer. The inquest papers were prepared and the investigating officer took into possession griddle (Tawa) Ex. P-3, frame of window Ex. P-5, brief case Ex. P-6, blood stained soil Ex. P-8 from the spot. The accused was interrogated and arrested. Statements of the witnesses were recorded. Post mortem of the dead bodies of Man Bahadur and Parvati, father and mother of the accused respectively were got conducted. Post mortem reports Ex. PW-11/B and Ex. PW-11/C were obtained. On 20.01.2012, accused made a disclosure statement Ex. PW8/A in police custody and led the police party to the spot for recovery of Drat Ex. P-1 and Scissors Ex. P-4. These were taken into possession vide memo Ex. PW-15/C. The challan was put up after completing all the codal formalities in the Court.

4. The prosecution has examined number of witnesses to support its case. The accused was also examined under Section 313 of the Cr. P.C. Accused denied the case of the prosecution. The accused was convicted and sentenced, as noticed hereinabove. Hence, this appeal.

5. Mr. V.S. Rathore, learned counsel for the appellant has vehemently argued that the prosecution has failed to prove the case against the appellant/accused.

6. Mr. M.A. Khan, learned Additional Advocate General has supported the judgment and order, dated 10.09.2013/18.09.2013. He vehemently argued that the prosecution has proved the case against the accused beyond reasonable doubt. He then argued that the death penalty awarded to the accused be confirmed.

7. We have heard the learned counsel for the parties and gone through the judgment and records, carefully.

8. PW-1, Sita Ram deposed that he recorded the FIR Ex. PW-1/A. On 18.01.2012, Suresh deposited with him three packets alongwith specimen impression of seal. He made entries in the malkhana register. On 20.1.2012, two packets sealed with seal 'A' alongwith impression of seal were also deposited. The entries were made in the malkhana register. On 21.01.2012, Suresh Kumar deposited with him eight packets sealed with seal 'AK' alongwith specimen impression of seal. He made entries in the malkhana register vide Ex. PW-1/C. These packets alongwith specimen seal impression were sent to CFL on 23.01.2012. PW-2, Suresh Kumar deposed that on 23.01.2012, he deposited three packets sealed with 'N', two packets with 'NK' and eight packets with 'KKI' alongwith sample seal at FSL vide Ex. PW1/D.

9. PW-3, Constable Pradeep Kumar did videography and photography of the dead body at the place of occurrence. He took photographs Ex. A-1 to Ex. A-6. From the videography, CD was prepared vide Ex. PW-3/A.

10. PW-4, Constable Dimple deposed that on 18.01.2012 at 1:10 p.m., Pardhan, Gram Panchayat, Bagdomer telephonically informed that a Nepali was residing in the orchard of Daulat Ram and someone had killed him. He entered the information in the computer vide Ex. PW4/A. PW-5, Kuldeep Singh Thakur deposed that on 10.04.2011 at the instance of the police, he prepared site plan of the place of incident vide Ex. PW5/A. PW-6 is a formal witness.

11. PW-7, Daulat Ram Chauhan deposed that Man Bahadur, his wife Parwati, their son Om Parkash and his wife and children used to work in his land. Sometimes, sister-in-law of the accused also used to come there. All of them were residing in the Dhara (temporary shed) on his land. Parwati used to come to his house for milking his cow. On 16.01.2012, Parwati had come to his house for milking the cow in the morning, but during evening time, she had not come. On the next day, one another Man Bahadur, father of Dropti had come to him and he asked him to call Parwati. When he came back, the he told him that the door of the Dhara of Parwati was closed from inside and some voice of girl was coming. He asked Man Bahadur to report the matter to the police in case Parwati did not open the door. On 18.01.2012, police came there and he had also been called by the police to the spot. The door was opened by the police in his presence and after opening the door, Man Bahadur and Parwati were found inside dead in naked condition. There were injuries on the left side of Man Bahadur in his head and arm and his private part was found to be mutilated. When Deviyani and Dropti were asked about it, they had told them that Man Bahadur and Parwati had been killed by accused Om Prakash with drat and scissor used for pruning apples. In his cross-examination, he could not say that Devyani was in the house of accused from 16.01.2012 to 18.01.2012. However, he volunteered that when the door was opened on 18.01.2012, she was found inside *Dhara* of the accused. He also admitted that in the morning of 17.01.2012, father of Dropti, namely Man Bahadur did not report back to him. He had come only in the morning of 18.01.2012. Man Bahadur had not told him as to whose voice he had heard from inside the house. He had instructed Man Bahadur to report the matter to the police. He had never seen the accused and his family members quarrelling with each other in the *Dhara.* He had not gone inside the room, but he had seen the scene from the door.

12. PW-8, Vikas Nanda deposed that the accused while in police custody had given the statement in his presence to the police about his having hidden the drat with handle and the scissors for pruning of the apples in the room of his house and that he could get the same recovered. His statement is Ex. PW8/A.

13. PW-9, Jai Pal Chauhan has proved the copy of Jamabandi Ex. PW-9/C. PW-10, Arvind Sharma deposed that on 25.01.2012, the Police Constable Pradeep Kumar had given him his camera and photographs of digital camera for preparing CD and developing the photographs, on which he had prepared the CD Ex. PW3/A.

14. PW-11, Dr. Manika Sharma has conducted the post mortem on the dead body of Man Bahadur and Smt. Parwati Devi. According to her, the cause of death of Man Bahadur was multiple ante mortem injuries leading to hemorrhage which lead to cardio respiratory arrest leading to death. The probable duration between injuries and death was less then six hours and between death and post mortem was more than 24 hours. The cause of death of Smt. Parwati Devi was multiple ante mortem injuries leading to hemorrhage which lead to cardio respiratory arrest leading to death. The probable duration between injury and death was less then six hours and between death and post mortem was more than 12 to 24 hours. According to her, injury Nos. 1 and 2 caused on the person of deceased Man Bahadur could be caused with drat Ex. P1 and injury No. 4 caused on the person of deceased Man Bahadur could be caused by iron rod Ex. P2. The remaining injuries on the person of Man Bahadur could be caused with Tawa Ex. P3. Injury No. 1 on the person of Parwati Devi could be caused with scissor Ex. P4 and the other injuries No. 2 to 5 on her person could be caused by drat Ex.P1, rod Ex. P2, Tawa Ex. P3 and scissor Ex. P4.

15. PW-12, Mohan Chauhan, deposed that Sh. Daulat Ram was resident of his Panchayat. He had employed the parents of the accused in his house for agricultural land and orchard work. The accused, his wife, his two children and sister-in-law were also

residing with the parents of the accused in the same *Dhara*. On 18.01.2012, he came to know that the *Dhara* of parents of the accused was closed from inside and the parents-in-laws of the accused told about it to him, on which, he had telephonically informed the police. When police reached the spot, then he, Ward Member Naresh Kumar and Daulat Ram had also joined the police. Police got the *Dhara* opened in their presence. From one room, accused, his wife, his children and sister-in-law were taken out and when the kitchen was opened, in that room the parents of the accused were found dead in naked condition. There were injuries on their body parts. His statement was recorded under Section 154 Cr. P.C. vide Ex. PW12/A. In his presence, the police had interrogated Devyani and Dropti, the wife and sister-in-law of the accused, who told them that on the night of 16.01.2012, the accused had asked them and his parents to line up inside the room in naked condition and then he had picked up their clothes and had burn them in Chulla (hearth). They also told the police in their presence that they were threatened by the accused when they had tried to intervene. The accused had taken out the electric bulb and then in the darkness, he started beating them. He had given beatings to the deceased with Tawa and drat blows. He had also used the scissor for beating his mother. They had also told the police in their presence that the accused had kept them inside for two days and he had threatened them to be killed in case of their making noise. The police recovered drat Ex. P1 and scissor Ex. P4, Tawa Ex. P3 and frame of the window Ex. P5.

16. PW-13, Deviyani is the most material witness. According to her, accused was her brother-in-law. She was residing with his family. The accused, his parents and other family members were residing in the *Dhara* (temporary shed) of Daulat Ram, in whose orchard they had been working. Her brother-in-law, the accused was away to Rohru in connection with his work and he had come back to Chalnehar on 13.01.2012. On the night of 16.01.2012, the accused did not allow anyone to go out of the house/*Dhara.* At about 11/12 mid-night, the accused asked them and his parents to undress. After undressing them all in the kitchen, the accused had burnt their clothes in the *Chulla (hearth).* The accused asked her and her sister Dropti Devi to stand on the side and then he started beating his father with iron Tawa. The accused directed his wife to take out the electric bulb. Thereafter, in the darkness, the accused killed his father with drat and his mother with scissors. Due to fear, they kept on standing there because the accused had threatened them to keep quite. She identified drat Ex. P1, Tawa Ex. P3 and scissors Ex. P4. During whole night, they remained in the kitchen and in the morning, they were allowed to go to the other room. On 17.01.2012 also, they remained in that room. On 17.01.2012, during day time, her father had come there. He called them from outside, but the accused asked him to go from inside. Her father again came on 18.01.2012 during morning hours and called from outside, on which the accused again told him to go away. During day time, her father came again with owner of the *Dhara*, police and other villagers including Pradhan and asked the accused to open the door, but he did not open the door. Thereafter, the police officials pushed the door and the door was opened. The police officials had seen the dead bodies inside the room. In her cross-examination, she has admitted that behaviour of the accused with them was nice.

17. PW-14, Sub-Inspector Gauri Dutt Sharma is formal witness. PW-15, Dalip Chauhan deposed that he was called to the Police Station on 20.01.2012. In his presence and in the presence of Vikas Nanda, the accused made a disclosure statement vide Ex. PW8/A that he could recover a drat and scissor, which he had concealed in the side of a room below a sack. The accused led the police party to a room situated in the apple orchard of one Daulat Ram Chauhan. He took out a blood stained drat from the corner of the room concealed under a sack and produced before the police. Thereafter, he took out a blood stained scissors.

18. PW-16 Man Bahadur deposed that he had two daughters, namely Dropti and Devyani and three sons. He married his daughter Dropti with the accused. Accused had two children from his daughter. Accused was also residing in the orchard of Daulat Ram Chauhan at Chalnehar. Accused was residing there with his parents and family members. His younger daughter Devyani also used to reside with them. During winter season, when there was snow fall, he had gone to the house of Daulat Ram to take *Lassi*. Daulat Ram directed him to call Parwati, mother of the accused to milk the cow. He went to the temporary shed of accused and called from outside. His daughter Dropti told him to leave since door was closed. Thereafter, he left for his *Dhara* (temporary shed) at Bagga. On the next day, he again went to the house of Daulat Ram Chauhan at 10:00 a.m. and told him that when he had gone to call Parawati, the door was closed from inside. Thereafter, Daulat Ram directed him to report the matter to the police. When he was about to leave to call the police, President of Gram Panchayat, Mohan Chauhan came to the spot alongwith police and other residents of the village. The police and Pradhan directed to open the door. Thereafter, he noticed that dead bodies of mother and father of accused were lying in pool of blood in naked condition in the temporary shed of accused. He inquired about the incident from his daughters Dropti and Devyani. They disclosed that accused gave beatings to Parwati and Man Bahadur with griddle (Tawa). They also disclosed that accused made all the persons naked and thereafter their cloths were set ablaze and electric bulbs were also put into fire. Thereafter, accused gave beatings to Parwati and Man Bahadur with griddle. In his cross-examination, he deposed that he had not noticed anything outside the door of the temporary shed of accused. On 17.01.2012, he had not made any effort to open the door of *Dhara*. He had also not inquired about the reasons from his daughter for not opening the door.

19. PW-17, Sub-Inspector, Rattan Chand, investigated the matter. On 18.01.2012, Pradhan, Gram Panchayat Chelnehar Mohan Chauhan telephonically informed the police that somebody had killed Man Bahadur and Parwati Devi, regarding which rapat Ex. PW-4/A was entered in the computer. On reaching the spot, he recorded the statement of Mohan Chauhan, under Section 154 Cr. P.C. vide Ex. PW12/A, on the basis of which, FIR Ex. PW-1/A was registered against the accused. He clicked the photographs Ex. A-1 to A-6. Inquest papers were prepared. He took into possession the griddle (Tava) Ex. P3, frame of window Ex. P5, brief case Ex. P6 vide memo Ex. PW12/B. He also took into possession the blood stained soil Ex. P8 vide memo Ex. PW12/C. These were duly sealed. The post mortem on the bodies of the deceased was got conducted. Drat Ex. P1 and scissor Ex. P4 were also taken into possession. He also got prepared the site plan Ex. PW5/A from the Junior Engineer. In his cross-examination, he has admitted that he had not seized the clothes of accused from the spot, however, volunteered that clothes were not blood stained.

20. Case of the prosecution, precisely is that the accused alongwith his family members was residing in a Dhara of PW-7, Sh. Daulat Ram Chauhan. On 17.01.2012, PW-7, Sh. Daulat Ram Chauhan asked PW-16, Man Bahadur to call Parwati. He went to the *Dhara* of accused. It was bolted from inside. PW-7, Daulat Ram again asked him to call Parwati on 18.1.2012, but he found the door of the *Dhara* closed. Thereafter, PW-7, Sh. Daulat Ram Chauhan asked him to report the matter to the police. Police reached the spot and recovered the bodies. PW-16, Sh. Man Bahadur has testified that his younger daughter Devyani also used to reside with the family of the accused. On 17.01.2012, during winter season when there was snow fall, he had gone to the house of Daulat Ram to take *Lassi*. Daulat Ram directed him to call Parwati, mother of the accused to milk the cow. He went to the temporary shed of accused and called from outside. His daughter Dropti told him to leave since door was closed. Thereafter, he left for his temporary shed at Bagga. On the next day, he again went to the house of Daulat Ram Chauhan at 10:00 a.m. and told him that

when he had gone to call Parwati, the door was closed from inside. He again went to the Dhara (temporary shed) on 18.01.2012. He found it locked. Thereafter, Daulat Ram directed him to report the matter to the police. PW-13, Smt. Devyani deposed that the accused asked her and her sister Dropti Devi to stand on the side and then he started beating his father with iron Tawa. Accused directed his wife to take out the electric bulb. Thereafter, in the darkness, the accused killed his father with drat and his mother with the scissor. Due to fear, they kept on standing there because the accused had threatened them not to speak anything. During whole night, they remained in the kitchen and in the morning, they were allowed to go to the other room. On 17.01.2012 also, they remained in that room. On 17.01.2012 during day time, her father had come there. He called them from outside, but the accused asked him to go from inside. Her father again came on 18.01.2012 during morning hours and he called from outside, on which the accused again told him to go away. PW-16, Sh. Man Bahadur in his examination-in chief deposed that when he went to the temporary shed of accused and called from outside, his daughter Dropti told him to leave since door was closed. But, PW-13, Smt. Devyani deposed that it was the accused who told from inside the room to Man Bahadur to leave. PW-7, Sh. Daulat Ram, in his cross-examination, has admitted that in the morning of 17.01.2012, the father of Dropti, namely, Man Bahadur had not contacted him and had come only on the morning of 18.01.2012. Man Bahadur had not told him as to whose voice he had heard from inside the house. The conduct of PW-16, Sh. Man Bahadur is unusual. He had gone to the house of accused in the morning of f 17.01.2012. He was told by his daughter to leave the house. He had gone to the house of accused at the instance of PW-7, Sh. Daulat Ram Chauhan. He did not inform Sh. Daulat Ram Chauhan on 17.01.2012 that the door was found locked from inside. PW-7, Sh. Daulat Ram again told him on 18.01.2012 to call Parwati. He went to the Dhara, but the door was found locked. It should have aroused his suspicion why the door was not opened in the morning of 17.01.2012 and in the morning of 18.01.2012. It is also intriguing to note that why the accused with his children, his wife and sister-in-law PW-13, Smt. Devyani would have remained in the room after the commission of the crime for about 48 hours. The endeavour of the accused would have been to run away from the scene of crime instead of locking himself inside the room for two days. The prosecution has not examined the wife of accused, who was also present in the house when the incident took place. In normal circumstances, all the occupants of the room would have come out of the room and raised hue and cry.

21. PW-16, Sh. Man Bahadur has admitted in his cross-examination that on 17.01.2012, he had not made any effort to open the door of Dhara. He had also not inquired about the reasons from his daughter for not opening the door. On 18.01.2012, he had also not made any effort to open the door. He had not made any complaint to Pradhan and police. It was an unusual behaviour on behalf of PW-16, Sh. Man Bahadur of not making efforts to open the door on the morning of 17.01.0212 and also on the morning of 18.01.2012 and not ascertaining the reason from his daughter why the door was not being opened. This casts serious doubt upon the prosecution version about the commission of the crime. The cause of death of deceased Man Bahadur was multiple ante mortem injuries leading to hemorrhage leading to cardio respiratory arrest leading to death. The probable duration between injuries and death was less then six hours and between death and post mortem was more than 24 hours and the cause of death of deceased Parwati Devi was multiple ante mortem injuries leading to hemorrhage leading to cardio respiratory arrest, leading to death. The probable duration between injury and death was less than six hours and between death and post mortem was more than 12 to 24 hours. PW-17, Sub Inspector Rattan Chand has not even recovered the cloths of the accused. The blood stains were bound to be on the cloths of the accused the manner in which according to the prosecution the murder has taken place.

22. Mr. M.A. Khan, learned Additional Advocate General has argued that on the basis of the disclosure statement made by the accused, the police has recovered the Tawa, Scissor and Drat. The recoveries must connect the accused with the commission of offence. According to Mr. M.A. Khan, learned Additional Advocate General, PW-13, Smt. Devyani was an eye witness of the incident. However, the statements of PW-13, Smt. Devyani and PW-16, Sh. Man Bahadur do not inspire confidence. It is also not clear, who has informed the police. PW-12, Sh. Mohan Chauhan in his cross-examination testified that the father-in-law of the accused Sh. Man Bahadur had come to him at about 1:00 p.m. to give the information. However, PW-16, Sh. Man Bahadur deposed that Daulat Ram had directed him to report the matter to the police and when he was about to leave to call the police, President of Gram Panchayat, Mohan Chauhan came to the spot alongwith police and other residents of village. This is major contradiction in the statement of PW-12, Sh. Mohan Chauhan and PW-16, Sh. Man Bahadur. Now, as per the version of PW-12, Sh. Mohan Chauhan, PW-16 Sh. Man Bahadur told him to give information to the police, but PW-16, as noticed above, has stated that when he was about to leave to contact the police, PW-12 alongwith the police had already reached the spot.

23. Mr. V.S. Rathore, learned counsel for the appellant has vehemently argued that no motive has been attributed to the accused. However, Mr. M.A. Khan, learned Additional Advocate General submitted that the accused was annoyed with his father for keeping a bad eye on his sister-in-law. If that was so, he would have killed only his father and not his mother. It has come in the statement of PW-13, Smt. Devyani that the accused was nice to them. The sister-in-law, Smt. Devyani, though according to the prosecution version was living with the accused, she was supposed to live with her father PW-16, Sh. Man Bahadur and not in the house of the accused. Thus, the prosecution has failed to prove the case against the accused beyond reasonable doubt.

24. Accordingly, in view of the observations and discussion made hereinabove, the Criminal Appeal No. 186 of 2014 is allowed. The judgment and order, dated 10.09.2013/18.09.2013, are set aside. The accused is acquitted of the charge framed against him. He be released forthwith, if not required in any other case. The Registry is directed to prepare the release warrant and send the same to the concerned Superintendent of Jail. Since the appeal of the appellant/accused has been allowed, the Death Sentence Reference No. 4001 of 2013 has become infructuous. Order accordingly.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE DHARAM CHAND CHAUDHARY, J.

Union of India & others ....Petitioners
Versus
Paras Ram ....Respondent

Review Petition No. 65 of 2015
Date of decision: 25.06.2015

Code of Civil Procedure, 1908- Order XLVII- Review petitioners claimed that the original petitioner was not sponsored by the employment exchange nor was he entitled to the grant of temporary status- he was not entitled to regularization and was a casual worker- the grounds taken in the Review Petition show that petitioners have filed an appeal and not a Review Petition – there was no error on the face of the record- petition dismissed.

(Para-2 to 4)

For the petitioner : Mr. Ashok Sharma, Assistant Solicitor General of India.
For the respondents: Mr. Onkar Jairath, Advocate.

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 04.07.2014, made by this Court in CWP No. 962 of 2008, titled Sh. Paras Ram Sharma versus Union of India and others, on the grounds taken in the memo of the review petition.

2. The petitioners have specifically averred in the review petition that the writ petitioner was neither sponsored by the employment exchange nor was entitled to grant of temporary status. He was not entitled to regularization. He was a casual worker. The mistake has crept-in, which is apparent on the face of the record.

3. Order XLVII of the Code of Civil Procedure, 1908, mandates how the power of review can be exercised. This Court in the judgment rendered in **Review Petition No. 56 of 2014,** titled as **Ranjeet Khanna versus Chiragu Deen and another,** decided on 8th August, 2014, has discussed how the power of review has to be exercised. It is apt to reproduce paras 9 to 14 of the aforesaid judgment herein:

> "9. It is beaten law of the land that the power of review has to be exercised sparingly and as per the mandate of Section 114 read with Order 47 Rule 1 CPC. A reference may be made to Section 114 CPC and Order 47 Rule 1 CPC hereunder:
>
> **"114. Review. -** Subject as aforesaid, any person considering himself aggrieved,—
>
> (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed by this Court, or
>
> (c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may make such order thereon as it thinks fit."
>
> "ORDER XLVII
>
> **REVIEW**
>
> **1. Application for review of judgment. – (1**) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,
>
> (b) by a decree or order from which no appeal is allowed,
>
> Or
>
> (c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made

against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree on order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Explanation—The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. I, as a Judge of the Jammu and Kashmir High Court, while sitting in Division Bench, authored a judgment in case titled **Muzamil Afzal Reshi vs. State of J&K & Ors., Review (LPA) No.16/2009, decided on 29.3.2013,** in which it was laid down that power of review is to be exercised in limited circumstances and, that too, as per the mandate of Section 114 read with Order 47 CPC. It was further held that the review petition can be entertained 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.

11. The Division Bench of this Court has also laid down the similar principle in **Review Petition No.4084 of 2013**, **titled M/s Harvel Agua India Private Limited vs. State of H.P. & Ors., decided on 9th July, 2014**, and observed that for review of a judgment, error must be apparent on the face of the record; not which has to be explored and that it should not amount to rehearing of the case. It is apt to reproduce paragraph 11 of the judgment herein:

> **"11.** The error contemplated under the rule is that the same should not require any long-drawn process of reasoning. The wrong decision can be subject to appeal to a higher form but a review is not permissible on the ground that court proceeded on wrong proposition of law. It is not permissible for erroneous decision to be "re-heard and corrected." There is clear distinction between an erroneous decision and an error apparent on the face of the record. While the former can be corrected only by a higher form, the latter can be corrected by exercise of review jurisdiction. A review of judgment is not maintainable if the only ground for review is that point is not dealt in correct perspective so long the point has been dealt with and answered. A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. A mere repetition of old and overruled arguments cannot create a ground for review. The present stage is not a virgin ground but review of an earlier order, which has the normal feature of finality."

12. The Apex Court in case **Inderchand Jain (deceased by L.Rs.) vs. Motilal (deceased by L.Rs.), 2009 AIR SCW 5364,** has observed that the Court, in a review petition, does not sit in appeal over its own order and rehearing of the matter is impermissible in law. It is apt to reproduce paragraph 10 of the said decision hereunder:

"10. It is beyond any doubt or dispute that the review court does not sit in appeal over its own order. A re-hearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order. Review is not appeal in disguise. In Lily Thomas v. Union of India [AIR 2000 SC 1650], this Court held:

"56. It follows, therefore, that the power of review can be exercised for correction of a mistake and not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated an appeal in disguise."

13. The Apex Court in case **Haryana State Industrial Development Corporation Ltd. vs. Mawasi & Ors. Etc. Etc., 2012 AIR SCW 4222,** has discussed the law, on the subject in hand, right from beginning till the pronouncement of the judgment and laid down the principles how the power of review can be exercised. It is apt to reproduce paragraphs 9 to 18 of the said judgment hereunder:

"9. At this stage it will be apposite to observe that the power of review is a creature of the statute and no Court or quasijudicial body or administrative authority can review its judgment or order or decision unless it is legally empowered to do so. Article 137 empowers this Court to review its judgments subject to the provisions of any law made by Parliament or any rules made under Article 145 of the Constitution. The Rules framed by this Court under that Article lay down that in civil cases, review lies on any of the grounds specified in Order 47 Rule 1 of the Code of Civil Procedure, 1908 which reads as under:

"Order 47, Rule 1:

1. Application for review of judgment.-

(1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case of which he applies for the review.

Explanation- The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the

subsequent decision of a superior Court in any other case, shall not be a ground for the review of such judgment."

10. The aforesaid provisions have been interpreted in several cases. We shall notice some of them. In S. Nagaraj v. State of Karnataka 1993 Supp (4) SCC 595, this Court referred to the judgments in Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai AIR 1941 FC 1 and Rajunder Narain Rae v. Bijai Govind Singh (1836) 1 Moo PC 117 and observed:

"Review literally and even judicially means reexamination or re-consideration. Basic philosophy inherent in it is the universal acceptance of human fallibility. Yet in the realm of law the courts and even the statutes lean strongly in favour of finality of decision legally and properly made. Exceptions both statutorily and judicially have been carved out to correct accidental mistakes or miscarriage of justice. Even when there was no statutory provision and no rules were framed by the highest court indicating the circumstances in which it could rectify its order the courts culled out such power to avoid abuse of process or miscarriage of justice. In Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai the Court observed that even though no rules had been framed permitting the highest Court to review its order yet it was available on the limited and narrow ground developed by the Privy Council and the House of Lords. The Court approved the principle laid down by the Privy Council in Rajunder Narain Rae v. Bijai Govind Singh that an order made by the Court was final and could not be altered:

"... nevertheless, if by misprision in embodying the judgments, by errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in .... The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies."

Basis for exercise of the power was stated in the same decision as under:

"It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard."

Rectification of an order thus stems from the fundamental principle that justice is above all. It is exercised to remove the error and not for disturbing finality. When the Constitution was framed the substantive power to rectify or recall the order passed by this Court was specifically provided by Article 137 of the Constitution. Our Constitution-makers who had the practical wisdom to visualise the efficacy of such provision expressly conferred the substantive power to review any judgment or order by Article 137 of the Constitution. And clause (c) of Article 145 permitted this Court to frame rules as to the conditions subject to which any judgment or order may be reviewed. In exercise of this power Order XL had been framed empowering this Court to review an order in civil proceedings on grounds analogous to Order XLVII Rule 1 of the Civil Procedure Code. The expression, 'for any

other sufficient reason' in the clause has been given an expanded meaning and a decree or order passed under misapprehension of true state of circumstances has been held to be sufficient ground to exercise the power. Apart from Order XL Rule 1 of the Supreme Court Rules this Court has the inherent power to make such orders as may be necessary in the interest of justice or to prevent the abuse of process of Court. The Court is thus not precluded from recalling or reviewing its own order if it is satisfied that it is necessary to do so for sake of justice."

11. In Moran Mar Basselios Catholicos v. Most Rev. Mar Poulose Athanasius AIR 1954 SC 526, the three-Judge Bench referred to the provisions of the Travancore Code of Civil Procedure, which was similar to Order 47 Rule 1 CPC and observed:

"It is needless to emphasise that the scope of an application for review is much more restricted than that of an appeal. Under the provisions in the Travancore Code of Civil Procedure which is similar in terms to Order 47 Rule 1 of our Code of Civil Procedure, 1908, the court of review has only a limited jurisdiction circumscribed by the definitive limits fixed by the language used therein. It may allow a review on three specified grounds, namely, (i) discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed, (ii) mistake or error apparent on the face of the record, and (iii) for any other sufficient reason. It has been held by the Judicial Committee that the words "any other sufficient reason" must mean "a reason sufficient on grounds, at least analogous to those specified in the rule". See Chhajju Ram v. Neki AIR 1922 PC 12 (D). This conclusion was reiterated by the Judicial Committee in Bisheshwar Pratap Sahi v. Parath Nath AIR 1934 PC 213 (E) and was adopted by on Federal Court in Hari Shankar Pal v. Anath Nath Mitter AIR 1949 FC 106 at pp. 110, 111 (F). Learned counsel appearing in support of this appeal recognises the aforesaid limitations and submits that his case comes within the ground of "mistake or error apparent on the face of the record" or some ground analogous thereto."

12. In Thungabhadra Industries Ltd. v. Govt. of A.P. (1964) 5 SCR 174, another three-Judge Bench reiterated that the power of review is not analogous to the appellate power and observed (Para 11):

"A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. We do not consider that this furnishes a suitable occasion for dealing with this difference exhaustively or in any great detail, but it would suffice for us to say that where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions, entertained about it, a clear case of error apparent on the face of the record would be made out."

13. In Aribam Tuleshwar Sharma v. Aibam Pishak Sharma (1979) 4 SCC 389, this Court answered in affirmative the question whether the High Court can review an order passed under Article 226 of the Constitution and proceeded to observe (Para 3):

"But, there are definitive limits to the exercise of the power of review. The power of review may be exercised on the discovery of new and important matter or evidence which, after the exercise of due diligence was not within

the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate court."

14. In Meera Bhanja v. Nirmala Kumari Choudhury (1995) 1 SCC 170, the Court considered as to what can be characterised as an error apparent on the fact of the record and observed (Para 8):

".....it has to be kept in view that an error apparent on the face of record must be such an error which must strike one on mere looking at the record and would not require any longdrawn process of reasoning on points where there may conceivably be two opinions. We may usefully refer to the observations of this Court in the case of Satyanarayan Laxminarayan Hegde v. Mallikarjun Bhavanappa Tirumale AIR 1960 SC 137 wherein, K.C. Das Gupta, J., speaking for the Court has made the following observations in connection with an error apparent on the face of the record:

"An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Where an alleged error is far from self evident and if it can be established, it has to be established, by lengthy and complicated arguments, such an error cannot be cured by a writ of certiorari according to the rule governing the powers of the superior court to issue such a writ."

15. In Parsion Devi v. Sumitri Devi (1997) 8 SCC 715, the Court observed:

"An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order 47 Rule 1 CPC..... A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise"."

16. In Lily Thomas v. Union of India (2000) 6 SCC 224, R.P. Sethi, J., who concurred with S. Saghir Ahmad, J., summarised the scope of the power of review in the following words (Para 15):

"Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for review. Once a review petition is dismissed no further petition of review can be entertained. The rule of law of following the practice of the binding nature of the larger Benches and not taking different views by the Benches of coordinated jurisdiction of equal strength has to be followed and practised."

17. In Haridas Das v. Usha Rani Banik (2006) 4 SCC 78, the Court observed (Para 13):

"The parameters are prescribed in Order 47 CPC and for the purposes of this lis, permit the defendant to press for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason". The former part of the rule deals with a situation attributable to the applicant, and the latter to a jural action which is

manifestly incorrect or on which two conclusions are not possible. Neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the court and thereby enjoyed a favourable verdict."

18. In State of West Bengal v. Kamal Sengupta (2008) 8 SCC 612, the Court considered the question whether a Tribunal established under the Administrative Tribunals Act, 1985 can review its decision, referred to Section 22(3) of that Act, some of the judicial precedents and observed (Para 14):

"At this stage it is apposite to observe that where a review is sought on the ground of discovery of new matter or evidence, such matter or evidence must be relevant and must be of such a character that if the same had been produced, it might have altered the judgment. In other words, mere discovery of new or important matter or evidence is not sufficient ground for review ex debito justitiae. Not only this, the party seeking review has also to show that such additional matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court earlier. The term "mistake or error apparent" by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 47 Rule 1 CPC or Section 22(3)(f) of the Act. To put it differently an order or decision or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment / decision"

14. The Apex Court in a recent judgment in case **Akhilesh Yadav v. Vishwanath Chaturvedi & Ors., 2013 AIR SCW 1316**, has held that scope of review petition is very limited and submissions made on questions of fact cannot be a ground to review the order. It was further observed that review of an order is permissible only if some mistake or error is apparent on the face of the record, which has to be decided on the facts of each and every case. Further held that an erroneous decision, by itself, does not warrant review of each decision. It is apt to reproduce paragraph 1 of the said judgment hereunder:

"Certain questions of fact and law were raised on behalf of the parties when the review petitions were heard. Review petitions are ordinarily restricted to the confines of the principles enunciated in Order 47 of the Code of Civil Procedure, but in this case, we gave counsel for the parties ample opportunity to satisfy us that the judgment and order under review suffered from any error apparent on the face of the record and that permitting the order to stand would occasion a failure of justice or that the judgment suffered from some material irregularity which required correction in review. The scope of a review petition is very limited and the submissions advanced were made mainly on questions of fact. As has been repeatedly indicated by this Court, review of a judgment on account of some mistake or error apparent on the face of the record is permissible, but an error apparent on the face of the record has to be decided on the facts of each case as an

erroneous decision by itself does not warrant a review of each decision. In order to appreciate the decision rendered on the several review petitions which were taken up together for consideration, it is necessary to give a background in which the judgment and order under review came to be rendered."

4. We have gone through the judgment under review and the grounds taken in the review petition. It appears that the petitioners have filed an appeal, not a review petition. We find no error on the face of the record.

5. Having said so, the review petition merits to be dismissed. Accordingly dismissed.

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

Dixit Chauhan ...Petitioner.
Versus
Jagdish Thakur and others ...Respondents.

CMPMO No. 238 of 2015.
Date of decision : 26th June, 2015

Motor Vehicle Act, 1988- Section 169- Petitioner filed an application for releasing the awarded amount but MACT only released 25% of the arrear- held, that compensation awarded in favour of minors, illiterate claimants or widows is to be invested- petitioner does not fall in the category of claimants specified above- no reason was assigned as to why the entire amount was not released to the claimant- petition allowed and the entire amount ordered to be released in favour of petitioner.

Case referred:
A.V. Padma and others vs. R. Venugopal and others (2012) 3 SCC 378

For the Petitioner : Mr. B. M. Chauhan, Advocate.
For the Respondents : Nemo.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This is an unfortunate case where the petitioner has been dragged to an otherwise avoidable litigation.

2. The award passed by the learned Motor Accidents Claims Tribunal (III), Shimla in favour of the petitioner had admittedly attained finality, but when the Tribunal got down to releasing the amount, it only released 25% of the share of the claimant/petitioner constraining him to approach this Court challenging therein the order so passed by the learned Tribunal on 31.3.2015.

3. No doubt, the Tribunals are entrusted with a duty to safeguard the interest of the claimants, more particularly, when they happen to be minors, illiterate claimants or widows. But then it is not in every case, more particularly, in the decided cases that the

Tribunal is to insist on investment of the compensation amount in long -term fixed deposit. Similar fact was noticed by the Hon'ble Supreme Court in ***A.V. Padma and others*** vs. ***R. Venugopal and others (2012) 3 SCC 378***, which constrained it to pass the following orders:

> "6. *Even as per the guidelines issued by this Court Court, long term fixed deposit of amount of compensation is mandatory only in the case of minors, illiterate claimants and widows. In the case of illiterate claimants, the Tribunal is allowed to consider the request for lumpsum payment for effecting purchase of any movable property such as agricultural implements, rickshaws etc. to earn a living. However, in such cases, the Tribunal shall make sure that the amount is actually spent for the purpose and the demand is not a ruse to withdraw money. In the case of semi-illiterate claimants, the Tribunal should ordinarily invest the amount of compensation in long term fixed deposit. But if the Tribunal is satisfied for reasons to be stated in writing that the whole or part of the amount is required for expanding an existing business or for purchasing some property for earning a livelihood, the Tribunal can release the whole or part of the amount of compensation to the claimant provided the Tribunal will ensure that the amount is invested for the purpose for which it is demanded and paid. In the case of literate persons, it is not mandatory to invest the amount of compensation in long term fixed deposit.*
>
> *7. The expression used in guideline No. (iv) issued by this Court is that in the case of literate persons also the Tribunal may resort to the procedure indicated in guideline No. (i), whereas in the guideline Nos. (i), (ii), (iii) and (v), the expression used is that the Tribunal should. Moreover, in the case of literate persons, the Tribunal may resort to the procedure indicated in guideline No. (i) only if, having regard to the age, fiscal background and strata of the society to which the claimant belongs and such other considerations, the Tribunal thinks that in the larger interest of the claimant and with a view to ensure the safety of the compensation awarded, it is necessary to invest the amount of compensation in long term fixed deposit.*
>
> *8. Thus, sufficient discretion has been given to the Tribunal not to insist on investment of the compensation amount in long term fixed deposit and to release even the whole amount in the case of literate persons. However, the Tribunals are often taking a very rigid stand and are mechanically ordering in almost all cases that the amount of compensation shall be invested in long term fixed deposit. They are taking such a rigid and mechanical approach without understanding and appreciating the distinction drawn by this Court in the case of minors, illiterate claimants and widows and in the case of semi-literate and literate persons. It needs to be clarified that the above guidelines were issued by this Court only to safeguard the interests of the claimants, particularly the minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering an application seeking release of the money.*
>
> *9. The guidelines cast a responsibility on the Tribunals to pass appropriate orders after examining each case on its own merits. However, it is seen that even in cases when there is no possibility or chance of the feed being frittered away by the beneficiary owing to ignorance, illiteracy or susceptibility to exploitation, investment of the amount of compensation in long term fixed deposit is directed by the Tribunals as a matter of course and in a routine*

manner, ignoring the object and the spirit of the guidelines issued by this Court and the genuine requirements of the claimants. Even in the case of literate persons, the Tribunals are automatically ordering investment of the amount of compensation in long term fixed deposit without recording that having regard to the age or fiscal background or the strata of the society to which the claimant belongs or such other considerations, the Tribunal thinks it necessary to direct such investment in the larger interests of the claimant and with a view to ensure the safety of the compensation awarded to him.

10. The Tribunals very often dispose of the claimant's application for withdrawal of the amount of compensation in a mechanical manner and without proper application of mind. This has resulted in serious injustice and hardship to the claimants. The Tribunals appear to think that in view of the guidelines issued by this Court, in every case the amount of compensation should be invested in long term fixed deposit and under no circumstances the Tribunal can release the entire amount of compensation to the claimant even if it is required by him. Hence a change of attitude and approach on the part of the Tribunals is necessary in the interest of justice."

4. The relevant portion of the order passed by the learned Tribunal below reads thus:

".....I have perused the award passed by this Tribunal. Accordingly, the application is allowed and out of the awarded amount 25% of the share of applicant No.2 Dixit Chauhan alongwith interest accrued thereon be released in his favour by remitting the same in his bank account against proper receipt and identification..."

5. As is evident from the aforesaid order, there is no reason whatsoever given by the learned Tribunal as to why an amount to the extent of 25% of the share is being released. Even the Hon'ble Supreme Court has observed that the guidelines issued by the Court were only to safeguard the interest of the claimants, particularly, minors, illiterates and others whose amounts are sought to be withdrawn on some fictitious grounds. The guidelines were not to be understood to mean that the Tribunals were to take a rigid stand while considering the application for release of money.

6. Having said so, the case of the petitioner does not fall in the categories of the claimants identified by the Hon'ble Supreme Court whose amounts are to be kept in long term deposits. The petitioner admittedly is not a minor and as per the affidavit, his age is 30 years, therefore, there is no reason why the entire amount falling to his share should not have been ordered to be released in his favour.

7. In view of the aforesaid discussion, there is merit in this petition and the same is allowed and the order passed by learned Motor Accidents Claims Tribunal (III), Shimla in CMP No. 26-S/6 of 2014/11 dated 31.3.2015 is ordered to be set-aside and the entire amount falling to the share of the petitioner/claimant is ordered to be released in his favour by remitting the same to his bank account against proper receipt and identification. Petition stands disposed of in the aforesaid terms.

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

M/s United India Insurance Company ...Petitioner.

Versus

M/s Kishan Singh & Co. Pvt. Ltd & others.

...Respondents.

Arb. Case No.48 of 2007
Reserved on: 24.6.2015
Decided on : 26.6.2015

Arbitration and Conciliation Act, 1996- Section 34- A contract was awarded by NHPC for the construction of permanent suitable bridge across the river Siul- 67 meters length of suspended portion being launched with 33.5 meters length of the nose fell down in the river- 16 persons died on the spot and 5 persons were grievously injured- the bridge was insured – a claim for loss of Rs.1,51,30,000 was made- Arbitral Tribunal awarded various amounts towards loss of bridge and rejected the claim for compensation on account of death of workmen- held, that Court cannot reappraise the material on record and substitute its own view in place of Arbitrator's views – the findings recorded by Tribunal are based upon correct evidence and cannot be termed as perverse - where two views are possible, the view taken by arbitrator has to be preferred- petition dismissed. (Para- 5 to 12)

Cases referred:

Navodaya Mass Entertainment Limited versus J.M. Combines, (2015) 5 Supreme Court Cases 698

Swan Gold Mining Limited vs. Hindustan Copper Limited, (2015) 5 SCC 739

For the Petitioner : Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate, for the petitioner.

For the Respondent: Mr. Rajnish Maniktala, Advocate for respondent No.1.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge

Petitioner has filed the present application under Section 34 of the Arbitration and Conciliation Act, 1996 against the award made on 17.3.2001 by the Arbitral Tribunal.

2. "Key facts" necessary for the adjudication of the present application are that respondent No. 1-Contractor was awarded by National Hydro-Electric Power Corporation Limited (for short "NHPC") the work of construction of permanent suitable bridge across river Siul, near village Koti on 30.8.1991 on lump sum basis at a total cost of Rs. 131.50 lacs. The work of bridge was to be undertaken in two spans, i.e. one of 53.6 meters cantilever span resting on concrete pier and second 67 meters span resting on tip of cantilever at one end and supported on roller bear bearing on the other end. An agreement between Contractor and NHPC was executed on 19.11.1991 for the revised contract of Rs. 138 lacs. It was further revised to Rs. 173 lacs from Rs. 138 lacs on 25.8.1993. The Contractor got the risk of the work covered by the petitioner by effecting its insurance for Rs. 1, 28,34,000/- with 3rd party liability for a period between 15.5.1992 to 31.5.1992. It was extended by another six months upto 30.11.1993 and further extended from 1.12.1993 to

31.1.1994 as per the terms and conditions of the insurance policy as amended by the insurer vide letter dated 1.12.1993.

3. The construction work of bridge was undertaken; however, at about 12 p.m. on 12.12.1993, there was a big bang and 67 meters length of suspended portion being launched with 33.5 meters length of the nose fell down in the river over a height of 50-60 meters. 16 persons died on the spot and 5 persons were grievously injured. The Contractor informed the insurer of the loss occurred at the work vide letter dated 17.1.1994. He made a tentative claim for the apparent loss of Rs. 1,51,30,000/-.

4. The matter was referred to the Arbitral Tribunal. The parties were directed to appear before the Arbitral Tribunal vide order dated 10.11.1998. The parties were afforded opportunity to file their respective additional documents in support of their case. The admission and denial of documents was also done.

5. Claim No. 1 was qua the cost of reconstruction of lost 67 meters span of bridge, i.e. Rs. 1,51,96,286.37/-. The learned Tribunal on the basis of the claim statement, rejoinder and the documents came to the conclusion that the Contractor did not take up the reconstruction of the portion of the work. It was got done by allotment of the work to another contractor, namely, Shri Vinay Kumar Gupta at higher rates. The work, as noticed hereinabove, was awarded by the NHPC to the Contractor for a lump sum payment of Rs. 173 lacs revised cost. It was insured for Rs. 1,18,34,000/- besides Rs. 10,00,000/- for 3rd party liability. Learned Tribunal has taken into consideration the report of Surveyors M/s Mita Marine and General Survey Agencies. The cost of the reconstruction of the same design was worked out at 260 MT and its cost was worked out at Rs. 41,60,000/-. The cost of fabrication, erection and launching was claimed at Rs. 73,25,000/-. The total cost was Rs. 1,14,85,000/-. Adding supervision and contingencies at 5%, i.e. Rs. 5,74,250/-, the amount claimed from the Contractor was Rs. 1,20,69,250/-. However, in view of considered view of the Arbitral Tribunal, the total actual payment made by the NHPC to the Contractor for 120.6 meters was Rs. 1,51,74,000/- and the cost of 67 meters span of bridge lost was Rs. 84,30,000/-. The total loss came to Rs. 62,00,265/-.

6. According to claim No. 2, the Cost of repair, strengthening and replacement of numbers and load testing of 53.6 meters span of the bridge and ultrasound testing of joint was considered for a sum of Rs. 41,37,913/-. The Tribunal on the basis of the figures given in Annexures-II to appendix S & T of the Survey report came to the conclusion that the damage to 53.6 meters span of bridge was Rs. 10.40 lacs and the insurers was liable to pay Rs. 7,14,920/-.

7. According to claim No.3, the cost of balance work, i.e. deck slab, railing, footpath etc. was claimed for Rs. 20,76,000/-. It was rejected by the learned Arbitral Tribunal. Thereafter, the Arbitral Tribunal has made award for cost of retrieval of salvage of lost 67 meters span of the bridge including watch ward of retrieved salvage. The net realization from the salvage according to the Arbitral Tribunal was Rs. 2,99,600/-.

8. The claim for compensation on account of death of workmen was rejected by the Arbitral Tribunal. The Arbitral Tribunal on the basis of evidence oral as well as documentary and survey report has awarded for loss of 67 meters span of the bridge Rs. 62,00,265/-. Compensation for repairs of the damage caused to 53.6 span of the bridge was Rs. 7,64,920/-. Less payment on sale of salvage due from NHPC to the insurer was Rs. 2,99,600/-, less payment of compensation already made by the insurer to NHPC on 14.3.1999 was Rs. 22,64,963/- and the net balance amount of compensation required to be paid by the insurer was Rs. 44,00,622/-. The interest @ 12% per annum was awarded from

1.2.1994 with future interest at the same rate from the date of award till actual payment with cost of Rs. 90,000/-.

9. This Court cannot re-appraise the material on record and substitute its own view as Arbitrator's view. The Arbitrators have applied their mind. The findings recorded by them are based on correct appreciation of evidence and the same cannot be termed as perverse.

10. Their Lordships of the Hon'ble Supreme Court in ***Navodaya Mass Entertainment Limited*** versus ***J.M. Combines***, (2015) 5 Supreme Court Cases 698 have held that even if two views are possible, view taken by the Arbitrator would prevail and reappraisal by the Court is not permissible. Their Lordships have held as under:

> **"[8] In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. Vs. L.K. Ahuja, 2004 5 SCC 109; Ravindra & Associates Vs. Union of India, 2010 1 SCC 80; Madnani Construction Corporation Private Limited Vs. Union of India & Ors., 2010 1 SCC 549; Associated Construction Vs. Pawanhans Helicopters Limited, 2008 16 SCC 128; and Satna Stone & Lime Company Ltd. Vs. Union of India & Anr., 2008 14 SCC 785.)"**

11. Their Lordships of the Hon'ble Supreme Court in ***Swan Gold Mining Limited*** vs. ***Hindustan Copper Limited***, (2015) 5 SCC 739 have held that arbitrator's decision is generally considered binding between the parties and, therefore, the power of the court to set aside the award would be exercised only in cases where the court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. Their Lordships have further held that the arbitrator appointed by the parties is the final judge of the facts. The findings of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him. Their Lordships have held as under:

> **"11. Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.**

12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.

18. Mr. Sharan, learned senior counsel appearing for the appellant, also challenged the arbitral award on the ground that the same is in conflict with the public policy of India. We do not find any substance in the said submission. This Court, in the case of Oil and Natural Gas Corporation Ltd. (supra), observed that the term 'public policy of India' is required to be interpreted in the context of jurisdiction of the Court where the validity of award is challenged before it becomes final and executable. The Court held that an award can be set aside if it is contrary to fundamental policy of Indian law or the interest of India, or if there is patent illegality. In our view, the said decision will not in any way come into rescue of the appellant. As noticed above, the parties have entered into concluded contract, agreeing terms and conditions of the said contract, which was finally acted upon. In such a case, the parties to the said contract cannot back out and challenge the award on the ground that the same is against the public policy. Even assuming the ground available to the appellant, the award cannot be set aside as because it is not contrary to fundamental policy of Indian law or against the interest of India or on the ground of patent illegality.

19. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

12. Accordingly, there is no merit in the application and the same is rejected, so also the pending application(s), if any.

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

Birbal ...Appellant.

Vs.

State of H.P. ...Respondent.

Criminal Appeal No.549 of 2010
Reserved on : 11.5.2015
Date of Decision : June 29, 2015.

Indian Penal Code, 1860- Sections 302, 364 and 201- PW-1 and PW-4 were staying at Mehatpur- they had two daughters and one son- accused claimed to be putative father of the son- he took away the girls on 3.8.2009- PW-1 brought the matter to the notice of the police- investigation revealed that accused had thrown his daughters in a water canal- dead

bodies were recovered- parents had duly identified the girls- accused made a disclosure statement and identified the place from where the girls were thrown in the canal- chappals were recovered which were identified by the parents- it was duly proved that accused had taken away the girls without the consent of the parents- Medical Officer specifically stated that girls had died due to drowning- recovery of chappals pursuant to the disclosure statement was duly proved- all the circumstances led to the guilt of the accused- held, that accused was rightly convicted. (Para-6 to 23)

For the Appellant : Mr. Surinder Sharma, Advocate.
For the Respondent : Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Birbal, hereinafter referred to as the accused, has assailed the judgment dated 27.7.2010/4.8.2010, passed by Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh, in Sessions Case No.1/2010 (Sessions Trial No.1/2010), titled as *State v. Birbal*, whereby he stands convicted and sentenced as under:

Offence	Sentence
302 IPC	Imprisonment for life and to pay fine of Rs.10,000/- and in default of payment thereof to further undergo simple imprisonment for a period of six months.
364 IPC	Rigorous imprisonment for a period of five years to pay fine of Rs.5,000/- and in default of payment thereof to further undergo simple imprisonment for a period of three months.
201 IPC	Imprisonment for a period of one year and to pay fine of Rs.1,000/- and in default of payment thereof to further undergo simple imprisonment for a period of one month.

2. In relation to FIR No.286, dated 5.8.2009 (Ex.PW-24/A), registered, under the provisions of Section 364 of the Indian Penal Code, at Police Station, Sadar (Una), accused was charged to face trial for having committed offences, punishable under the provisions of Sections 364, 302 & 201 of the Indian Penal Code.

3. Undisputedly, defence taken by the accused, in his statement, under the provisions of Section 313 of the Code of Criminal Procedure, reads as under:

> "I am innocent. I have not done anything. I have been implicated in this case as Parvesh Kumar was suspicious about paternity of girls-daughters and was also suspicious that his wife Ritu had illicit relations with me. Due to this reason I have been implicated in this case falsely."

4. Finding the testimonies of the prosecution witnesses to be reliable and their version to be clear, cogent and consistent, trial Court found the prosecution to have proved

on record the chain of circumstances, beyond reasonable doubt, leading to the only hypothesis of the guilt of the accused,. Correctness of the findings and the judgment is the subject matter of the present appeal.

5. Prosecution relies upon the following circumstances in order to establish the guilt of the accused:

I) Recovery of dead bodies of the deceased from the canal, who died of drowning.

II) Accused would often visit the house of the deceased.

III) On the date of occurrence of incident, under the influence of alcohol, accused took away the deceased with himself.

IV) Immediately prior to the occurrence of crime, deceased were lastly seen in the company of the accused,

V) Accused having confessed of having committed the crime, which led to the identification of spot of crime and recovery of *Chappals* (slippers) of the deceased.

6. In brief, it is the case of prosecution that Parvesh Kumar (PW-1) and Ritu (PW-4) were staying at Mehatpur. They had two daughters Tamanna & Rajju (both deceased) and son Kishan. Accused claimed himself to be the putative father of Kishan. On 3.8.2009, at about 7.30 p.m., in the absence of Parvesh Kumar, accused took away the girls. Finding his daughters to be missing, Parvesh Kumar brought the matter to the notice of the police and on the basis of his statement, so recorded, under the provisions of Section 154 of the Code of Criminal Procedure, FIR (Ex. PW-24/A) was recorded at Police Station, Sadar (Una). Investigation revealed that the accused first took the girls to the shop of Sanjeev Kumar (PW-2), where he purchased toffees and thereafter boarded a bus towards Nangal. Lateron he threw the decessed in the water canal, as a result of which they died. On 7.8.2009, police found the dead bodies at the Gate of Ganguwal Power House, which were recovered vide Memo (Ex.PW-1/D). Parents identified the dead bodies. Accused, who was arrested on 7.8.2009, made a disclosure statement (Ex.PW-10/A), not only admitting his guilt but voluntarily got the spot, from where he had thrown the girls in the canal, identified. This was so done in the presence of HHC Mohinder Kumar (PW-10) and independent witness Harish Chander (PW-20). Pursuant thereto, accused identified the spot from where police also recovered a pair of *Chappals* (Ex. P-1 & P-2), belonging to the deceased, vide Memo (Ex.PW-1/B). This was in the presence of independent witness Rajiv Thakur (PW-9) and HC Pawan Kumar (PW-11). Recovered articles were also identified by the parents. Postmortem was conducted by Dr. P.S. Rana (PW-19), who issued postmortem reports (Ex. PW-19/D & 19/E). He opined the deceased to have died on account of asphyxia following aspiration of water due to ante-mortem drowning.

Circumstance No.II

7. In Court, Ritu, mother of the deceased, has deposed that the accused claimed himself to be the putative father of her son Kishan. Unrebuttedly, accused was known to the witness from before and was on visiting terms. Also the deceased used to consider and call the accused as their "*Mama*" (uncle). This witness further states that on 3.8.2009, at about 6.30 p.m., accused, who was under the influence of liquor, came to her house and desired that the daughters be given to the husband and that she elope with him carrying Kishan, whom he claimed to be the putative father. She objected to the same. Also, accused quarrelled with her. The deceased, who were playing in the *Gali* (street), were taken away by the accused. Only when they did not return at about 8.30 p.m., she started searching for them and also informed her husband. Though the witness does state that she

had actually not seen the accused take away the deceased, but has explained that children were playing in the adjoining *Gali* and accused took them away.

8. Version of this witness stands corroborated by her husband Parvesh Kumar (PW-1), who has further deposed that Sanjeev Kumar, a shop-keeper, had also informed him of the accused having purchased toffees, at the time when deceased were with him.

9. What is important in the testimony of both these witnesses is that the children were not taken away by the accused with the consent of parents. He, under the influence of alcohol, took away the deceased after quarrelling with Ritu. In our considered view, nothing has emerged from the cross-examination part of testimony of these witnesses, which would impeach the credence or credibility, of the witnesses, rendering their version, in any manner, to be lacking in confidence. Thus, prosecution has been able to establish this link in the chain.

Circumstance No.IV

10. Sanjeev Kumar (PW-2) has testified that on 3.8.2009, at about 7.30 p.m., accused came to his shop with the daughters (deceased) of Parvesh and purchased toffees. Evidently, he knew both the accused and the children from before, as his shop is situated in the *Gali* near the house of Parvesh.

11. We find that even Chander Shekhar (PW-3) noticed the accused with the deceased. This was same day at about 8 p.m.

12. Presence of the accused at Mehatpur, on the date of occurrence of the incident, also stands recorded through the testimony of Pardeep Kumar (PW-8).

13. Sham Lal (PW-6), who is an auto-rickshaw driver, has also testified to the fact that same day, at about 8 p.m., he saw the accused board a bus towards Nangal. At that time, daughters of Parvesh were with him. The witness does not remember whether the bus was private or Government owned, but then this fact would not render his testimony to be doubtful. His version that accused was holding one of the girls with hand and the other on his lap, is not so recorded in his previous statement, with which he was confronted. Even this fact, in our considered view, would not shatter his testimony, for the reason that on material facts, there is neither any improvement, nor any exaggeration/embellishment. Thus, prosecution has been able to prove the circumstance of the deceased lastly seen in the company of the accused.

Circumstance No.III

14. Through the testimony of Kamal Singh (PW-7), prosecution has been able to establish that on 3.8.2009, accused had consumed alcohol in the *Ahata* owned by this witness. This was at about 5 p.m. Accused was a regular visitor to the *Ahata* and was personally known to this witness. He has categorically denied the suggestion of any quarrel having taken place between him and the accused.

Circumstance No.I

15. Dead bodies of Tamanna and Rajju, so recovered by the police on 7.8.2009, vide Memo (Ex.PW-1/D) were identified by Parvesh Kumar. Thereafter, Investigating Officer Sewa Singh (PW-24) got conducted postmortem from Dr. P.S. Rana (PW-19), who issued postmortem reports (Ex. PW-19/D and 19/E). The doctor has explained that two doctors, simultaneously, conducted the postmortem, whereafter reports were prepared by him. The deceased died on account of asphyxia following aspiration of water due to ante-mortem drowning.

16. Tara Singh (PW-12), who was posted at BBMB Power House, Ganguwal, has also deposed about the recovery of dead bodies. Thus, the prosecution has proved recovery of dead body from the canal and the deceased having died due to drowning.

Circumstance No.V

17. In his testimony IO Sewa Singh has testified that during investigation, accused, who was in custody, in the presence of Mohinder Kumar (PW-10) and Harish Chander (PW-20) made a disclosure statement (Ex. PW-10/A). Immediately, Dy. S.P. Raman Sharma (PW-25) was informed of such fact. On this count, Mohinder Singh, in his unrebutted testimony, has also corroborated such version. It also stands corroborated by Harish Chander, who is an independent witness and member of Municipal Council, Mehatpur. He has explained the circumstances under which he was present at the Police Post. Dy.S.P. Raman Sharma, in Court, has corroborated the version of Harish Chander. We do not find the version of these witnesses to be doubtful or their credence to be impaired or shattered in any manner. Their version with regard to disclosure statement is clear and testimonies consistent and unimpeachable.

18. It has come on record that after the disclosure statement, investigation was taken over by Dy.S.P. Raman Sharma, who has further deposed that pursuant to the disclosure statement (Ex. PW-10/A), accused led the police to the spot, from where he had thrown the deceased in the water canal. The spot was identified, from where two *Chappals* (Ex. P-1 & P-2) were recovered, which were identified by Parvesh to be that of the deceased. The same were taken into possession in the presence of independent witness Rajeev Thakur (PW-9) and HC Pawan Kumar (PW-11), vide Memo (Ex. PW-1/B). It is only after recovery of *Chappals* that the police started looking for the bodies of the missing girls, which were recovered from the gate of the Ganguwal Power House. The photographs (Ex.PW-15/1 to 15/9) were also taken on the spot by HC Ashok Kumar (PW-15). Rajeev Thakur, though initially supported the prosecution on the question of identification of the spot, from where the accused had thrown the deceased into the canal, but however, on the question of recovery of the *Chappals,* resiled from his previous statement and was declared hostile. However, when cross-examined by the Public Prosecutor, admitted having signed the recovery memo (Ex.PW-1/B), upon which the accused had put his thumb impression. Significantly, on the issue of identification of the spot, his version goes unrebutted. Also, Pawan Kumar (PW-11) has corroborated the version of Dy.S.P. Raman Sharma. Thus, factum of identification of spot and recovery of *Chappals,* belonging to the deceased, stands materially proved on record by the prosecution.

19. We find no discrepancy, contradiction or inconsistency in the testimony of the witnesses, which would render the prosecution case to be doubtful, in any manner. Prosecution has been clearly able to establish, beyond reasonable doubt, the fact that the accused, who was on visiting terms, came to the house of Parvesh and after quarrelling with Ritu, without consent, took away the children (deceased) and threw them in the water canal, as a result of which they died. Motive stands explained by the mother.

20. Accused made a disclosure statement, which further led to the identification of the spot, from where deceased were thrown, which further led to recovery of their dead bodies at the gates of the Power House. Also, *Chappals* (slippers) belonging to the deceased were recovered by the police.

21. Evidence produced on record is clear, cogent, convincing and the unbroken chain of circumstances only establishes the prosecution case of the accused having intentionally kidnapped the deceased with an intent of committing murder, which actually was so done. Innocently, children went with the accused, whom they called their *Mama*.

They were not in the know of any quarrel, which took place between the accused and their mother. To allure the children, accused bought them toffees from a nearby shop. Significantly, at that time, they were playing in the *Gali* and not in the courtyard of their house. The occasion, cause and effect in relation to the fact in issue, so also motive, preparation, previous and subsequent conduct of the accused, stand established on record.

22. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

23. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

24. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Sesh Ram ...Appellant.

Versus

State of H.P. ...Respondent.

Criminal Appeal No.310 of 2012
Reserved on : 26.5.2015
Date of Decision: June 29, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 8 k.g of charas- police did not have any prior information- it was a case of chance recovery- accused was unable to satisfactorily answer the queries of the police party, on which he was searched- non-association of the independent witnesses in such circumstances is not material- police officials had corroborated testimonies of each other- their version is clear, cogent and consistent – testimonies are free from exaggerations, embellishments and major contradictions- once possession has been proved, burden is upon the accused to prove that possession was not conscious- held, that prosecution version was proved beyond reasonable doubt and the accused was rightly convicted. (Para-9 toe 30)

Cases referred:
Mohinder Kumar v. State, Panaji, Goa, (1998) 8 SCC 655
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
Shivaji Sahabrao Bobade & another vs. State of Maharashtra, (1973) 2 SCC 793
State of H.P. v. Sunil Kumar, (2014) 4 SCC 780.

For the Appellant	:	Mr. Ashwani Kaundal, Advocate.
For the Respondent	:	Mr. Ashok Chaudhary, Mr. V.S. Chauhan, Additional Advocates General and Mr. Vikram Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Sesh Ram, hereinafter referred to as the accused, has assailed the judgment dated 21.4.2012, passed by Special Judge (II), Kinnaur at Rampur, Himachal Pradesh, in Sessions Trial No.61-AR/3 of 2011, titled as *State of Himachal Pradesh v. Sesh Ram*, whereby he stands convicted of the offence punishable under the provisions of Section 20(b)(ii)(C) of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay a fine of Rs.1,20,000/-, and in default thereof, to further undergo simple imprisonment for a period of two years.

2. It is the case of prosecution that a police party of the State CID, Police Station, Bharari (Shimla), was on duty in the field. They had left the Police Station on 20.2.2011 and spent two nights at a place known as Nogli. On 22.2.2011, the party headed towards Nirmand Baghipul side and at about 1 p.m., while they were just 1 km behind Baghipul, they saw the accused coming with a *Pithu* on his back. Seeing the accused, SI Rattan Singh (PW-7), who was heading the police party, stopped the vehicle and enquired the area from which he was coming. Not finding a satisfactory response, police officials enquired as to what he was carrying in the bag. At that accused got scared. Hence, on suspicion, the bag was searched, from which Charas in the shape of small balls and sticks, wrapped in two carry bags, was recovered. In the presence of police officials ASI Rajesh Kumar (PW-1) and Constable Nazar Lal (PW-11), Memo of identification (Ex.PW-1/A) was prepared. Upon weighment, the contraband substance was found to be 8 kgs, which was sealed in a parcel with seal impression 'L'. NCB form (Ex.PW-6/D) was filled up in triplicate. HC Tilak Raj (PW-3) took the Ruka to the CID Police Station, Bharari. Ruka was also sent through FAX by Constable Parkash Chand (PW-10), from the shop of Shri Ajit Sankhian (PW-2), on the basis of which FIR No.3, dated 22.2.2011 (Ex. PW-6/A) was registered by Shri Tenjing Shashni (PW-6). The file was taken to the spot by HC Devinder (PW-8). Accused was arrested. With the completion of investigation on the spot, SI Rattan Singh entrusted the case property to Shri Tejjing Shashni, who resealed the same with his own seal of seal impression 'H'. HC Parkash Chand (PW-4), to whom the case property was entrusted, made entries in the Malkhana Register (Ex.PW-4/C) and sent it to the Forensic Science Laboratory, Junga, through HC Bhagirath (PW-9). Repot of the Laboratory (Ex. PW-6/D) was obtained by the police. Also, Special Report (Ex.PW-5/A), taken by Constable Nazar Lal, was delivered in the Office of the Superintendent of Police (Crimes), State CID, which was received by ASI Shiv Ram (PW-5). With the completion of investigation, which, prima facie,

revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 11 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took the following defence:

> "I am innocent. The police party had been in the area for last many days meeting people and staying locally. On 22.02.2011 they made telephone calls to may people including Jai Singh of village Tharla and also called me to Jaon Bazar. They were accompanied one lady inspector in civil dress and one person from Nalagarh side. In presence of Jai Singh and local shopkeepers and a tailor master I was arrested and taken to PWD rest house Nirmand and documents were prepared there. The contraband was collected by the police people with the help of the person belonging to Nalagarh and was planted on me."

In defence, accused examined one witness.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him, as aforesaid. Hence, the present appeal by the accused.

6. Learned counsel for the appellant, attacking the judgment of trial Court, has made the following submissions:

I) Area in question is prone to trafficking of Charas. Police had prior information and detection of such crime was the reason for the police to be present on the spot. Under these circumstances, there is infraction of provisions of Sections 42, 52 and 57 of the Act.

II) In the absence of non-association of independent witnesses, testimony of police officials is rendered unreliable and unbelievable.

III) Defence set up by the accused stands probablized through testimony of defence witness so examined by him.

7. Mr. V.S. Chauhan, learned Additional Advocate General, has supported the findings of fact and judgment, so rendered by the trial Court.

8. Having perused the testimony of the prosecution witnesses, at the threshold, it be only observed that there is nothing on record to even remotely suggest, that the area in question is prone to trafficking of drugs. Also, there is nothing on record to even remotely suggest that police party was on patrol duty in the area, in connection with detection of crime pertaining to narcotic substances. Under these circumstances, there is no question of violation of the provisions of Sections 42, 52 and 57 of the Act.

9. Rattan Singh (PW-7), who headed the police party, has categorically deposed that the police party left Shimla on 20.2.2011. They spent two nights at a place known as Nogli and only in the morning of 22.2.2011, they left towards Nirmand Baghipul side. Further, just 1 km before Baghipul, he saw the accused, holding a *Pithu* on his back. He made enquiries to which there was no satisfactory response. Also accused got scared. Hence, on suspicion, after informing him of his statutory rights, and obtaining his consent,

the bag was searched. Police officials ASI Rajesh Kumar and Nazar Lal were associated in this process. From the bag, contraband substance i.e. Charas, weighing 8 kgs, was recovered. The same was sealed with seal impression 'L' NCB form was filled up in triplicate and the property taken onto possession, vide Memo (Ex.PW-1/C). Ruka (Ex. PW-3/A), alongwith case property, was sent through Constable Tilak Raj to the Police Station. On 23.2.2011, after receiving the case file, remaining formalities were completed. Ruka, which was sent by FAX, bearing endorsement of SHO Tenjing, was taken on record.

10. Apart from corroborating the aforesaid version, Tilak Raj has deposed that he delivered the case property to SHO Tenjing. He is categorical that so long as the case property remained with him, it was not tampered with.

11. Testimony of ASI Rajesh Kumar, Constable Parkash Chand (PW-10) and Constable Nazar Lal (PW-11) is also to similar effect. Additionally, Parkash Chand has deposed that he faxed the Ruka from Sankhian Book Depot at Nirmand and obtained cash Memo (Ex. PW-2/A) and Tilak Raj (PW-3) states that he took the Ruka alongwith the contraband substance and deposited the same with SHO Tenjing.

12. Shri Ajit Sankhian (PW-2) is the Proprietor of Sankhian Book Depot, who has also corroborated the version of Parkash Chand (PW-10).

13. SHO Tenjing Shashni (PW-6) has also testified that with the registration of FIR, on the basis of Ruka so received by him, case file was sent through HC Davinder (PW-8). Also, Tilak Raj deposited the case property with him, which he resealed with his seal impression 'H'. Relevant entries in the NCB form (Ex. PW-6/B) were made. Specimen of the seal, so embossed by him, is Ex. PW-6/C, and the resealing certificate is Ex. PW-4/B.

14. Prosecution witnesses, and more particularly, Tilak Raj (PW-3), have clarified that the place where the accused was apprehended is isolated and secluded. No vehicular traffic passed, at the time when the contraband substance was recovered and seized.

15. It is a case of chance recovery and not of prior information. Only when the accused was not able to satisfactorily answer the queries of the police party, he was searched, which led to the recovery of the contraband substance. In this backdrop, contention with regard to non-association of independent witnesses only merits rejection.

16. We find that police had taken all precautions. Even Special Report (Ex.PW-5/A) was sent to the superior Officer, which fact is evident from the testimony of ASI Shiv Ram and Constable Nazar Lal.

17. From the conjoint reading of testimonies of the aforesaid witnesses, we find their version to be clear, cogent, consistent, and there is nothing which would render their testimonies to be unbelievable. They are free from exaggerations, embellishments and major contradictions. Prosecution has been able to establish the factum of having carried out the search and seizure operations, in accordance with law, and recovered the contraband substance from the conscious possession of the accused.

18. Even on the question of link evidence, prosecution has been able to establish its case, beyond reasonable doubt. Both, SI Rattan Singh and HC Tilak Raj, have deposed that so long as the contraband substance remained in their possession, it was not tampered with. Recovery was effected on 22.2.2011 and contraband substance deposited with the SHO of the concerned Police Station the very next day. It took time for Tilak Raj to travel from Nirmand to Shimla. Upon receipt of the contraband substance, SHO Tenjing resealed the same and completed the necessary formalities. Certificate of re-sealing and impression of the seal stands proved on record.

19. Case property was entrusted to MHC HC Prakash Chand (PW-4), who made entries in the Malkhana Register (Ex. PW-4/C). Sealed parcel alongwith the road certificate (Ex.PW-4/D) was sent through HC Bhagirath (PW-9) for chemical analysis to the Forensic Science Laboratory, who deposited the same in the Laboratory at Junga. Even these witnesses, in their unrebutted testimony, have deposed that so long as the parcel remained with them it was not tampered with. Report of the Laboratory (Ex.PW-6/D) categorically establishes the seized contraband substance to be psychotropic substance, i.e. Charas.

20. Mr. Ashwani Kaundal, learned counsel for the accused, has referred to the decision rendered by the Hon'ble Supreme Court of India in *Mohinder Kumar v. State, Panaji, Goa,* (1998) 8 SCC 655, which we find not to be applicable in the given facts and circumstances. The Court was dealing with a case where the house of the accused was searched, after sunset, and with a strong suspicion that the accused had kept psychotropic substance in his house. It is in this backdrop, the Court held the prosecution not to have complied with the provisions of Sections 42, 52 and 57 of the Act.

21. On the other hand, in *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, has held that the initial burden of proof of the possession lies on the prosecution. Once it is discharged legal burden would shift on the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt. However, what is required to prove innocence by the accused would be preponderance of probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution would not nail him with offence. Offences under the Act being more serious in nature, higher degree of proof is required to convict an accused.

It needs no emphasis that the expression possession is not capable of precise and completely logical definition of universal application in context of all the statutes. Possession is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act, once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption from possession of illicit articles.

22. Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the accused has not been able to account for satisfactorily, the possession of Charas. Once possession is established, the Court can presume that the accused had culpable mental state and had committed the offence.

23. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (Also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

24. In the present case, not only possession but conscious possession has been established, beyond reasonable doubt. It has not been shown by the accused that the possession was not conscious in the logical legal backdrop of Sections 35 and 54 of the Act.

25. It is a settled position of law that the prosecution has to prove its case beyond reasonable doubt and what is "beyond reasonable doubt", it has been explained by the Hon'ble Supreme Court of India in *Shivaji Sahabrao Bobade & another vs. State of Maharashtra,* (1973) 2 SCC 793 has held that:-

> "6. Even at this stage we may remind ourselves of a necessary social perspectives in criminal cases which suffers from insufficient forensic appreciation. The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then breaks down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [*Glanville Williams in 'Proof of Guilt'*] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that " a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ... ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." [Emphasis supplied]

26. On the issue in hand, one would only refer to the near recent decision rendered by the Hon'ble Supreme Court of India in *State of H.P. v. Sunil Kumar,* (2014) 4 SCC 780.

27. Significantly, in his statement, under the provisions of Section 313 of the Code of Criminal Procedure, accused does not state the name of the tailor master. He has not produced Jai Singh or any other local shop-keeper. He never protested his arrest at any point in time.

28. Now, Ramesh Chand (DW-1) claims himself to be running a tailoring shop at village Jaon. He does not state that the police arrested the accused in his presence. All that he states is that on 22.2.2011, at about 2 p.m., CID officials were talking to one Jai Singh. In the meanwhile, accused also crossed his shop and after half an hour, three officials visited him with a piece of cloth and asked him to stitch the same into a parcel, which he did. Thereafter, the police officials left towards Baghipul side. It was only lateron that he learnt that the police had arrested Sesh Ram (accused). Defence of the accused, by no stretch of imagination, can be said to have been probablized even by this witness. We do not find the testimony of this witness to be worthy of credence, for the reason that he admits to be running the shop from his residential house, and of his vocation there is no proof and also he is a close relative of the accused. He has not undergone any training in tailoring and claims to have learnt the same from his father, of which also there is no evidence. His version of the police having visited the shop for getting the parcel stitched also does not inspire confidence, for he does not name them. He admits that there is a *Karyana* shop of Chuni Lal nearby. Now, if the accused had been falsely arrested, this person being a close relative would have been the first one to have raised hue and cry. Also, he does not even remember the name of the lady Constable, who allegedly visited his shop.

29. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt, to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

30. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence.

31. For all the aforesaid reasons, we find no reason to interfere with the well reasoned judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Mangat Ram ....Appellant.

Versus

Dila Ram Verma ....Respondent.

RSA No.131 of 2004.
Judgment reserved on: 24th June, 2015.
Date of Decision: 30th June, 2015.

Specific Relief Act,1963- Section 38- **Torts-** Defendant started raising construction of the house and in the process stacked the construction material on the retaining wall- wall fell

down along with stones and excavated material on the house of the building and causing damage of Rs.94,000/-- defendant denied the allegation made in the plaint- trial Court dismissed the suit- the decree was upheld in the appeal- held, that injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property at the hands of the defendant- injunction can also be granted when defendant was trustee of the property and invades the rights of enjoyment of such property where the damage caused or to be caused by such invasion cannot be measured in terms of money- collapse of retaining wall cannot be attributed to any omission or negligence on the part of the defendant, rather, plaintiff had dug pits for erection of pillars without raising any retaining wall –merely, because defendant had not obtained approved from the Town and Country Planning Department to raise construction is not sufficient- moreover, plaintiff had also not obtained the permission from Town and Country Planning Department- in these circumstances, suit was rightly dismissed. (Para-11 to 20)

For the appellant:	Mr. Bhupender Gupta, Senior Advocate, with Mr. Janesh Gupta, Advocate.
For the respondent:	Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J.

Plaintiff is in second appeal before this Court. He is aggrieved by the judgment and decree dated 27th December, 2003, passed by learned District Judge, Shimla, in Civil Appeal No.54-S/13 of 2001, whereby the appeal has been dismissed and the judgment and decree passed by learned trial Court on 2nd June, 2001, in Case No.1/1 of 1991, affirmed.

2. The plaintiff and defendant are neighbourers. The plot of the plaintiff measuring 4 biswas, bearing Khasra No.772/451/1, situate in village Pagog, Tehsil and District Shimla, is immediately below that of defendant. The plaintiff had acquired the land hereinabove by way of sale, vide sale deed dated 7th November, 1989, Ext.PW-1/A. The defendant had started raising construction of his house in the year 1989 well before the plaintiff purchased the plot.

3. The complaint is that the defendant raised the construction of retaining wall with boulders, stones and mud. While raising the construction of his house, he used to stack the construction material on the retaining wall. On account of load on the wall, the same started sliding-down. Many cracks also developed in the retaining wall. As a result thereof, stones became loose at many places. The defendant also filled the gap in between the retaining wall and his plot with excavated material and debris. The plaintiff on seeing all this, apprised on so may occasions the defendant about such acts of omission attributed to him including issuance of the notice, but of no avail with the result that the retaining wall collapsed on 7th January, 1991 and the entire debris including stones and excavated material used for filling the gap slided-down and came on the building of the plaintiff thereby damage was caused to his building under construction. He got such damage assessed, which came to Rs.94,000/-. He suffered such damage on account of the negligence attributed to defendant. He requested the defendant to make the loss, so caused to him, good, but of no avail. It is also claimed that the defendant has been raising construction unauthorisedly without obtaining proper demarcation or sanction from the competent authority, hence the suit for permanent prohibitory and mandatory injunction restraining thereby him from raising further construction of his house and throwing debris,

stones or excavated material on the plot of the plaintiff and to remove the debris, stones or excavated material accumulated on his plot on account of collapse of the retaining wall with further direction to reconstruct the retaining wall. A decree for recovery of Rs.94,000/- against the defendant has also been sought to be passed.

4. The defendant, when put to notice, has contested the suit. In preliminary, he has raised the objections qua the maintainability of the suit, suppression of material facts, cause of action and estoppel. On merits, it is submitted that his plot, measuring 5 biswas bearing Khasra No.784/451 situate in Kufta-Dhar, is above the plot of the plaintiff. The plaintiff while starting construction of his house, dug and excavated the soil just below the retaining wall, the defendant raised to support his plot. He had also constructed a pucca tank over his plot. On account of excavation and digging of soil just below the retaining wall, the wall and pucca tank collapsed. He had already constructed the house, retaining wall and also tank when the plaintiff started digging work of his plot to raise the construction over the retaining wall of the house of the defendant. It is denied that the retaining wall was constructed by boulders with mud. It is pointed out that he constructed the retaining wall under the supervision and guidance of an expert. On account of collapse of his retaining wall and tank, he allegedly suffered with a loss of more than Rs.50,000/-. He, therefore, has filed a suit against the plaintiff for recovery of the amount in question in the Court.

5. In replication, the plaintiff has denied the contents of preliminary objections being wrong and on merits, has reiterated his case as set out in the plaint.

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

1) Whether the plaintiff is entitled to prohibitory injunction, as prayed for? OPP.
2) Whether the plaintiff is entitled to mandatory injunction, as prayed for? OPP.
3) Whether the plaintiff is entitled to the alternative relief for the recovery of Rs.94,000/-? OPP.
4) Whether the plaintiff is estopped from filing the suit due to his own act, deeds and conducts? OPD.
5) Whether the plaintiff has suppressed material facts? OPD.
6) Relief.

7. Learned trial Court put the parties on both sides to trial on the issues so framed. On the conclusion of the trial and on appreciation of the oral as well as documentary evidence produced by the parties on both sides, the trial Court neither held the plaintiff entitled to permanent prohibitory and mandatory injunction nor for the recovery of Rs.94,000/- against the defendant. The suit was, therefore, dismissed.

8. In appeal, learned lower appellate Court has dismissed the appeal and affirmed the judgment and decree passed by learned trial Court.

9. The legality and validity of the impugned judgment has been questioned on the grounds *inter alia* that proper issues arising out of the pleadings of the parties have not been framed and by clubbing issues No.1, 2 and 3 for determination together the trial Court has committed a grave error. The evidence on record has been misread and mis-appreciated. The admission of the defendant/ respondent that he has not obtained sanction from H.P. Town and Country Planning Department required for raising construction, has been ignored. In the absence of the sanction to raise construction, the defendant by way of decree

of permanent prohibitory injunction should have been restrained from raising construction. The ingredients required for grant of permanent prohibitory injunction have neither been discussed nor taken into consideration and the suit to the contrary was determined in utter disregard of the evidence available on record. The findings that the retaining wall slided-down on account of non-providing support by the plaintiff, are not legally sustainable, as in view of the vacant space between the two properties no support could have been provided by the plaintiff to the retaining wall in question. The testimony of PW-7 has been misconstrued and the documents Exts.PW-7/A to PW7/D, he proved, have also been erroneously ignored. Both Courts below have committed a grave error in relying upon the evidence of DW-1 and DW-2, who were not the experts. The Courts below allegedly failed to understand the true import of term 'negligence'. The findings that the plaintiff has not got the plan approved from the Municipal Corporation, are not only erroneous but perverse because the area where the property is situated did not fall within the jurisdiction of Municipal Corporation, Shimla.

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

> Whether both the Courts below without discussing the necessary ingredients for grant of prohibitory injunction took an essentially wrong approach in the matter in denying the relief to the plaintiff-appellant when it was duly proved that the construction of the defendant was not in accordance with any approved plan or sanction from the HP Town and Country Planning vis-à-vis the pleadings and oral and documentary evidence which entitled the plaintiff for not only permanent injunction but also mandatory injunction?

11. Mr. Bhupender Gupta, learned Senior Advocate, while addressing arguments on behalf of the appellant-plaintiff, has drawn the attention of this Court to the evidence having come on record, particularly, by way of testimony of expert witnesses PW-7 Surjit Singh and DW-3 R.B. Saxena and has urged that the evidence so produced has not been appreciated by learned trial Court and also lower appellate Court. According to Mr. Gupta, the findings as in para-19 of the trial Court's judgment and para-15 in that of learned lower appellate Court qua the cause of collapse of retaining wall, are absolutely wrong and the result of misappreciation and misreading of evidence available on record.

12. Mr. Sanjeev Kuthiala, Advocate, learned Counsel, has come forward with the version that the respondent-defendant after acquiring the plot in the year 1984-85 raised construction thereon in the year 1989. It is the appellant-plaintiff, who acquired the plot in the year 1990 and started construction work in an unscientific manner and made the cutting of earth to erect pillars without making a provision of breast-wall and as a result thereof the retaining wall and septic tank constructed by the defendant slided–down and huge loss caused to him. Therefore, according to Mr. Kuthiala, the defendant never evaded any right of the plaintiff and it is rather the latter, who on account of his illegal act caused loss to the property of the former. The defendant, therefore, had to file a suit for recovery of the loss so caused to him by the plaintiff, which is pending disposal in the Court.

13. Learned Counsel on both sides have failed to address to this Court on the substantial question of law framed at the time of admission of the appeal and highlighted the factual aspect of the matter more during the course of arguments. Any how, the complaint is that the failure of both Courts below not to take into consideration the necessary ingredients of permanent prohibitory injunction and having dismissed the suit without taking such ingredients into consideration has vitiated the judgment and decree under challenge.

14. In order to decide the legal question hereinabove, it is desirable to make a reference here to the provisions contained under Section 38 of the Specific Relief Act. The provisions contained under the Section *ibid* deal with perpetual/permanent prohibitory injunction. A perpetual injunction can be granted to prevent the breach of an obligation and when there is invasion of the plaintiff's right to enjoy any property at the hands of the defendant. The perpetual injunction can be granted in those cases where the defendant was trustee of the property and invades the rights of enjoyment of such property by the plaintiff, where the damage caused or likely to be caused by such invasion cannot be measured in terms of money nor payment of compensation in terms of money would afford adequate relief to the plaintiff and where the grant of such injunction is necessary to prevent the multiplicity of litigation.

15. The perpetual injunction is a discretionary and equitable relief. A person who claims equity must do equity. A person, who is not fair, cannot claim equity. It is in the light of the above legal parameters, the plaintiff's claim for the grant of decree of perpetual injunction has to be examined and determined.

16. There is no dispute so as to the defendant's acquired the plot well in time as compared to the plaintiff. It is also established not only from the own testimony of the plaintiff while in the witness-box as PW-11, but also from that of PW-6 Sohan Lal that in the year 1990-91 when the plaintiff acquired his plot and started construction of his house thereon the defendant has already constructed the retaining wall, septic tank and ground floor of his house. True it is that as per the plaintiff's claim, the defendant had raised construction of retaining wall with boulders and mud and failed to construct the same by using cement despite requests made in this regard. This part of the plaintiff's case seems to be not correct because he had acquired the plot at such a time when half of the retaining wall was already constructed, whereas as per that of defendant, the retaining wall and septic tank were already constructed well before the plaintiff acquired his plot.

17. The further grouse of the plaintiff that the defendant, during the course of raising construction, had stacked the construction material over the retaining wall, which was constructed with boulders and mud, as a result thereof the retaining wall gave way due to load thereon and collapsed also seems to be neither plausible nor reasonable for the reason that over the platform of a retaining wall construction material can not be stacked to such an extent that the same collapsed. No doubt, the plaintiff and also PW-6 Sohan Lal and for that matter PW-9 Gulaba Ram have said so, however, such evidence cannot be believed as a gospel truth, particularly when the defendant has denied the same to be wrong and as regards DW-2 Ajit Ram, the mason, the defendant engaged to raise the construction of retaining wall, he has categorically said that the retaining wall was of pucca masonry raised on hard strata after filling by *gatka* in the ratio of 1:5 and septic tank was also of pucca masonry. Therefore, the evidence qua this aspect of the matter is equally balanced. The plaintiff, no doubt, has examined 11 witnesses including himself, however, in sundry and many of them are the witnesses to prove the alleged damage caused to the house due to collapse of the retaining wall. The retaining wall though collapsed, however, not on account of any omission or negligence which can be attributed to the defendant and rather on account of unscientific cutting of the earth made by the plaintiff to dig pits for erection of pillars of his house over his plot including the space below the foundation of retaining wall constructed by the defendant. As a matter of fact, the plaintiff was required to have raised the construction of a breast-wall before making digging of earth below the retaining wall of the defendant. He, however, failed to do so and as a result thereof the retaining wall which was of pucca-masonry gave way and collapsed. The stones and debris, no doubt, have fallen on the plot of the plaintiff, however, it is he who cleared the stones and debris is difficult to

believe because as per his own admission, the defendant had reconstructed the retaining wall and also the septic tank obviously by using the same material, particularly stones. Otherwise also, when it is the plaintiff, the wrong-doer even if he cleared the debris cannot be heard to have any complaint in this regard.

18. True it is that the defendant had not obtained approval from the Town and Country Planning Department to raise the construction of his house, however, for that matter the plaintiff had also not obtained any approval from such Department. He, while in the witness-box, has himself stated that the Town and Country Planning Act is not applicable to the area where the properties in question are situated, however, corrected himself while stating in the same breath that the Act is applicable in that area. Anyhow, when he himself has not obtained the approval from the Town and Country Planning Department, how he could have sought such equitable relief against the defendant. True it is that injunction with regard to a construction being raised in violation of the statutory rules and bye-laws can be granted, however, at this stage and with the afflux of time when we do not know as to what is the exact position on the spot, the decree for permanent prohibitory injunction cannot otherwise be also granted. As a matter of fact, learned Counsel on both sides are also not at variance in this regard.

19. I, therefore, find the present case where the plaintiff has miserably failed to prove that there is invasion of his right of enjoyment of the property belonging to him by the defendant. It is also not proved that the plaintiff has suffered any loss on account of negligence or acts of omission and commission attributed to the defendant. On the other hand, the defendant has also filed a suit for damages against the plaintiff. Both the Courts, therefore, have rightly declined the relief sought by the plaintiff in the suit. It cannot also be said that on account of failure of the Courts below to discuss the ingredients of the perpetual injunction, the judgment and decree is vitiated. The present rather is a case where the plaintiff has failed to prove the essential ingredients for the grant of the nature of the relief sought in the plaint. The substantial question of law is answered accordingly.

20. Learned lower appellate Court has not committed any illegality or irregularity while dismissing the appeal and upholding the judgment and decree passed by the trial Court. The judgment and decree under challenge in the present appeal thus calls for no interference. Consequently, the appeal fails and the same is hereby dismissed. No order as to costs.

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